

***Operating Protocols***  
***for the***  
***Bureau of Indian Education***  
***Standards, Assessments, and Accountability System***  
***Negotiated Rulemaking Committee***  
***September 2018***

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## I. INTRODUCTION

This document describes the goals for the Bureau of Indian Education (BIE) Standards, Assessments, and Accountability System Negotiated Rulemaking Committee (Committee), its operating structure and how Committee Members (“Members”) will communicate, make decisions and support agreements made. Upon review, revision, and approval by the Committee, the Operating Protocols will guide and direct the Committee’s collaborative efforts, and any Subcommittees it establishes, to develop consensus recommendations.

## II. COMMITTEE PURPOSE, COMPOSITION, AND STRUCTURE

### A. The Committee Purpose

This Committee is established under the Negotiated Rulemaking Act (NRA) (5 U.S.C. §561, *et seq.*); the Federal Advisory Committee Act (FACA) (5 U.S.C., Appendix 2); and the Elementary and Secondary Education Act of 1965, (ESEA) (20 U.S.C. §6301 *et seq.*)

In negotiated rulemaking, a committee is convened by the Federal Government for the purpose of negotiating the terms of a proposed administrative rule. The Committee is composed of representatives of Federal and key parties that will be significantly affected by the rule. The BIE has followed legally mandated rules and procedures to solicit nominees, and secure federal appointments of individuals who represent the diverse interests affected by the final rule.

In general, the Committee will advise the Secretary of the Interior (Secretary), through the BIE, on the development of proposed regulations for implementation of the Secretary’s responsibility to define the standards, assessments, and accountability system. The proposed regulations will describe how to execute the Secretary’s responsibility consistent with 20 U.S.C. §6311 (ESEA Section 1111), for schools funded by the BIE, taking into account the unique circumstances and needs of such schools and the students served by such schools. *See* 20 U.S.C. §7824(c). Additionally, the Committee will be asked to provide recommendations that encourage the exercise of the authority of Tribes to adopt their own standards, assessments, and accountability system and also provide recommendations on how BIE could best provide technical assistance under ESEA Section 8204. Other issues related to the proposed regulations that the BIE and Committee Members mutually agree to address may also be discussed. The Committee will act solely in an advisory capacity to the BIE, and will neither exercise program management responsibility nor make decisions directly affecting the matters on which it provides advice.

### B. Committee Composition

The Committee is composed of designated representatives and alternates. The Secretary reserves the right to replace any member who is unable to participate in the Committee’s meetings.

- 1) **Designated Federal Official (DFO)** - The DFO is an ex-officio member and is required by the FACA. A DFO is an employee of the Federal Government who chairs or sits in attendance of each Committee meeting.

- 2) **Bureau of Indian Education (BIE)** - Three BIE representatives (two primary and one alternate) are appointed to the Committee and are authorized to negotiate on behalf of the agency and U.S. Government. They will report to, consult with, and secure approval of the agency's negotiation parameters with the DFO of the BIE.
- 3) **Tribal Members** - Thirteen Tribal representatives are primary representatives on the Committee and an additional two representatives are alternates. The Tribal representatives reflect a balance of interests that will be significantly affected by the final rule (e.g., students enrolled, or parents of students enrolled at the 174 BIE-funded schools, school teachers and administrators, Tribes and Indian communities served by these schools). The individuals represent Tribes whose students attend BIE-funded schools operated by either BIE or by the Tribe through a contract or grant who would be affected by the final rule. Participation in the Committee in no way precludes or supersedes a Tribe's legal rights to engage in government-to-government meetings and consultations with BIE or the U.S. Department of the Interior (DOI).

In addition to the members of the negotiating committee, the following individuals will support the work of the Committee in reaching consensus:

- 4) **Facilitator and Support** – The DOI Office of Collaborative Action and Dispute Resolution (CADR) will provide impartial collaboration, consensus building facilitation support to the Committee. The Office of Regulatory Affairs and Collaborative Action (RACA) will assist in supporting the Committee.
- 5) **Legal Advisor** - A representative of the DOI Office of the Solicitor has been appointed to the Committee to provide legal advice to the Committee during deliberations.
- 6) **Technical Experts** - The U.S. Department of Education is providing technical expertise in the areas of standards, assessments and accountability systems.

### C. Committee Structure

The Committee may form subcommittees in order to assist committee management and productive and timely deliberations. The following subcommittees may be used:

- 1) **Leadership Team (LT)** – In lieu of a single chairperson, the LT will represent the Committee as a whole. It will be composed of the DFO or his/her designee, and one to two representatives selected from the Tribal Committee Members and one to two representatives selected from the Federal Committee Members.

The LT will have responsibility for procedural coordination. It will make only procedural decisions, and not substantive decisions regarding the Committee's recommendations to BIE. The LT will have a number of management tasks including:

- a) Represent the Negotiated Rulemaking Committee as a whole to the general public;
- b) Assist the Facilitator in the development of the plenary meeting agendas and approaches for addressing relevant issues;
- c) Coordination between meetings on issues to be discussed;
- d) Oversight, with the Facilitator, of the Subcommittee functions, and

- e) Liaison between the Committee as a whole and the Facilitator.

The LT will operate by consensus. (See definition of consensus in section IV – How the Committee will Make Decisions.)

- 2) **Subcommittees** – The Committee, on an as needed basis, may establish Subcommittees to assist in deliberations and develop proposals for the Committee’s consideration. Subcommittees may be composed of Committee Members, technical experts, or others designated by Committee Members with knowledge and expertise relevant to topics under discussion may participate in subcommittees.

Subcommittees will have responsibility for developing technical data needed by the Committee for productive deliberations, and, as appropriate, the generation of draft proposals regarding regulations as described in the Committee’s Charter.

Subcommittees do not have final substantive decision-making authority on any issue. Subcommittees, to the greatest extent possible, will bring consensus-based recommendations to the Committee as a whole for its deliberation and potential approval.

Meetings of Subcommittees are not required to be open to members of the public.

#### **D. Schedule**

The Committee schedule is determined by the need to implement a final rule by July 1, 2019 for the 2019-2020 academic year. The regulatory negotiation is scheduled to begin in September 2018 and be conducted over a four month period. The Committee is scheduled to meet for three days every month. However, the Committee may change this schedule upon mutual agreement by all Committee Members.

#### **E. Observers**

All Committee meetings will be open to the public. However, in order for the Committee to achieve its goals, discussion and deliberation at work sessions must be focused and manageable. Participation and times for input by non-members of the Committee during their working sessions will be determined by the LT in consultation with the DFO. The decision regarding when to open a Committee meeting for public comment may be made by the LT during the development of the meeting agenda.

### **III. HOW THE COMMITTEE AND ITS MEMBERS WILL UNDERTAKE THEIR ROLES AND RESPONSIBILITIES**

#### **A. Roles and Responsibilities**

- 1) **Committee members** are expected to:
  - a) Commit to engage in respectful and good faith negotiations and discussions to develop mutually acceptable recommendations;
  - b) Regularly prepare for and attend Committee, LT, and Subcommittee meetings;
  - c) Clearly articulate and represent the interests of their constituent group(s) and bring their constituents’ concerns and ideas to the deliberations;
  - d) Keep their constituents informed (through meetings, calls, written communications) about what is being or will be discussed in the future by the Committee or

Subcommittees regarding potential recommendations to the BIE and solicit their input on these issues as needed or appropriate;

- e) Listen to other points of view and try to understand the interests of other Committee Members;
  - f) Openly discuss issues with Committee, LT, and Subcommittee Members who hold diverse views, and participate in a cooperative problem solving procedure to resolve differences;
  - g) Generate and evaluate options to address the needs expressed by Committee, LT, and Subcommittee Members;
  - h) A Committee Member may, as appropriate, give their proxy to their alternate to participate in decision-making on recommendations to the BIE;
  - i) In the event that a Committee Member cannot attend a meeting, she/he should inform the Facilitator as early as possible about their absence; and
  - j) Agree to support and abide by the content of this Operating Protocol.
- 2) **Alternate Committee Members** – Where identified, alternates represent Committee Members when the Member cannot attend. Alternates are expected to:
- a) Fulfill the duties described in III-A-1 above;
  - b) Attend all Committee meetings to assure they are informed and current on issues that have been discussed, ongoing deliberations, and agreements reached on recommendations; and
  - c) Confer with their Committee Member so they know and understand the former's thinking and views on issues under discussion and decisions to be made on recommendations.

If a Committee Member's alternate has not attended Committee meetings on a regular basis, other Committee Members are not obligated to use time dedicated for deliberations or problem solving sessions to backtrack and accommodate information needs of the alternate who has not attended prior meeting(s). Decisions made at prior sessions will not be reopened to accommodate concerns of alternates who did not attend these meetings, unless agreed upon by the Committee, as a whole.

- 3) **Designated Federal Official** - The DFO chairs or sits in attendance of each Committee meeting and is so designated and authorized, whenever she/he determines it to be in the public interest, to adjourn any such meeting. The law requires that no advisory committee shall conduct any meeting in the absence of the DFO. The DFO serves to keep the group focused on the task at hand. The DFO will, with the Facilitator, enforce the Committee's operating protocols and meeting guidelines.
- 4) **Facilitator** - The Facilitator serves at the pleasure of the collective membership of the Committee, as an independent process designer and meeting facilitator.

The Facilitator is accountable to the Committee as a whole and not to any one Committee Member or participating party. The Facilitator is not beholden to any government agency or organization involved in substantive discussions related to the development of recommendations. The Facilitator has no decision-making authority

and cannot impose any solution, settlement, or agreement among any or all of the members regarding substantive issues.

To the greatest extent possible, the Facilitator will assist Committee Members to reach and record consensus agreements. If and when consensus agreements are not possible, the Facilitator will help the Committee and Subcommittee Members to determine appropriate ways to respond to impasses and provide BIE with information on the diversity of views.

The Facilitator will remain impartial toward the substance of the issues under discussion, and “multipartial” toward all parties in that she will work with all Committee Members to help identify and/or develop mutually acceptable solutions that meet all parties’ interests to the greatest extent possible.

In collaboration with members of the LT, the Facilitator will design the meeting agenda for the Committee and Subcommittee meetings and strategies to address identified issues for discussion.

The Facilitator may use any number of techniques to help ensure that everyone has the opportunity to speak, that comments are kept to a reasonable length of time, and that subjects under discussion are provided sufficient time and focus for progress.

The Facilitator will enforce Operating Protocols and Meeting Guidelines approved by the Committee.

Parties are encouraged to express any concerns about the Facilitator’s role or action: first to the Facilitator directly; and then, if needed, to the LT and/or DFO.

#### **B. Representation of Committee Members’ Interests**

To enhance creativity during meetings, primary Committee Members and alternate Members are expected to not restrict themselves to prior positions held by their organization or group. Instead, they should remain open to new options or solutions to issues being addressed that may emerge in negotiations and deliberations.

The goals of the Committee and Subcommittee(s) are to have frank and open discussions of the issues in question and develop options to address these issues. Therefore, ideas raised in the process of negotiations and prior to the development of final recommendations to the BIE, will be considered “for discussion purposes only,” and will not be construed to reflect the final conclusion of a Committee or Subcommittee Member or his or her constituent group.

#### **C. Disclosure of Information**

A goal of the regulatory negotiation is to have transparent and candid discussions of relevant issues. This process also requires that the participants speak as openly and creatively as possible. To encourage free and open discussion by representatives of constituents that have been or may be involved in future legal proceedings, all communications and documents under this process are accepted by all participants to be part of this negotiated rulemaking. Therefore, Committee Members agree not to use

information revealed during the negotiations in any pending or future legal proceedings for any purpose.

Committee Members may mark information used in discussions to identify them as being prepared for use exclusively in the BIE Standards, Assessments, and Accountability System Negotiated Rulemaking Committee. However, future limitations on the use of information do not preclude the use of data that might be obtained through normal public channels.

#### **D. Adversarial or Legal Proceedings**

As a matter of courtesy, Members of the Committee agree to notify the DFO and all Committee Members verbally and in writing before initiating any adversarial or legal proceedings that may involve other Committee Members or which could adversely affect deliberations of the Committee. Notification should provide all parties adequate time to consider options, and take appropriate measures to minimize potential adverse impacts on the work of the Committee or its Members.

#### **E. Technical Support**

Committee Members may, at their own expense, bring staff from their organizations or agencies or members of their constituency groups to support the problem solving process. Committee Members can defer to these individuals when their expertise is required or when requested by the Committee as a whole. However, the use of support persons must not disrupt deliberations, and technical support people are neither formal members of the Committee nor authorized to participate in decision-making.

#### **F. Attendance**

Participation in and effective consensus decision-making requires consistent attendance by Committee and Subcommittee Members. Committee and Subcommittee Members commit to attend all meetings, and let the Facilitator and LT know if they are not able to participate. If both the principal and the alternate Members are absent from a meeting in which consensus will be deliberated or decided, the absences will be equivalent to not dissenting.

### **IV. HOW THE COMMITTEE WILL MAKE DECISIONS**

#### **A. Definition of Consensus**

The Committee, LT, and any Subcommittees will operate by consensus, which is defined in the NRA (5 USC 562 (2)), as unanimous concurrence of the principal Members, or in the absence of the principal, his or her alternate.

Reaching a consensus requires all group members to educate each other about their important needs, interests, and concerns, and develop an integrative solution or agreement that addresses and satisfies both individual and group interests to the greatest extent possible.

A consensus decision at its best is the strongest form of agreement a group can reach. It is an outcome that *all group members can support*. However, at a minimum, a consensus agreement may be a compromise that *all group members can accept*, “live with” and will not oppose.

**B. Using Consensus**

If a Member disagrees with a proposed approach or solution she/he should make every effort to offer an alternative proposal that is satisfactory to all Members.

A Member who is not in agreement with the general opinion in the group may voluntarily “stand aside” and not block a consensus decision by other Committee Members. This may be done verbally noting that the individual is not in agreement with the rest of the Committee Members and stating why, but will stand aside and allow the Committee to reach a decision on a recommendation.

Consensus on substantive topics will be developed using a two-step process. The Facilitator may first ask for a tentative consensus by conducting a non-binding poll of the Members’ views on the issue(s) in question. Members may voice affirmative support for or objection to a proposal or agreement; refrain from the poll or remain silent. Based on the results of the tentative consensus, Committee Members may use the input to continue their deliberations and try to reach a final consensus, or, if appropriate, voluntarily agree to recognize the degree of support or rejection of the proposal and accept the results.

All consensus agreements reached during the negotiations will be assumed to be tentative agreements until the Committee Members reach final agreement on a package of recommendations. Once final consensus is achieved on the package of recommendations, Committee Members may not thereafter withdraw from the consensus decision.

**V. AGREEMENT**

**A. Consensus Agreement Report**

The goal of the Committee is to develop a consensus agreement report that reflects the final consensus by the Committee. If the Committee reaches consensus on a proposed rule at the conclusion of negotiations, the Committee, through the BIE, shall transmit to the Secretary, a Consensus Agreement Report containing the proposed rule. The BIE will use this Report as the basis for its notice of proposed rulemaking. Prior to publication in the Federal Register the BIE will circulate the draft to the Committee to check for consistency with the Report. The Facilitator will be available to work with the Committee to resolve any differences in opinion about consistency.

On issues where consensus is reached, Committee members will refrain from opposing or commenting negatively on the consensus-based language and will encourage their constituents to do the same.

**B. Absent a Consensus**

If the Committee does not reach consensus on the proposed rule, the Committee will determine what to transmit to the BIE about the Committee’s efforts. As envisioned by the NRA, the Committee may transmit a report specifying areas in which the Committee reached a consensus as well as an explanation for the disagreements, a description of the interest that must be satisfied to reach an agreement and, if possible, ways to address the differences. The Committee may include in a report any other information,

recommendations or materials that the Committee considers appropriate. Any Committee Member may include, as an addendum to the report, additional information, recommendations, or materials.

**C. Caveats**

Committee members should note that final, formal rulemaking requires review and approval by various federal entities that are beyond the authority of the BIE. These authorities include the Office of Management and Budget, the Secretary of the Interior, and the President.

**VI. COMMITTEE MEETINGS**

- A.** The Facilitator will maintain a clear and reliable record of tentative and final agreements reached during the negotiations process. The draft meeting summaries will be provided to Committee Members, who may share them with others within their constituency. After review and approval by the Committee, this record will be made available to the public.
- B.** All members of the Committee may speak during the negotiations. Each member not designated as an alternate will participate for the purpose of determining consensus. A member designated as an alternate will participate for the purpose of determining consensus in the absence of a member of his or her designated constituency.
- C.** A caucus, defined as a private meeting of one or more Committee Members and/or Committee staff, held to confer about issues under deliberation, may be requested of the Facilitator at any time, by any Committee Member or the DFO. The Facilitator may also request a caucus.
- D.** All Committee meetings, but not subcommittee meetings or caucuses, are open to the public.
- E.** Members of the public, organizations, and staff of agencies who are not formal representatives on the Committee will have an opportunity to provide comments. The Committee is not obligated to respond to public comments. A time for public comment will be designated at each meeting and allocated evenly among the individuals making public comment.
  - 1) The Committee will also accept written public comments. Comments can be Email to: [BIComments@bia.gov](mailto:BIComments@bia.gov). Written comments received through this address will be provided to the Committee at each meeting.

## **VII. SAFEGUARDS FOR MEMBERS**

### **A. Member Participation**

Any member may withdraw from the negotiations at any time, by notifying the facilitator and DFO in writing. All members and the organizations they represent shall act in good faith<sup>1</sup> in all aspects of these negotiations.

### **B. Media Contact**

In the interest of promoting free and open conversation as well as collegial decision-making, contact with the media and other organizations outside the community of interest represented by the member will generally be limited to discussion of the overall objectives and progress of the negotiations. Members should refrain from characterizing the views, motives, and interests of other members during contact with the media, other organizations outside the community of interest represented by the member, and to the general public through social media.

### **C. Document Management**

In communicating with entities outside of the Committee, a clear distinction should be made between preliminary information, concept papers, or proposals under consideration and final decisions on recommendations. It is important to differentiate between documents used for discussions and decisions. Preliminary documents will be marked with “DRAFT” or “FOR DISCUSSION PURPOSES ONLY.”

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<sup>1</sup> Good Faith will be defined by the Committee at its first meeting.