



777 6th Street NW
Suite 500
Washington DC 20001
Tel: (202) 618-3900
Fax: (202) 478-1804
www.pennhillgroup.com

MEMORANDUM

TO: **Interested Parties**
FROM: **Penn Hill Group**
DATE: **February 3, 2016**
SUBJECT: **ESEA Title I Negotiated Rulemaking**

Introduction

On February 4, 2016, the U.S. Department of Education (ED) will publish a *Federal Register* notice specifically seeking nominations for a negotiated rulemaking (neg-reg) panel to assist with the development of regulations under Title I of the Elementary and Secondary Education Act (ESSA) as reauthorized by the Every Student Succeeds Act (ESSA). The purpose of this memorandum is to describe the neg-reg process that ED will carry out as part of its development of regulations, including a discussion of the history of its use by ED and a description of its plan for regulatory negotiations this winter and spring.

Origins and Overview of Negotiated Rulemaking

The Administrative Conference of the United States (ACUS, an independent agency that makes recommendations for improvement in federal procedures) developed the concept of negotiated rulemaking, and federal agencies began using it in the early 1980s. ACUS put forward the concept as a means of overcoming problems that had plagued traditional rulemaking, particularly in areas like environmental protection and transportation safety where a federal agency would typically issue a rule, the rule would immediately be challenged in court by an affected party, implementation of the rule would be delayed until the litigation was settled, the agency might have to revise the rule in response to the court's ruling, and sometimes the agency and stakeholders went through several rounds of this activity before a final rule was in place and implemented. The premise of neg-reg was that, particularly on very contentious issues, it would make more sense to convene the interested parties and seek to achieve a consensus through face-to-face interaction before an agency publishes a regulation in the *Federal Register*. ACUS developed model procedures for neg-reg, which have since been codified into federal statute.

Under neg-reg, in brief, an agency convenes a committee of negotiators representative of all interests that the forthcoming rule is likely to effect. The negotiators, assisted by a facilitator, attempt to reach unanimous consensus on a regulation, typically working from a draft prepared by the agency. If the committee is unable to reach consensus, the agency retains authority to put forward its own proposed regulation for public comment.

Negotiated Rulemaking in the Department of Education

For the most part, federal agencies have entered into negotiated rulemaking at their own discretion, based on the agency's judgment on whether neg-reg would be appropriate in a given context. Beginning with the 1988 reauthorization of ESEA, however, and continuing in the 1994, 2002, and 2016 reauthorizations, Congress has directed ED to convene negotiations on a

limited number of Title I regulatory issues. The issues identified for regulation and certain other requirements have changed slightly with each reauthorization.

In addition, Congress has mandated that ED use neg-reg for *all* programs authorized under Title IV of the Higher Education Act, which includes all of the major federal student aid programs. Because Title IV regulatory issues can be very contentious, neg-reg negotiations that go on for weeks and months and often do not result in consensus have become a major part of the Title IV policy-making landscape.

But this has not been the case with Title I under ESEA; the negotiations have generally focused on less contentious issues and in each case the negotiators have achieved consensus in a short period of time. A review of how the process operated in 2002, the last time ED convened a Title I neg-reg committee, illustrates this fact. Briefly:

- The No Child Left Behind Act (NCLB) was signed into law on January 8, 2002. Under Title I, the reauthorization required that ED, before issuing proposed regulations, solicit advice and recommendations from representatives of federal, state and local administrators, parents, teachers, paraprofessionals and members of local school boards and other organizations involved with the implementation of Title I programs.
- The law further required that ED conduct neg-reg on, at minimum, the regulations for standards and assessments, and select neg-reg panel participants from among the individuals and groups that provided advice and recommendations.
- ED decided to conduct neg-reg only on standards and assessments, the two policy areas specified in the statute. ED specifically elected not to negotiate on adequate yearly progress or other areas of Title I accountability, issues on which negotiations would likely have been protracted and on which it would have been very difficult to achieve consensus.
- Ten days after the enactment of NCLB, ED published in the *Federal Register* a notice seeking advice and recommendations on standards and assessments, describing the negotiated rulemaking process, and indicating that ED would select neg-reg participants from among the individuals and organizations that provided advice.
- ED subsequently selected 24 individuals to serve on the neg-reg committee: six representatives of state educational agencies and state boards (two chiefs, three other state educational agency officials and one employee of a state board); four representatives of local administrators and school boards (one local superintendent, one big-city district official, one school board member and one local charter school board official); four representatives of teachers and principals (two of each); seven representatives of students (two parent representatives, one teacher, one state director of bilingual education, one state director of special education, one state director of migrant education and one representative of private schools); one representative of the business community; and two Department officials. On February 28, 2002 ED issued a *Federal Register* notice announcing the participants, specifying the issues for negotiation and describing the process.
- The negotiators met for three days in March to review draft regulations developed by ED, and reached an initial consensus, including a consensus on various revisions to ED's draft. They then recessed for a week to give ED time to codify their consensus into

revised regulatory language, and then reconvened for one or two days and reached final consensus on every issue under discussion.

- ED subsequently issued a Notice of Proposed Rulemaking (NPRM) that incorporated the negotiators' consensus along with the agency's proposed regulations on other Title I issues.

ESSA Requirements for Negotiated Rulemaking

The recently enacted ESSA continues the mandate that ED conduct neg-reg on a limited number of Title I issues, but makes certain changes to the requirements.

- ED must carry out neg-reg on, at a minimum, its proposed regulations on standards, assessments and the supplement/not supplant requirement.
- The law continues to require that ED select neg-reg participants from among the individuals and groups that provided advice and recommendations on Title I regulations. The law adds principals and school leaders (including charter school leaders) to the list of interests from which ED must solicit advice.
- The law continues to require that the neg-reg panel include representatives from all geographic regions of the United States and that it provide an equitable balance between representatives of parents and students and representatives of educators and education officials.
- The law continues to require that ED provide negotiators with a draft of proposed policy options not less than 15 days before the panel's first meeting.
- ESSA adds new requirements regarding the promulgation of regulations in the event that the neg-reg panel cannot reach consensus. If this occurs, ED may publish proposed regulations but must first send them (along with certain other materials) to the congressional authorizing committees and give those committees 15 business days to comment.

Department of Education Planning for Negotiated Rulemaking under ESSA

On December 22, 2015, ED published a *Federal Register* notice seeking public input on regulations for Title I; more than 370 individuals and organizations submitted comments. ED also convened two public meetings on the regulations, on January 11 and 18. The parties providing input (either written comments submitted through the *Federal Register* portal or testimony at the meetings) constitute the universe from which ED may select negotiators. Tomorrow, February 4, ED will publish a *Federal Register* notice specifically seeking nominations for the neg-reg panel and describing its planned timeline and procedures for the negotiations.¹ The major decisions announced in the notice are:

- The panel will negotiate over regulations on assessments (including on the new authorization for districts to use locally selected, nationally recognized high school assessments; the new statutory language on advanced mathematics assessments for certain eighth-grade students; the inclusion of students with disabilities in assessments,

¹ The notice is available [here](#).

including the use of alternate assessments for students with the most significant cognitive disabilities; the inclusion of English learners in academic assessments and in English proficiency assessments; and the use of computer-adaptive assessments) and on the supplement/not supplant provision (including on the funds allocation methodology a district must use to ensure compliance with the provision and the timeline for compliance).

Note: The notice does not state that the panel will negotiate over regulations on academic standards. Presumably, this indicates that ED is not intending to regulate on standards and interprets the requirement for negotiation on that issue as applying only if ED intends to regulate on it.

- ED will select for participation representatives of 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; and federal administrators.

Representatives of tribal leadership and of paraprofessionals were not included on the 2002 panel; otherwise, the represented constituencies are substantively identical.²

Each constituency will have one or more representatives on the panel. The number of these representatives will be up to ED. For constituencies where there will be only a single representative, ED will select both a regular and an alternate member. ED will also seek to select individuals who contribute to the diversity and expertise of the panel, while representing the interests of their constituencies and seeking to help the panel reach consensus. We believe it is likely that the total number of negotiators will be similar to the 24 who participated in 2002, but this is entirely up to ED.

- The panel will meet on March 21–23 and April 6–8, and as needed on April 18–19, at ED’s headquarters in Washington, DC.
- Nominations for the neg-reg panel will be due 21 days after publication of the notice. Individuals and organizations that provided input in response to the December 18 *Federal Register* notice may submit nominations. Organizations that provided input may nominate one or more of their members.

In reviewing ED’s plans, we believe that the upcoming negotiations are likely to proceed in the same manner as previous Title I neg-regs, with the exception that the issues before the panel, particularly in the area of assessments, are somewhat more complex than what the earlier panels faced. We would not be surprised if the negotiations are more time-consuming than in the past.

² In 2002, ED did not differentiate “the civil rights community” as a constituency, but, as in the new notice, the representatives of parents and students included representatives of historically underserved students.