

The Negotiated Rulemaking Process for the Every Student Succeeds Act – Frequently Asked Questions

1. What is negotiated rulemaking, and why does the Department of Education conduct this process?

Typically, the Department of Education (the Department) 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. Under negotiated rulemaking, before issuing an NPRM, the Department works to develop the proposed regulations in collaboration with representatives of constituencies that are significantly affected by the topics proposed for negotiations. This is done through a series of meetings during which these representatives, referred to as negotiators, work with the Department to come to consensus on the Department's proposed regulations. These meetings are facilitated by a neutral third-party. Following the negotiations, the Department publishes the NPRM in the Federal Register and the public may comment on the NPRM at that time.

Under the Elementary and Secondary Education Act (ESEA) of 1965, as amended by the Every Student Succeeds Act (ESSA), the Department 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.

2. How are the issues to be negotiated determined?

On December 22, 2015, the Department 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. Those meetings were held on January 11, 2016, in Washington, DC, and on January 19, 2016, in Los Angeles, California. The Department also solicited written submissions of advice and recommendations through that RFI. Those written submissions can be found at www.regulations.gov.

On February 4, 2016, the Department 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. As stated in that Notice, after considering the advice and recommendations provided at the regional meetings and through written comments, the Department decided to establish a negotiating committee to address assessments and the supplement not supplant requirement, as follows:

- (1) Prepare proposed regulations that would update existing assessment regulations to reflect changes to section 1111(b)(2) of the ESEA, including:
 - a. Locally selected nationally recognized high school assessments, under section 1111(b)(2)(H);
 - b. The exception for advanced mathematics assessments in 8th grade, under section 1111(b)(2)(C);
 - 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;

- d. Inclusion of English learners in academic assessments and English language proficiency assessments; and
- e. Computer-adaptive assessments.

(2) 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:

- a. Regarding 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
- b. The timeline for compliance.

These topics are tentative. Topics may be added or removed as the process continues. When the negotiating committee first meets, members may suggest additional issues that may be added to the agenda, subject to the full committee's approval.

3. Who is eligible to be a negotiator, and how are negotiators selected?

Negotiators are nominated by the public, and selected by the Department. In the same Federal Register Notice that announces the Department's intent to conduct negotiated rulemaking, the Department solicits nominations for negotiators to represent the constituencies that will be significantly affected by the topics proposed for negotiations. The Department identifies in the Notice the constituencies it believes will be significantly affected.

As described in the February 4th Notice, the Department will include on the negotiating committee representatives from the following constituencies: Federal, State, and local education administrators; tribal leadership; parents and students, including historically underrepresented students; teachers; principals; other school leaders (including charter school leaders); paraprofessionals; members of State and local boards of education; the civil rights community, including representatives of students with disabilities, English learners, and other historically underserved students; and the business community.

The Department selects negotiators for a committee from the list of nominees with the goal of providing adequate representation for the affected parties while keeping the size of the committee manageable. 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, then another member of that organization can be nominated and selected for the negotiating committee). By law, a Federal agency must limit membership on a negotiated rulemaking committee to 25 members unless the agency head determines that a greater number of members is necessary for the functioning of the committee, or to achieve balanced membership. Typically, the Department convenes committees of 12 to 15 negotiators, as well as alternates to ease attendance concerns for negotiations consisting of multiple sessions. Each committee includes at least one Department representative.

4. How may individuals not selected as negotiators participate in the negotiated rulemaking process?

Individuals who are not selected as negotiators but who will be affected by the regulations may still participate in the process in several ways. They can contact the individuals representing their constituency to express their views, and may be able to participate in informal working groups on issues between meetings. Of course, individuals who are not selected as negotiators can always submit comments in response to the published NPRM.

Additionally, members of the public may observe meetings of the negotiating committee. Caucuses (i.e., meetings of smaller groups of negotiators) are open to the public at the discretion of the negotiating committee.

The committee protocols usually address how the negotiators may interact with the media.

5. How is the negotiated rulemaking process structured and what is the time commitment for a negotiator?

The negotiating committee will meet for two sessions of three days each (March 21-23 and April 6-8, 2016), with an optional third session (April 18-April 19, 2016) at the discretion of the negotiating committee. The first order of business for a negotiating committee is 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, the Department drafts or amends the proposed regulatory language based on committee discussions and on any tentative agreements reached on the issues. The Department 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.

A nominator should confirm that a potential nominee can and will make the necessary time commitment to the process before nominating an individual to participate.

6. How is consensus defined for purposes of negotiated rulemaking?

Consensus generally means that there is no dissent by any member of the negotiating committee although the committee may decide on a different definition at the first meeting. 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, committee members may not withdraw their consensus for that particular topic and the Department will use this consensus-based regulatory language in its NPRM. Only under very limited circumstances may the Department depart from this language.

7. What happens after the negotiations have concluded?

If consensus is achieved, the Department uses that regulatory language in its NPRM. If consensus is not achieved, the Department determines whether to proceed with regulations. If the Department 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. If consensus is not reached, the Department must submit the proposed regulations, not less than 15 business days prior to issuing an NPRM in the Federal Register, to 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 the Department will include and seek to address these comments in the public rulemaking record for the NPRM.

In addition to the text of proposed regulations, the Department drafts the preamble language (the portion of the NPRM that explains the proposed regulatory text). If consensus was reached, the Department usually shares the preamble language with the negotiators who may review it for accuracy. Although the preamble language is not negotiated, the Department may agree during the negotiations to include in the preamble explanations of certain issues. If the committee did not reach consensus, the preamble language is not shared with the negotiators.

When the NPRM is published in the Federal Register, it contains a request for public comments and a deadline for submitting those comments. If consensus was reached, negotiators and, if applicable, their employing organizations may not comment negatively on the consensus-based regulatory language. The Department considers the comments received by the close of the comment period in developing final regulations. The final regulations published in the Federal Register contain the regulations with which affected parties must comply and the date by which they must do so. The preamble of the final regulations includes a summary of the comments received, the Department's response to the comments, and an explanation of any changes made to the regulations that differ from the proposed regulations.