The C. Boyden Gray Center
Center for the Study of the Administrative State
Antonin Scalia Law School . George Mason University

Negotiated Rulemaking in the U.S. Department of Education: Where Administrative Law Meets Higher Education Policymaking

Rebecca S. Natow

CSAS Working Paper 23-02

Administration of Education

February 2023

George Mason University | Antonin Scalia Law School

Negotiated Rulemaking in the U.S. Department of Education:

Where Administrative Law Meets Higher Education Policymaking

By:

Rebecca S. Natow, Ed.D., J.D.[1]

Assistant Professor of Educational Leadership & Policy

Director of EdD Program in Educational Policy & Leadership

Director of Higher Education Leadership & Policy Studies Program

Hofstra University, Hempstead, New York

[1] The author thanks and acknowledges the C. Boyden Gray Center for the Study of the Administrative State at George Mason University, and participants in the Gray Center's November 2022 roundtable on Administration of Education, for useful feedback on a prior version of this manuscript.

Negotiated rulemaking is the process through which a government agency meets with policy stakeholders to discuss and negotiate the language of a forthcoming proposed regulation (Blake & Bull, 2017; Carey, 2021; Kerwin & Furlong, 2011). Governed by federal statutes such as the Administrative Procedure Act and the Negotiated Rulemaking Act, this process has been identified as "a realistic alternative to adversarial administrative procedures" (Perritt, 1986, p. 471). Negotiated rulemaking presents an opportunity for interested parties to engage in a process resembling deliberative democratic policymaking: debates over policy content occur in public view, and if consensus is reached among participants, negotiations have the power to influence the substance of regulations (Natow, 2019).

Negotiated rulemaking – or "reg neg" as it is sometimes abbreviated (Schuck & Kochevar, 2014, p. 417) – is a common exercise in the U.S. Department of Education because since 1992, the Higher Education Act has required the department to use negotiated rulemaking when developing new regulations under Title IV of the Act (Natow, 2017; Natow, 2019). This title includes federal student financial aid programs that annually affect millions of students and thousands of higher education institutions nationwide (Natow, 2022b). This statutory requirement makes the Department of Education unique among federal agencies – other agencies may, but are not required, to use negotiated rulemaking, while the Department of Education must (with limited exceptions) engage in negotiated rulemaking when creating regulations that involve Title IV student aid programs (Task Force on Federal Regulation of Higher Education, 2014). While proponents hail negotiated rulemaking as an opportunity for open debate and direct stakeholder participation in policymaking (Susskind & McMahon, 1985), critics claim that the process is overly expensive and tends to be dominated by powerful special interests (Funk, 1997).

There has been criticism of negotiated rulemaking as a process, and its use has declined in the federal government over the years (Blake & Bull, 2017; Lubbers, 2008; Schuck & Kochevar, 2014). Understanding what stakeholders perceive about the benefits and burdens of negotiated rulemaking is a first step toward improving the process so that it can work more efficiently, more effectively, and perhaps more frequently in federal policymaking. The purpose of this report is to explain and analyze the process of negotiated rulemaking in the U.S. Department of Education, to understand the strengths and weaknesses of the process, and to make recommendations for its improvement. First, the paper explains what negotiated rulemaking involves, including the various steps in the process and how it has been employed in the U.S. Department of Education for the creation of higher education regulatory policy. Next, a discussion of the history of negotiated rulemaking and its use in the Department of Education is presented. The paper then explains the research methods for the case study that is the basis of this report. The following section describes the strengths and positive aspects of negotiated rulemaking, followed by a discussion of its weaknesses and negative aspects. Finally, the paper concludes with recommendations for how negotiated rulemaking may be improved for the future.

The Procedure of Negotiated Rulemaking

The Department of Education's negotiated rulemaking process is governed by several federal statutes, including the Administrative Procedure Act, the Negotiated Rulemaking Act, and the Higher Education Act (Carey, 2021; Natow, 2017). Negotiated rulemaking is itself part of the larger notice-and-comment rulemaking process for creating regulations under the Administrative Procedure Act (Kerwin & Furlong, 2011). Negotiated rulemaking takes place near the beginning of the rulemaking process, before a proposed rule – known as a Notice of

Proposed Rulemaking (NPRM) – is issued. The purpose of negotiated rulemaking is to bring representatives of groups that are likely to be affected by a forthcoming rule into conversation with the regulating agency in order to deliberate and develop the language of the proposed regulation (Kerwin & Furlong, 2011; Natow, 2017).

The following steps are involved in the negotiated rulemaking process (unless otherwise indicated, the information that follows was drawn from Blake and Bull [2017], Carey [2021], Kerwin and Furlong [2011], Lubbers [1998], Lubbers [2014], Natow [2017], Natow [2019], Natow [2022c], Pelesh [1994], and Pritzker and Dalton [1995]):

- After an agency decides that negotiated rulemaking is appropriate for the creation of a new rule, the agency publishes a notice of intent to convene a negotiating rulemaking committee and a call for nominations of negotiators in the *Federal Register*. This notice provides information about the subject of the forthcoming rule and the stakeholder groups for which it is seeking representation in the negotiations (see, e.g., Negotiated Rulemaking Committee, 2021b). For higher education negotiated rulemaking, even before seeking nominations of negotiators, the Department of Education must post an announcement of public hearings, traditionally conducted in various regions across the United States for the purpose of gathering information about topics within the purview of the forthcoming rulemaking (see, e.g., Intent to Establish Negotiated Rulemaking Committee, 2014). Members of the public may speak for up to five minutes at the public hearings and/or may submit comments in writing to the department. Since the start of the COVID pandemic through the time of this writing, public hearings have been conducted virtually (see, e.g., Intent to Establish Negotiated Rulemaking Committee, 2021).

- After receiving nominations for negotiators, the agency selects negotiated rulemaking participants from among those nominated. Ideally, all stakeholder groups potentially affected by the forthcoming regulation would have a representative and an alternate representative at the negotiating table. The exact composition of the negotiating panel depends on the subject matter of the rule, but for higher education rulemaking this often includes representatives of students, consumers, and different types of higher education institutions (e.g., for-profit/non-profit, 2-year/4-year, religiously affiliated/not religiously affiliated). Other stakeholder categories include accreditors, lending industry representatives, state government officials, and other potential stakeholders.
- Negotiated rulemaking sessions take place for several days in a row over the course of several months. For example, the negotiated rulemaking committee tasked with developing language for a proposed rule on the topic of "Affordability and Student Loans" took place in three sessions in 2021: October 4 through October 8, November 1 through November 5, and December 6 through December 10 (U.S. Department of Education, n.d.-d). Traditionally, negotiating sessions have taken place at U.S. Department of Education headquarters in Washington, D.C. Since 2020 and through this writing, negotiations have taken place fully online. The department provides negotiators with suggested regulatory language as well as agendas, issue papers, and other relevant documents prior to the start of negotiations. The sessions, which are moderated by a trained negotiation facilitator, involve negotiators presenting information, arguments, evidence, and recommendations to revise the agency's suggested regulatory language.
- Negotiation sessions are open to the public, and members of the public may speak to the negotiating committee at the end of each day's session. Negotiators may caucus – that is,

conduct private, small-group conversations with selected other negotiators outside of public view – during negotiation sessions if they would like to confer privately with other participants. Between negotiation sessions, the agency revises the suggested regulatory language to reflect what was agreed upon during negotiations.

- Negotiators attempt to reach consensus on the language that will be used in the NPRM, with consensus defined as unanimous agreement. If consensus is reached, then the agency uses that language in the NPRM (and negotiated rulemaking participants may not comment negatively on that language during the notice-and-comment phase, which begins upon the publication of the NPRM). If consensus is not reached, the agency writes the NPRM on its own. More recent higher education rulemakings have divided the content into separate groups of issues, with consensus on one issue being sufficient for the Department of Education to adopt the negotiated language for that issue even if consensus was not reached on other issues (McCann, 2019).
- After negotiated rulemaking, the agency writes the NPRM and publishes it in the *Federal Register*. At that point, the notice-and-comment period begins, during which members of the public may submit written comments to the agency regarding the proposed rule. The agency determines whether to make revisions to the rule based on those comments. Any changes at this point in the rulemaking process are typically minor. The Department of Education's rulemaking process operates under a "master calendar," according to which a new regulation "must be published by November 1 in order to be effective by July 1 of the following year" (Lubbers, 2014, p. 95).

Not all agencies use negotiated rulemaking, and even among those that do, not all regulations include a negotiated rulemaking process. Indeed, the use of negotiated rulemaking

across all federal agencies is quite rare and has declined over time (Carey, 2021). Even in the Department of Education, if a forthcoming regulation does not affect a Title IV program, or if the secretary of education decides that, for a given regulation, going through negotiated rulemaking would be "impracticable, unnecessary, or contrary to the public interest" (Higher Education Act, 2018, § 492[b][2]), then negotiated rulemaking is not necessary. Some examples of such situations include emergencies requiring fast attention, when the agency is directed by Congress to make a particular rule giving agency little to no discretion or leeway, or technical amendments that do not involve substantive policy issues.

History and Overview of Negotiated Rulemaking and its Use in the U.S. Department of Education

Beginning in the 1970s and continuing through the 1980s, observers of regulatory policymaking argued that traditional rulemaking procedures were inefficient, overly adversarial, and insufficiently informed by policy implementers (Blake & Bull, 2017; Carey, 2021; Funk, 1997; Perritt, 1986; Perritt, 1987; Susskind & McMahon, 1985). To address these issues, scholars of administrative law made suggestions for regulatory policymaking reform. Among the recommendations was the concept of negotiated rulemaking – bringing policy stakeholders into conversation with regulating agencies for the purpose of negotiating the terms of a proposed regulation (Perritt, 1987). In 1982, Philip J. Harter – a legal scholar who had consulted for the Administrative Conference of the United States (ACUS) (Lubbers, 2008) – wrote an article for the *Georgetown Law Journal* arguing that negotiated rulemaking could successfully address what he characterized as a "malaise" that had "existed since the very origins of American administrative law" (Harter, 1982, p. 2). Harter proposed that negotiated rulemaking could provide more democratic legitimacy to regulations, as they would have been created through

successful negotiations with "the support of the respective interests" (p. 7). Even when negotiations would not result in consensus, Harter argued, the process would still benefit from negotiated rulemaking "[b]ecause areas of disagreement will be narrowed" and, as such, "the issue will be better defined" (p. 110). That same year, the ACUS recommended that federal agencies consider employing negotiated rulemaking and that Congress enact legislation to facilitate and encourage its use (Administrative Conference of the United States, 1982).

Negotiated rulemaking took hold in federal legislation in the 1990s, beginning with the passage of the Negotiated Rulemaking Act in 1990 (Blake & Bull, 2017). The Act did not require agencies to employ negotiated rulemaking, and in fact noted that its use would be recommended only under certain circumstances (Carey, 2021; Lubbers, 2014). But the Act did "endorse agencies' use of negotiated rulemaking, make clear that agencies had the authority to engage in it voluntarily, and establish a common set of procedures for agencies to use" should they decide to employ negotiated rulemaking (Carey, 2021, p. 2). The Negotiated Rulemaking Act was made permanent by legislation enacted in 1996 (Lubbers, 2014).

In 1992, Congress codified the use of negotiated rulemaking in the creation of regulations under Title IV of the Higher Education Act through that year's reauthorization of the Act (Natow, 2019). The 1992 reauthorization also required the Department of Education to hold preliminary meetings before convening a negotiated rulemaking panel. These meetings have been characterized as "'pre-reg-neg' public hearings" (Carey, 2021, p. 9) with potentially affected stakeholders, including representatives of students, higher education institutions, and the lending industry, among others (Natow, 2017). The subsequent Higher Education Act reauthorizations maintained the negotiated rulemaking requirement. Ever since, the Department of Education has employed the procedure in numerous rulemakings affecting Title IV of the

Higher Education Act, covering such subjects as gainful employment accountability for career-focused programs, student loan borrowers' defense to repayment when schools are found to have committed fraud or misrepresentation in getting students to enroll, and incentive compensation policies for student recruitment personnel, among other matters (Natow, 2017; Natow, 2020; Natow, 2022c). Although negotiated rulemaking continues to occur somewhat frequently in the higher education policy arena due to the statutory mandate, its use has declined in other agencies (Blake & Bull, 2017; Lubbers, 2008; Schuck & Kochevar, 2014).

There has been limited prior research on participants' perceptions of the negotiated rulemaking process. One such study, conducted by Langbein and Kerwin (2000), found that participants in negotiated rulemaking were generally more satisfied with the rulemaking process and final rule content than participants in rulemaking proceedings that did not include negotiation. That study, which was limited to the Environmental Protection Agency's rulemaking procedures, also found that participants in negotiated rulemaking tended to learn more and endure greater financial costs than participants in nonnegotiated rulemaking. In another study of National Park Service policy, Merritt and Shafer (2012) found that negotiated rulemaking participants perceived that they learned more about agency decision making and improved their relationship with agency staff. McDonald et al. (2016) found that participants in a National Oceanic and Atmospheric Administration negotiated rulemaking project had perceptions about the success of the policies they negotiated that aligned well with the actual effectiveness of the policies. Despite these important findings, prior research on the perceptions of negotiated rulemaking participants has not investigated stakeholder views of the process's strengths and weaknesses, with the goal of identifying how the process may be improved. The present analysis aims to address this gap in prior research and to provide this information

specifically with regard to the U.S. Department of Education's negotiated rulemaking procedures for higher education.

Research Methods

As explained above, the U.S. Department of Education has been required by law to use negotiated rulemaking in the creation of federal student financial aid regulations for more than 30 years. In this amount of time, numerous individuals representing a variety of stakeholders and government officials have participated in higher education negotiated rulemaking. Therefore, a case study of negotiated rulemaking in the Department of Education would be useful to understand the strengths and weaknesses of this process – informing how it might be improved – because this agency has a wealth of experience with the process, both historically and through the present day. The analysis presented here addresses the following research questions: *What are the positive aspects of the U.S. Department of Education's negotiated rulemaking process? What are the negative aspects of this process?* This analysis is based not only on interviews but also on a review of scholarly literature and policy-relevant documents reflecting negotiated rulemaking procedures.

Case Study Approach

The empirical data cited in the remainder of this paper were gathered as part of a qualitative case study on how research has been used in the U.S. Department of Education's higher education rulemaking process (see Natow, 2020 and Natow, 2022c for detailed descriptions of the case-study regulations). As a comparative case study (see Creswell & Poth, 2018), the analysis focused on understanding several individual cases of rulemaking in the U.S. Department of Education: the Gainful Employment Rule of 2014, the Revised Pay as You Earn (REPAYE) Rule of 2015, the Borrower Defense Rule of 2016, the Teacher Preparation Rule of

2016, and the Gainful Employment Rule Rescission of 2019. These rules were purposefully sampled for the case study (Maxwell, 2013), because they all involved regulations that affected Title IV federal student financial aid programs, they all employed negotiated rulemaking, and they were all different in some regard. For example, each case-study rule had its own substantive regulatory topic, some of which were relatively high-profile and controversial (particularly the two Gainful Employment rules), and one of which had a negotiated rulemaking panel that reached consensus (REPAYE) (Natow, 2020; Natow, 2022c).

Data Collection

This case study's dataset included the texts of all case-study regulations identified above as well as records of their negotiated rulemaking proceedings. Importantly for purposes of the analysis of negotiated rulemaking's strengths and weaknesses, the present analysis also included policy-relevant documents reflecting negotiated rulemaking procedures as well as observations about negotiated rulemaking as a policymaking process. These documents were supplemented by relevant academic literature.

This study's dataset also included verbatim transcripts reflecting research interviews conducted with 34 policy actors familiar with the development of at least one of the five case-study rules identified above. Like the case-study rules, interviewees were purposefully selected (Maxwell, 2013), because they had information that was useful to the case study due to their participation in and/or close observation of one or more case-study rules. Interviewees included key policy actors both in and outside the federal government, such as people who had worked in the Department of Education, other federal agencies, state government agencies, higher education associations, different kinds of higher education institutions, interest groups representing students or consumers, think tanks, student lending industry representatives,

accrediting body representatives, or some combination of these (Natow, 2020; Natow, 2022c). To maintain interviewees' confidentiality, no participants are identified by name, organization, or exact job title when presenting the findings of this research. Rather, interviewees' statements are presented in the sections below with citations to the interview code number they were given in the case study (e.g., Author's interview data, # [code number]).

Data Analysis

In the semi-structured interviews, respondents were asked a number of questions about the rulemaking process, particularly with regard to how research was used in each case-study rulemaking, as research utilization in the process was the primary focus of the study. In the course of answering those questions, respondents often commented on the negotiated rulemaking process itself, including its strengths and weaknesses and ways in which it may be improved. The interviews were audio recorded and transcribed, and interview transcripts were coded using a custom coding structure and qualitative data analysis software. On the interview transcripts, statements about the strengths and weaknesses of negotiated rulemaking were coded as reflecting positive or negative aspects of negotiated rulemaking. All data so coded were gathered for a second round of analysis (Miles et al., 2019), focusing on patterns regarding the positive and negative aspects of negotiated rulemaking in the U.S. Department of Education. A similar data analysis process was employed for information relevant to negotiated rulemaking's strengths and weaknesses that were identified in the documents included in this study's dataset. Data patterns relevant to the positive and negative aspects of negotiated rulemaking were identified as the key themes of this analysis and are presented in the Findings section below.

Findings

Positive Aspects of Negotiated Rulemaking

The positive aspects of negotiated rulemaking include its open dialogue and transparency, the fact that it enables policymakers to receive input from policy implementers, and its ability to influence the content of final regulations, which indicates the process is at least somewhat effective.

Open Dialogue and Transparency

One strength of negotiated rulemaking is that it requires an open, publicly accessible debate and dialogue about the language of a proposed rule. This promotes transparency in regulatory policymaking and the opportunity to raise public awareness about forthcoming regulations. Participants in and observers of the U.S. Department of Education's rulemaking process have appreciated the openness of the debates and transparency about how proposed regulations are negotiated. As one participant said, "I really like the transparency that the department has provided, [including] the websites … where we can see all the documents" used in negotiations (Author's interview data, #16). A former Department of Education official observed that the participation and transparency involved in negotiated rulemaking "does kind of help to provide … the opportunity for the public to be aware of how the agency is thinking and the issues that emerge" (Author's interview data, #21).

In the past, the higher education negotiated rulemaking process had limitations on its transparency. Specifically, not long ago, the negotiations were conducted fully in-person in the Department of Education's headquarters in Washington, D.C., and were not video streamed, recorded, or transcribed (Natow, 2017; Natow, 2019). Although open to the public, only individuals who could take the time and had the resources to travel to Washington during the

days in which negotiations were in session were able to observe negotiated rulemaking and hear the actual discussions among negotiators (Natow, 2017). However, thanks to technology, negotiated rulemaking has become more open and transparent over time. In 2017, the Department of Education began to provide verbatim transcripts and audio recordings of negotiated rulemaking proceedings to the public on its website (see, e.g., U.S. Department of Education, n.d.-a). Around this time, there were calls from interest groups to record or video stream negotiations in the interest of transparency, and the availability of Internet and video streaming technology has made these calls more pressing. As one youth advocate predicted in 2018, "As technology progresses, there is going to be more and more of a demand for the general public, who wants to view a lot of this, to be able to do that" (Author's interview data, #16). This comment proved to be prescient. In 2019, the department began video streaming the negotiations in real time (see, e.g., U.S. Department of Education, n.d.-c). Following the onset of the COVID-19 pandemic, all negotiations and preliminary public hearings have been conducted virtually (see, e.g., Intent to Establish Negotiated Rulemaking Committee, 2021). The expansion of technology – accelerated by a global health crisis that required socially distant convenings – has made higher education negotiated rulemaking more publicly accessible than ever.

Input From Policy Implementers

Another strength of negotiated rulemaking is that it involves direct participation by interested parties in the development of regulatory language. This provides proposed regulations with the benefit of hearing from policy implementers about the feasibility of policies being implemented in the way envisioned by policymakers, and determining the extent to which a policy may be successful at achieving its desired goals. Taking stakeholder input into account when drafting a proposed regulation should, theoretically, enable an agency to create a more

efficient, effective, and easily implemented rule than the agency would have done without receiving such input (Blake & Bull, 2017; Kerwin & Furlong, 2011; Pelesh, 1994).

A federal official interviewed for my research recognized that input from policy implementers in the drafting process is a strength of the Department of Education's rulemaking process. This respondent said, "[The Department of] Education already has a fairly unique rulemaking process across government, one that involves a lot more stakeholder involvement than other processes" (Author's interview data, #25). Similarly, a consumer advocate who has participated in negotiated rulemaking appreciated the role that stakeholder input has played in the process. This respondent said, "I have found it very valuable … because it gives the public a chance early in the process to provide stakeholder input into regulations. Of course, members of the public … also have substantive expertise in various ways" (Author's interview data, #13). Another negotiated rulemaking participant who had been critical of the lengthy amount of time involved in the process (see the subsection on *Time Management* below) acknowledged that gathering input from policy implementers and other stakeholders contributes to the quality of final regulations. This respondent said, "The rules that come out, even the rules that are drafted on the sessions that break down, they're better at the end of the day, even when there's no consensus, than they were in the beginning" of the negotiated rulemaking process (Author's interview data, #8).

Influence on Proposed Regulations

There is evidence that negotiated rulemaking deliberations have influenced the content of proposed regulations, an indicator of the process's effectiveness. For example, when developing proposed language for a 2007 regulation of the Federal Perkins Loan Program, the Department of Education's original plan was criticized by negotiated rulemaking participants as being too

burdensome in some respects (Federal Perkins Loan Program, 2007). After hearing this feedback, the department rewrote the language and ultimately produced an NPRM that was less burdensome (Federal Perkins Loan Program, 2007; Natow, 2019). The influence of the process over proposed regulations is most evident when consensus is reached, because under those circumstances, the Department of Education adopts the agreed-upon wording in the NPRM (Natow, 2017; Natow, 2019). However, some of this study's respondents indicated that negotiated rulemaking can be influential even if the negotiating committee does not reach consensus. In the words of a community college representative:

> Yes, the Department of Education does listen to you. They don't shut people down, but they have some really experienced negotiators. And they listen… it was very difficult to come to consensus, and when you don't, the Department of Education just makes a decision. But I have seen that they made the decision and you can tell ... [it has] been affected by the discussion in some way. (Author's interview data, #23).

The fact that negotiated rulemaking has been shown to have some influence on proposed regulatory language is a strength of the process because it indicates the agency is mindful of concerns of interested parties and policy implementers, and that it takes those concerns into account when writing proposed regulations. In other words, the part of the negotiated rulemaking process that allows interested parties to influence the content of regulations is working as intended, at least to some extent.

Negative Aspects of Negotiated Rulemaking

Negative aspects of negotiated rulemaking include its financial expense, problems with time management, and stakeholders' skepticism about the extent to which the process is effective.

Financial Expense

The requirement to use negotiated rulemaking adds an entire phase to traditional notice-and-comment rulemaking – and one that involves considerable economic costs. This was a fact identified as a negative aspect of negotiated rulemaking by this study's participants, and it has also been noted in prior literature as a possible reason for the decline in agencies' use of negotiated rulemaking (Blake & Bull, 2017; Lubbers, 2008). The earliest stage of negotiated rulemaking involves Department of Education personnel traveling to various locations around the country for public hearings with stakeholders as required by the Higher Education Act to develop a specific agenda for negotiated rulemaking (Natow, 2017). Department staff time and other resources are used to select a broad range of negotiators, retain a neutral negotiation facilitator, participate in the negotiations, draft proposed regulatory language following each negotiating session, and develop issue papers and other preparatory materials. All of the time and resources that go into negotiated rulemaking are not required in typical notice-and-comment rulemaking, in which the Department of Education would develop proposed regulatory language behind closed doors.

In addition to being expensive for the government, negotiated rulemaking is expensive for participants (Natow, 2017). The department does not subsidize the costs of participating in negotiated rulemaking for nonfederal negotiators, so negotiators and the organizations they represent must pay their own expenses for travel and lodging associated with negotiated rulemaking. Since the start of the COVID-19 pandemic, negotiated rulemaking sessions have taken place fully online. This eliminates expenses associated with travel and lodging, but negotiators must still spend time away from work preparing for and participating in the negotiations. For these reasons, stakeholders who do not have a lot of resources may be unable to

participate directly in negotiated rulemaking, and those who do participate may have to make budget cuts elsewhere.

Time Management

Participants also criticized time management aspects of negotiated rulemaking. One common critique is that the process is time-consuming. Negotiating sessions take place for several days at a time over the course of several months, with several weeks' break in between (Natow, 2017). Even before negotiations begin, the Department of Education must spend time posting notices in the *Federal Register*, holding preliminary public hearings, seeking nominations for negotiators, selecting negotiators, and preparing materials for each negotiating session. Considering these preliminary steps, the entire negotiated rulemaking process takes several months from start to finish. For example, the Department of Education announced its intention to create a regulation setting forth accountability standards for postsecondary teacher preparation programs in May 2011 (Negotiated Rulemaking Committee, 2011), and the department held negotiated rulemaking sessions for this proposed rule from January through April 2012 (U.S. Department of Education, n.d.-b), for a regulation that was not issued until 2016 (Natow, 2020). More recently, in May 2021, the department announced public hearings to begin in June 2021 in anticipation of several negotiated rulemaking proceedings that concluded in March 2022 (Negotiated Rulemaking Committee, 2021a). A negotiated rulemaking participant interviewed for my research described the time involved in the process as follows:

> The timeframe is generally … three days of meetings, and then you come back a month later and have another three days of meetings. I mean, they're long meetings, 9:00 to 5:00. A lot of time goes into these efforts. (Author's interview data, #8)

This same respondent's perspective was that negotiated rulemaking is too time-consuming, particularly when the process gets politicized and no consensus is reached.

A related challenge is that negotiated rulemaking often does not provide sufficient planning time for participants. Negotiators reported receiving preparatory materials in a short amount of time before a negotiation session. This includes issue papers, which are documents provided by the Department of Education containing contextual materials, proposed regulatory language, and other information (New America, n.d.). One negotiated rulemaking participant said, "There were times literally as we were convening at 9:00 a.m. Monday morning, we'd get the issue papers at 5:00 Friday afternoon" (Author's interview data, # 5). Similarly, another participant reported:

> I was often asking [the department] for information sooner so that everyone has time to come prepared to meetings and to know what they should be prepared to discuss, and ideally also to share it with the broader communities that they're representing to get a more representative perspective. (Author's interview data, #15)

As these statements demonstrate, negotiators often felt that they had insufficient time to prepare for negotiated rulemaking, both for themselves as negotiators and for the broader constituent groups they represented.

Skepticism about Negotiated Rulemaking's Effectiveness

Many participants in and observers of the Department of Education's negotiated rulemaking process have expressed skepticism about the effectiveness of the process. Respondents provided a number of reasons for this. First, the department holds so much power that it can essentially do whatever it prefers regardless of what other negotiators say; second, some interested parties are not adequately represented during negotiations; and third, the open

and public nature of negotiated rulemaking can lead some participants to engage in political performances rather than frank discussions. In the subsections that follow, each of these criticisms is discussed in turn.

Department of Education Holds Too Much Power. A primary reason for participants' skepticism about negotiated rulemaking is the fact that the department itself holds a vast amount of power over the process, to the point that the agency can ultimately do whatever it wishes with regulatory language regardless of what happens during negotiated rulemaking. There is an argument to be made that normatively, this should be the case – a key role of federal agencies is to create regulations in accordance with agency personnel's technical expertise, and negotiated rulemaking could be a threat to that (Blake & Bull, 2017; Funk, 1997). However, participants in this study often perceived the Department of Education's role to be so large that it rendered the process virtually ineffective. In this way, the vast amount of power held by the agency engendered skepticism about negotiated rulemaking.

There are several ways the department exercises great power over this process. The department selects negotiators and facilitators, provides issue papers and a draft of suggested language before the sessions, and determines whether to commence a new rulemaking in the first place. Perhaps most importantly, the department has a negotiator (known as the *federal negotiator*) whose vote on consensus counts as much as any other negotiator's vote (Natow, 2017). Participants have indicated skepticism of the process due to the Department of Education's outsized role. The following statement from a public university representative illustrates the common theme of participants' understanding that the department holds a vast amount of power:

> So much of what gets presented and what we discuss comes from the Department of Education, and they have kind of their directions of what they're supposed to be accomplishing. And as part of negotiation, they're only going to go so far as to what they think is a good idea. (Author's interview data, #11)

The Department of Education's power in negotiated rulemaking increases when the committee is unable to reach consensus because in those circumstances, the department is able to write the proposed rule entirely on its own and is not required to use any language produced during negotiated rulemaking. Respondents also observed that recently, consensus has been more difficult to achieve. A representative of community colleges indicated that a more polarized political environment in recent years has led to fewer instances of negotiated rulemaking committees reaching consensus. This participant said the process "doesn't provide the same amount of consensus" as in the past, and that "there seems to have been a drift away from the assumption that consensus would be something that people would try really, really hard to generate. I don't get that sense anymore." As to why that is, the participant opined that in the current political environment, "the individual groups are less inclined, I think, to seek consensus or give up their organizational priorities in order to reach consensus" (Author's interview data, #10).

Given the department's power in negotiated rulemaking and the polarized political environment of higher education, some participants view negotiated rulemaking as a process that is doomed from the start: negotiators holding a diverse and often opposing range of policy positions are required to reach unanimous consensus with each other and a federal agency – led by political appointees – which can write its own regulation in the absence of unanimous agreement among negotiators. One participant described this process as being "so clearly set up

to fail" (Author's interview data, #31). Another participant expressed skepticism surrounding the department's power in this process as follows:

> The department knows it's not going to reach consensus [at] the outset … It has an incentive to bend a little bit to get consensus, but not a lot. And so if it's sitting down with true representatives of the community, often times it knows it's not going to reach consensus, and it's going do whatever it wants. (Author's interview data, #33).

Thus, reaching consensus in negotiated rulemaking does not necessarily indicate that all negotiators are pleased with the proposed regulations. It may simply mean that at least one nonfederal negotiator believes there is a good chance that the regulation the agency would write on its own would be less favorable to their constituency than the consensus-based NPRM.

Insufficient Representation. Another reason for skepticism about negotiated rulemaking is the perspective of some that there is insufficient representation of all interested parties on negotiated rulemaking committees. Typical negotiation committees include representatives from several different types of higher education institutions as well as higher education students (Natow, 2017). Moreover, depending on the subject of a forthcoming rule, there are also representatives of accreditors, the student loan industry, consumer protection specialists, state governments, and organizations that do business with higher education institutions. Yet some participants nonetheless perceived a lack of representation for certain constituent groups. For example, a youth advocate said there was insufficient representation of student-loan borrowers in negotiated rulemaking. Even if a committee has a student representative, the respondent said that often the student negotiator is "still in school," and "a lot of [student-loan] issues don't really … affect you until you've left [college] and you're repaying your student loan" (Author's interview data, #16).

Another participant said there tends to be a lack of individuals who work on college campuses at the negotiating table. Although all types of higher education institutions had negotiators representing them, these were often individuals who worked at associations rather than individual colleges. This respondent said, “There were associations, there were businesses, there were all kinds of things that touch higher education, but I really wanted to hear from the people who are in the middle of it” (Author’s interview data, #23).

However, it is important not to include representatives on the negotiating team simply for the sake of having more groups represented. As a representative of accreditors suggested, a constituent group should have a meaningful stake in the outcome of a regulation and knowledge of the policy area in order to be included in negotiations. This respondent said that involving so many different constituents even when some groups are not much affected by or knowledgeable about a proposed rule’s topic can lead to nonproductive negotiation sessions. When this occurs, the process is viewed by some as ineffective and “just a waste of time” (Author’s interview data, #30).

Political Performance. Some respondents observed that the openness and transparency provided by negotiated rulemaking can have the unintended consequence of leading participants to provide political performances rather than speak frankly during negotiations. This leads to skepticism about whether participants in the process are providing their true perspectives or being wholly transparent about the information they present. One negotiated rulemaking participant described this phenomenon as follows:

> Transparency and accountability is a fantastic thing, especially when it involves government… At the same time, when there are people from the public and reporters and the Twitterati hanging out watching all of this stuff, anything that you say as a negotiator

> will be Tweeted, or will be reported, or will be potentially disseminated for public consumption… It gets to a point where a lot of what's being said is for the sound bite and public consumption, rather than being completely open and transparent and honest with each other, and trying to find common ground. (Author's interview data, #17)

A different participant concurred, "If you make a mistake once… you're getting Tweeted about, and so people don't speak their mind. They speak politically" (Author's interview data, #20).

Indeed, it was this very concern that prevented the Department of Education from livestreaming negotiated rulemaking until 2019, or from even providing verbatim transcripts of negotiations until 2017 (see these dates in Natow, 2019). A former Department of Education official interviewed for my research explained that the reason the department did not provide verbatim transcripts before then:

> was to allow folks to have an open forum where they could test ideas, brainstorm ideas as a group, and not feel that they were being wedded to those ideas or that their words were going to be held against them. (Author's interview data, #14)

At the same time, however, the tendency of negotiators to provide a political performance may reflect what the first respondent cited in this subsection acknowledged as a "trade-off" of having an open and transparent policymaking process. As that respondent said, the alternative to transparency is having "to close the doors to the public, and I don't think that that's something that anyone really wants to do" (Author's interview data, #17). Thus, negotiators providing a political performance may be a necessary cost associated with having public and transparent negotiations, which – as explained above – is considered a strength of negotiated rulemaking.

Recommendations for Improving Negotiated Rulemaking

There are a number of steps lawmakers and agency personnel can take to address the challenges associated with negotiated rulemaking. These reforms can be made by Congress through legislation, including as part of a Higher Education Act reauthorization, as that statute governs negotiated rulemaking for regulations created under Title IV of that Act. The U.S. Department of Education could also implement these reforms by amending the agency's own negotiated rulemaking procedures.

To lower the process's financial expense, the department could continue to offer virtual negotiated rulemaking sessions. Negotiating sessions have been conducted virtually since the start of the COVID pandemic and through (at least) 2022. Although the Department of Education and other negotiators may want to bring back in-person meetings in the future, those meetings are more costly for nonfederal negotiators in that they require unreimbursed travel to Washington, D.C., lodging, and meals for the time negotiators are participating. Not all negotiated rulemaking sessions need to be virtual. Because each negotiated rulemaking panel typically meets for multiple days at a time over the course of several months, the department can reserve at least one week of negotiations for virtual meetings and, if it so chooses, conduct the remainder in person. Alternatively, the department should consider providing a virtual participation option for negotiators that live some distance away from Washington. Virtual negotiations reduce the cost of participating, thereby opening the potential to become a negotiator to a broader range of participants, which can in turn enhance the benefits of negotiated rulemaking by bringing perspectives of even more policy implementers and other interested parties into the process. Keeping at least some negotiating sessions virtual can also address some

of the time management issues associated with the process in that it would reduce travel time and time away from other work for negotiators and observers.

Other issues of time management can be addressed by requiring the Department of Education to provide issue papers and other preparatory materials well in advance of negotiating sessions. This will allow participants sufficient time to read and understand the materials and to prepare for discussing them at the convenings. Many respondents in this case study indicated support for such a requirement, as have some lawmakers. In 2017, Republicans in the House of Representatives proposed a bill to reauthorize the Higher Education Act known as the Promoting Real Opportunity, Success, and Prosperity through Education Reform (PROSPER) Act. This bill would have required the Department of Education to provide preparatory materials at least 15 days in advance of negotiated rulemaking sessions (PROSPER Act, 2017). That bill did not become law, but an act of Congress is not necessary to impose this requirement if the Department of Education reforms its own regulatory procedures to provide preparatory materials earlier than it often does.

The problem of stakeholder skepticism about the effectiveness of negotiated rulemaking may be more difficult to address. Skepticism about the process can lead to stakeholder disengagement, which threatens to reduce the number of policy implementers willing to participate in negotiated rulemaking, and input from implementers was identified as a key benefit of this process. Doubts about the effectiveness of negotiated rulemaking could also erode perceptions of "the legitimacy of resulting regulations" (Golden, 1998, p. 256), which is something the public participation aspects of rulemaking – such as negotiated rulemaking and the notice-and-comment process – are designed to protect (Golden, 1998; Natow, 2017). For

these reasons, addressing problems that lead to stakeholder skepticism should be a priority for the Department of Education.

There are several steps the government can take to restore participants' faith in the effectiveness of negotiated rulemaking. To address the perception of the Department of Education playing an outsized role in this process, the agency could hire an external party to interview and select negotiators. Ultimately, the Department of Education would still hold a great deal of power in negotiated rulemaking. However, involving a neutral third party in selecting negotiators is likely to remove some of the current skepticism about the process being stacked decidedly in the department's favor – or, in the words of two of this study's participants, the perception that it is simply a "pro forma" process (Author's interview data, #26 & #33). In the *Negotiated Rulemaking Sourcebook*, Pritzker and Dalton (1995) wrote that a third-party negotiated rulemaking convenor "is more likely to be able to establish rapport with prospective parties and to obtain more complete information than could agency rulemaking staff" (p. 124). An outside convener could ensure that negotiators are representative of all potentially affected groups and that they are well-informed and duly qualified to represent their groups in negotiations. Continuing the Department of Education's recent practice of grouping regulation components according to category and requiring consensus for each category but not for the entire package of categories is another way to increase perceptions of negotiated rulemaking's effectiveness. Because negotiators are more likely to reach consensus on individual parts of a regulatory package than the entire thing, participants and observers can have faith that beneficial proposed regulations will not be impeded from moving forward due to one small part of the regulatory package being unacceptable to one negotiator.

Finally, the Department of Education should continue to implement reforms to the negotiated rulemaking process that make it more transparent. For example, since 2017, the department has taken steps to make negotiated rulemaking more publicly accessible, first with audio recording and transcribing the negotiations, and later with live video streaming the sessions over the Internet. Since the COVID pandemic began, the negotiations have been conducted virtually, and members of the public were able not only to view the negotiations in real-time but also to speak directly to negotiators during the public comment period at the end of each session. This reduced the need for members of the public to be physically present in Washington, D.C. to speak before a negotiating panel. Negotiators who wish to conduct private, side-bar conversations by way of caucuses may still do so (Lubbers, 2014; Natow, 2017). As is the case with in-person negotiated rulemaking, caucus sessions would not be viewable by the public in online negotiated rulemaking. By continuing to provide some virtual negotiations, the Department of Education can also reduce the time and financial burdens for negotiators and members of the public to participate and be heard in the negotiated rulemaking process.

Conclusion

Promoted heavily by regulatory reformers in the 1980s, negotiated rulemaking gained prominence in the 1990s through legislation such as the Negotiated Rulemaking Acts of 1990 and 1996. Negotiated rulemaking has played an essential role in the federal administration of higher education policy for more than three decades, as the U.S. Department of Education has been required to employ the procedure in developing regulations under Title IV of the Higher Education Act since 1992. In the decades since then, the department has invited interested parties of various kinds to participate in preliminary public hearings as well as negotiated rulemaking sessions.

Negotiated rulemaking is not a panacea, and some would argue it has not achieved its goals of making the rulemaking process more efficient than traditional notice-and-comment rulemaking. As this study's respondents have observed, participating in negotiated rulemaking is expensive and time-consuming. The process has often not allowed participants sufficient preparation time. And the political nature of the process, combined with the Department of Education's enormous power over rulemaking outcomes, has led to a fair amount of skepticism regarding whether the process can be effective at achieving its goals.

However, negotiated rulemaking has a number of strengths as well. The process allows for open dialogue and transparency in regulatory policymaking. It also enables policymakers to receive input from policy implementers, which can help make policies more manageable and effective to implement. And negotiated rulemaking has shown to be effective at influencing the substance of regulations, even in some cases when consensus is not reached. As a representative of private, non-profit higher education interviewed for this case study said, "As much as folks in the community complain about the problems with negotiated rulemaking, we also recognize that we are very lucky in the education space, that we have the ability to do negotiated rulemaking" (Author's interview data, #17).

Negotiated rulemaking for higher education is likely to continue for the foreseeable future. Enshrined in the Higher Education Act, it would take another act of Congress to remove this requirement, and that is not likely to happen any time soon. As of this writing, the Higher Education Act has not been reauthorized since 2008, making it several years overdue. The political conditions that have led to gridlock for higher education bills, particularly those that would reauthorize the Higher Education Act, still exist (Natow, 2022a). Thus, it is unlikely Congress will pass a reauthorization, let alone a rescission of the negotiated rulemaking

requirement, in the foreseeable future. And even if a reauthorization were to pass, it would likely still require negotiated rulemaking: Republicans and Democrats have both introduced reauthorization bills in recent Congresses, and those bills would have maintained negotiated rulemaking (see, e.g., College Affordability Act, 2019; PROSPER Act, 2017). Yet the challenges with negotiated rulemaking identified above are problematic for the process's perceived legitimacy and effectiveness. For these reasons, regulators and other policymakers should continue to improve negotiated rulemaking by making it more accessible, transparent, and representative of all stakeholders' interests.

References

Administrative Conference of the United States. *Procedures for negotiating proposed regulations* (Recommendation 82-4), 47 Fed. Reg. 30708 (1982).

Blake, C., & Bull, R. T. (2017, June 5). *Negotiated rulemaking: Final report*. Administrative Conference of the United States.

Carey, M. P. (2021, April 12). *Negotiated rulemaking: In brief* (CRS Report No. R46756). Library of Congress.

College Affordability Act, H.R. 4674, 116th Cong. (2019).

Creswell, J. W., & Poth, C. N. (2018). *Qualitative inquiry and research design* (4th ed.). Sage.

Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program: Notice of proposed rulemaking, 72 Fed. Reg. 32410 (2007).

Funk, W. (1997). Bargaining toward the new millennium: regulatory negotiation and the subversion of the public interest. *Duke Law Journal*, *46*, 1351-1388.

Golden, M. M. (1998). Interest groups in the rule-making process: Who participates? Whose voices get heard? *Journal of Public Administration Research and Theory*, *8*(2), 245-270.

Harter, P. J. (1982). Negotiating regulations: A cure for malaise. *Georgetown Law Journal*, *71*, 1-118.

Higher Education Act, 20 U.S. C ode §§ 1001 et seq. (2018).

Intent to Establish Negotiated Rulemaking Committee, 79 Fed. Reg. 52273 (2014).

Intent to Establish Negotiated Rulemaking Committee, 86 Fed. Reg. 45666 (2021).

Kerwin, C. M., & Furlong, S. R. (2011). *Rulemaking: How government agencies write law and make policy* (4th ed.). Washington, DC: CQ Press.

Langbein, L. I., & Kerwin, C. M. (2000). Regulatory negotiation versus conventional rule making: Claims, counterclaims, and empirical evidence. *Journal of Public Administration Research and Theory*, *10*(3), 599-632.

Lubbers, J. S. (1998). *A guide to federal agency rulemaking* (3rd ed.). American Bar Association.

Lubbers, J. S. (2008). Achieving policymaking consensus: The (unfortunate) waning of negotiated rulemaking. *South Texas Law Review, 49,* 987-1017.

Lubbers, J. S. (2014, December 5). *Enhancing the Use of Negotiated Rulemaking by the U.S. Department of Education*. Available at SSRN: https://ssrn.com/abstract=2764954 or http://dx.doi.org/10.2139/ssrn.2764954

Maxwell, J. A. (2013). *Qualitative research design: An interactive approach* (3rd ed.). Sage.

McCann, C. (2019, May 16). Everything you never wanted to know about the Education Department's 2019 higher ed rulemaking. *New America Blog*. https://www.newamerica.org/education-policy/edcentral/everything-you-never-wanted-to-know-about-the-2019-rulemaking/

McDonald, S. L., Lewison, R. L., Roady, S. E., Kramer, R. A., Rigling-Gallagher, D., & Read, A. J. (2016). Comparing stakeholder perceptions with empirical outcomes from negotiated rulemaking policies: Is participant satisfaction a proxy for policy success? *Marine Policy*, *73*, 224-230.

Merritt L., & Shafer, C. S. (2012). The use preservation paradox: An examination of negotiated rulemaking at Cape Hatteras National Seashore. *Journal of Park & Recreation Administration, 30*(4), 66-82.

Miles, M. B., Huberman, A. M., & Saldaña, J. (2019). *Qualitative data analysis: A methods*

sourcebook (4th ed.). Sage.

Natow, R. S. (2017). *Higher education rulemaking: The politics of creating regulatory policy*. Johns Hopkins University Press.

Natow, R. (2019). Negotiated rulemaking for US higher education regulatory policy: A process of deliberative democracy? *Journal of Deliberative Democracy*, *15*(1), art. 9.

Natow, R. S. (2020). Research utilization in higher education rulemaking: A multi-case study of research prevalence, sources, and barriers. *Education Policy Analysis Archives, 28*(95).

Natow, R. S. (2022a). Understanding higher education bill success in the United States Congress. *The Review of Higher Education,* 46(1), 1-32.

Natow, R. S. (2022b). *Reexamining the federal role in higher education: Politics and policymaking in the postsecondary sector*. Teachers College Press.

Natow, R. S. (2022c). Research use and politics in the federal higher education rulemaking process. *Educational Policy*, *36*(3), 689-716.

Negotiated Rulemaking Committee, Negotiator Nominations and Schedule of Committee Meetings – Teacher Preparation and TEACH Grant Programs, 76 Fed. Reg. 66248 (2011).

Negotiated Rulemaking Committee, Negotiator Nominations and Schedule of Committee Meetings, 86 Fed. Reg. 69607 (2021a).

Negotiated Rulemaking Committee; Public Hearings, 86 Fed. Reg. 28299 (2021b).

New America. (n.d.). *U.S. Department of Education issue paper and other resources*. https://www.newamerica.org/education-policy/reports/negotiated-rulemaking-2022/us-department-of-education-issue-papers-and-other-resources/

Pelesh, M. L. (1994). Regulations under the Higher Education Amendments of 1992: A

case study in negotiated rulemaking. *Law & Contemporary Problems, 57*(4), 151-170.

Perritt, H. (1986). Negotiated rulemaking before federal agencies: evaluation of recommendations by the administrative conference of the United States. *Georgetown Law Journal, 74*(6), 1625-1718.

Perritt, H. (1987). Administrative alternative dispute resolution: The development of negotiated rulemaking and other processes. *Pepperdine law Review, 14*(4), 863-928.

Pritzker, D. M. & Dalton, D. S. (1995, September). *Negotiated rulemaking sourcebook*. United States Government Printing Office.

PROSPER Act, H.R. 4508, 115th Cong. (2017).

Schuck, P. H., & Kochevar, S. (2014). Reg neg redux: The career of a procedural reform. *Theoretical Inquiries in Law, 15*(2), 417-446.

Susskind, L., & McMahon, G. (1985). The theory and practice of negotiated rulemaking. *Yale Journal on Regulation, 3*, 133-165.

Task Force on Federal Regulation of Higher Education. (2014). *Recalibrating regulation of colleges and universities*. American Council on Education.

U.S. Department of Education. (n.d.-a). *Borrower defense and financial responsibility*. https://www2.ed.gov/policy/highered/reg/hearulemaking/2017/borrowerdefense.html

U.S. Department of Education. (n.d.-b). *Negotiated rulemaking for 2011 – Team I, Teacher Preparation Issues*. https://www2.ed.gov/policy/highered/reg/hearulemaking/2011/teacherprep.html

U.S. Department of Education. (n.d.-c). *Negotiated rulemaking for higher education 2018-19.* https://www2.ed.gov/policy/highered/reg/hearulemaking/2018/index.html

U.S. Department of Education. (n.d.-d). *Negotiated rulemaking for higher education 2021-22.*

https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/index.html?src=rn