

# Rulemaking under ESEA, as amended by ESSA

An Overview



U.S. Department of Education

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# What is Rulemaking?

- Rulemaking is the process through which a Federal agency develops proposed regulations to implement a substantive policy or requirement, publishes the proposed regulations for public comment, and based upon the comments, issues final regulations.
- The Department of Education (ED) develops and obtains public comment on proposed regulations by publishing them in the [Federal Register](#). The published document is known as a Notice of Proposed Rulemaking, or NPRM.
- Key elements of an NPRM include:
  - Proposed regulatory text
  - Summary of relevant statutory and current regulatory provisions
  - Analysis of the economic impact (i.e., costs and benefits) of the proposed regulations
  - Public comment period (e.g., 45, 60 days)



# What is Rulemaking?

- Following the public comment period, ED analyzes the comments and prepares Final Regulations that are published in the Federal Register.
- Key elements of Final Regulations include:
  - A summary of the comments and ED's response to the comments
  - Revised regulatory text
  - Updated analysis of the economic impact (i.e., costs and benefits) of the Final Regulations
  - Effective date of the Final Regulations (i.e., when parties must begin complying with the regulations)



## What is Negotiated Rulemaking?

- Under negotiated rulemaking, before issuing an NPRM, ED works to develop the proposed regulations in collaboration with representatives of constituencies that are significantly affected by the topics proposed for negotiations. Generally--
  - This is done through a series of meetings during which these representatives, referred to as negotiators, work with ED to come to consensus on the proposed regulations.
  - The meetings are facilitated by a neutral third party and are open to the public and the press.
  - Following the negotiations, ED publishes the NPRM in the Federal Register and sets a defined period of time for the public to comment on the NPRM.
  - After the public comment period, ED publishes Final Regulations in the Federal Register, as previously described.



## Negotiated Rulemaking under ESEA

- Under the Elementary and Secondary Education Act of 1965 (ESEA), as amended by the Every Student Succeeds Act (ESSA), ED must use negotiated rulemaking if it chooses to develop proposed regulations regarding standards, assessments under section 1111(b)(2) of ESEA, and the requirement under section 1118 of ESEA that Federal funds be used to supplement, and not supplant, State and local funds. Following negotiated rulemaking, ED publishes an NPRM seeking public comment on the proposed regulations.
- For other regulations under ESEA, ED develops proposed regulations without negotiated rulemaking and publishes the proposed regulations in an NPRM.



# **How Does Negotiated Rulemaking Work Under ESEA?**

**What has happened so far?**

**Where are we now?**

**What happens next?**

**What happens after negotiations end?**



# How Does Negotiated Rulemaking Work Under ESEA?

## What has happened so far?

- On December 22, 2015, ED published a request for information and notice of meetings (RFI) in the [Federal Register](#) (80 FR 79528), seeking advice and recommendations on regulatory issues under title I of the ESEA, and providing notice of regional meetings at which stakeholders were able to provide such advice and recommendations.
- Regional meetings were held on January 11, 2016, in Washington, DC, and on January 19, 2016, in Los Angeles, California.
- ED also solicited written submissions of advice and recommendations through that RFI. Those written submissions can be found at [www.regulations.gov](http://www.regulations.gov).



# How Does Negotiated Rulemaking Work Under ESEA?

## Where are we now?

- We received approximately 370 comments in response to the RFI.
- Based on the feedback we received, on February 4, 2016, ED published a Notice in the [Federal Register](#) –
  - Announcing its intent to conduct negotiated rulemaking and identifying the areas in which it intends to develop or amend regulations
  - Announcing the schedule for negotiations
  - Soliciting nominations for negotiators to serve on the negotiating committee



# How Does Negotiated Rulemaking Work Under ESEA?

## Topics for Negotiation

- **Assessments:** Prepare proposed regulations that would update existing assessment regulations to reflect changes to section 1111(b)(2) of the ESEA, including:
  - Locally selected nationally recognized high school assessments, under section 1111(b)(2)(H);
  - The exception for advanced mathematics assessments in 8th grade, under section 1111(b)(2)(C);
  - Inclusion of students with disabilities in academic assessments, including alternate assessments based on alternate academic achievement standards for students with the most significant cognitive disabilities, subject to a cap of 1.0% of students assessed for a subject;
  - Inclusion of English learners in academic assessments and English language proficiency assessments; and
  - Computer-adaptive assessments.



# How Does Negotiated Rulemaking Work Under ESEA?

## Topics for Negotiation (cont.)

- **Supplement not supplant:** Prepare proposed regulations related to the requirement under section 1118(b) of the ESEA that title I, part A funds be used to supplement, and not supplant, non-Federal funds, specifically:
  - The methodology a local educational agency uses to allocate State and local funds to each title I school to ensure compliance with the supplement not supplant requirement; and
  - The timeline for compliance.



# How Does Negotiated Rulemaking Work Under ESEA?

## Schedule for negotiations (in Washington, DC)

- March 21-23
- April 6-8
- April 18-19 (optional third session)



# How Does Negotiated Rulemaking Work Under ESEA?

## The Negotiating Committee

- **Nominating Negotiators**
  - Members of the public nominate individuals to represent constituencies affected by the proposed regulations.
  - The Feb. 4<sup>th</sup> notice identifies the constituencies to be represented and the information we need to review nominations and make selections.
  - Nominations must be submitted no later than February 25, 2016 to the following email address: [OESE.ESSA.nominations@ed.gov](mailto:OESE.ESSA.nominations@ed.gov).



# How Does Negotiated Rulemaking Work Under ESEA?

## The Negotiating Committee (cont.)

- **Nominating Negotiators -- What Should the Nomination Include?**
- The name of the nominee
- The constituency the nominee represents. ED intends to seat as negotiators individuals representing the following constituencies:
  - State administrators and State boards of education
  - Local administrators and local boards of education
  - Tribal leadership
  - Parents and students, including historically underserved students
  - Teachers
  - Principals
  - Other school leaders, including charter school leaders
  - Paraprofessionals
  - The civil rights community, including representatives of students with disabilities, English learners, and other historically underserved students
  - The business community
  - Federal administrators
- Evidence of the nominee's expertise or experience in the topics proposed for negotiations
- Evidence of support from individuals or groups within the constituency that the nominee will represent
- The nominee's commitment that he or she is available to attend all negotiation sessions and will actively participate in good faith in the development of the proposed regulations
- The nominee's contact information, including address, phone number, and email address



# How Does Negotiated Rulemaking Work Under ESEA?

## The Negotiating Committee (cont.)

- **Selecting Negotiators**
  - ED selects negotiators from the list of nominees with the goal of allowing significantly affected parties to be represented while keeping the committee small enough to ensure meaningful participation by all members. Section 1601(b)(3)(B) of the ESEA requires that negotiators be selected from among individuals or groups that provided advice and recommendations in response to the RFI published on December 22, 2015 (e.g., if a member of an organization provided a response to the RFI or testified at one of the regional meetings, then another member of that organization can be nominated and selected for the negotiating committee).
  - The committee includes at least one ED representative.



# How Does Negotiated Rulemaking Work Under ESEA?

## What Happens Next?

- ED notifies negotiators.
- Negotiations begin in late March.
- ED will provide negotiators with materials relating to the issues 15 days before the first session. Materials from the negotiations, including the list of negotiators, will be published on ED's website.
- At the first session, the first order of business will be to finalize the agenda and protocols, which are agreed upon by consensus of the committee. Once the agenda and protocols are finalized and agreed upon, the committee begins its negotiations of the issues on the agenda.
- During the time between sessions, ED drafts or amends the proposed regulatory language based on committee discussions and on any tentative agreements reached on the issues. ED provides this draft regulatory language to the negotiators prior to the subsequent session.
- Subcommittees formed by the negotiators may meet during this time to work on specific issues. The subcommittees bring the results of their discussions to the full committee when it reconvenes.



# How Does Negotiated Rulemaking Work Under ESEA?

## What Happens Next? (cont.)

- The negotiating committee works to achieve consensus on proposed regulations.
- What is consensus?
  - Generally, consensus means that there is no dissent by any member of the negotiating committee although the committee may decide on a different definition.
  - Under this general definition, no member can be outvoted. The absence or silence of a member at the time the final consensus vote is taken is equivalent to not dissenting. All agreements reached during the negotiations are assumed to be tentative agreements until members of the committee formally vote on the proposed regulations language for a particular topic (e.g., supplement not supplant).
  - If final consensus is achieved on the regulations, committee members may not withdraw their consensus for that particular topic and ED will use this consensus-based regulatory language in its NPRM. Only under very limited circumstances may ED depart from this language.



# How Does Negotiated Rulemaking Work Under ESEA?

## What Happens After Negotiations End?

- If the committee reaches consensus on the regulations, ED issues an NPRM for public comment and uses the consensus-based regulatory language in the NPRM. Given the consensus agreement, it is expected that negotiators and, if applicable, their employing organizations will not comment negatively on the consensus-based regulatory language.
- If the committee does not reach consensus—
  - ED determines whether to proceed with regulations. If ED decides to proceed with regulations,
    - It may use regulatory language developed during the negotiations as the basis for its NPRM, or develop new regulatory language for all or a portion of its NPRM.
    - ED submits the proposed regulations, not less than 15 business days prior to publishing an NPRM in the Federal Register, to Congress (the Committee on Health, Education, Labor, and Pensions of the Senate, the Committee on Education and the Workforce in the House of Representatives, and other relevant congressional committees.) During this period, Congress may provide comments on the proposed regulations, and ED will include and seek to address these comments in the public rulemaking record for the NPRM.



# How Does Negotiated Rulemaking Work Under ESEA?

- **What Happens After Negotiations End? (cont.)**
  - Following the negotiations, and notification to Congress, if applicable, ED will publish the NPRM in the Federal Register for public comment.
  - ED considers the comments received by the close of the comment period in developing Final Regulations.
  - ED publishes Final Regulations, including a summary and analysis of the comments, any changes from the proposed regulations, the final text of the regulations, and the regulations' effective date.



## Rulemaking Under ESEA

- **Reminder:** Please submit nominations to [OESE.ESSA.nominations@ed.gov](mailto:OESE.ESSA.nominations@ed.gov) **by Thursday, February 25, 2016.**
- For other inquiries about ESEA and ESSA, please contact us at: [essa.questions@ed.gov](mailto:essa.questions@ed.gov)
- For further information on ESEA and ESSA, see <http://www.ed.gov/essa?src=rn>