

The Good, the Bad and the Undecided

First Rounds of Negotiated Rulemaking Wrap Up

By Sean P. Johnson

After watching the latest round of negotiated rulemaking for higher education, Elise Scanlon found herself asking a very simple question: Have we gone too far?

Scanlon, the former executive director of the Accrediting Commission of Career Schools and Colleges of Technology and now an attorney with Drinker Biddle & Reath, LLP, was involved with Team V, a group that took on general and non-loan issues in education.

The daunting agenda included 31 items, ranging from the 90/10 rule to job placement rates to campus security. The group reached agreement on 29 of the 31 items.

While participants described the sessions as well run, and that Department negotiators seemed open to their input, Scanlon can't help but think one of the reasons the group could not reach an agreement on everything is because there is too much on the agenda. She wonders where the balance is between accountability in education and onerous regulation.

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Drinker Biddle & Reath, LLP**



Elise Scanlon discusses the issues with **Ray Testa** as **Mark Pelesh** and **Tom Netting** (in background) enjoy a lighter moment.

found it. I wonder if the pendulum will swing back. We are putting a great deal of regulation on schools for things other than education."

Despite the wide range of items on the agenda, Team V came awfully close to reaching consensus on every item

on the agenda. Not a bad session when you consider the breadth of the items and the participants on the team, which ranged from traditional four-year schools to small cosmetology schools and other proprietary institutions.

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experts and we are going to rely on you.”

Neely has been involved in four rounds of negotiated rulemaking since 1992.

“I have seen it evolve a lot during that time,” Neely said.

Negotiated rulemaking has not always been part of the process. When the *HEA* was first passed in 1965, implementation did not include input from any of the affected parties, a process that sometimes led to objections and unintended consequences.

Congress then decided to put some of the burden on sectors involved and established negotiated rulemaking, which allows the different sectors to nominate parties to help draft the rules. The caveat was that rulemaking had to achieve consensus, or implementation was left up to the Secretary of Education.

Each time the *HEA* is reauthorized, or Congress makes substantial changes to the law, a round of negotiated rulemaking follows. The intent of negotiated rulemaking is to determine



Elaine Neely shares her personal experience in working with student financial aid with the negotiators.

how changes passed by Congress are actually implemented.

There are five teams that meet in three, three-day sessions to hammer out the proposed rules. The objective is to resolve many of the objections to the proposals before the new rules are actually implemented.

If consensus is not reached by the negotiating team, then the Department is free to implement regulations as it sees fit, without any regard for the agreement or objections proposed during the negotiated sessions.

When Team V failed to reach a consensus on year-round Pell Grants and the publication of job placement rates, it left the door open for the Department to impose its vision of what Congress meant with its changes to the law.

Ray Testa, another veteran of negotiated rulemaking, said that past history would generally indicate that the Department will use a lot of the areas where agreement was achieved, even if a team did not reach consensus on its entire agenda.

“It’s true that it does leave open the possibility the Department can draft all of the regulations in these areas and they don’t have to consider any of the agreements that were reached,”



Neg reg veteran **Ray Testa** offers his perspective.

said Testa, of Empire Beauty Schools. “But they don’t want to throw away any agreements they might find beneficial as well.”

The only problem is when issues overlap, he said. Areas where there was an agreement can be undone by areas where agreement was not achieved.

For Team V, the problem areas essentially came down to semantics. It’s true, in regulations that will run hundreds, if not thousands of pages, a few words can still make a difference.

Negotiations regarding year-round Pell came to a halt when the sides could not agree on how the word “accelerate” in the law would apply to the actual awarding of the grants.

When *HEA* was reauthorized, it allowed for the receipt of a second Pell Grant in an academic year for students who accelerated their studies. The Department’s interpretation of that was that the student had to finish all of the credits of one year before they could receive the second grant.

For example, if 24 hours were required before the student was advanced to the next academic level, then the

student would have to complete all 24 credits before receiving their second Pell Grant.

Negotiators for the schools—primarily the community colleges and the four-year institutions—complained that would be too restrictive and would discriminate against students who were not enrolled full-time. They argued for a less restrictive definition, noting that the requirements as proposed were more restrictive than the recipients of regular Pell.

“If a regular student takes 24 hours, but only achieves 21, they are still eligible for a Pell Grant the next year,” said Testa, who admitted he did not have a dog in the fight since students at the institutions he represented worked largely on clock hours.

Still, it’s a matter of what the legislation intended.

“I think it was simply intended for students who are working at a faster pace,” he said.

With more time—and Team V did spend nearly two hours on the issue, quite a bit for a 31 item agenda—it’s possible a resolution would have been reached, said Neely.

“Had it come down to a vote, we might have voted for it even though we did not like it,” Neely said. “Now, we need to be watching when the regulations are published to see what is in them and we need to make sure we use the comment period.”

Even though it was her fourth go-round with negotiated rulemaking, Neely said there were several lessons educators would do well to learn from this latest round, particularly when it comes to dealing with the timeframe negotiators worked under.

Preparation is the key, she said. Neely praised the groups who had set up rapid response teams and had their constituency educated and involved with the process.

The other issue to watch when the regulations are published will relate to the publishing of consumer information, particularly outcome information such as job placement rates. The latest reauthorization requires schools to publish information about the jobs obtained by graduates.

Negotiators had asked that schools that calculate a placement rate to disclose their methodology. The proposal stalled when schools objected to it as burdensome.

“I think the question is what was meaningful,” Testa said. “The Department was asking for some really detailed information. A lot of the schools saw that as overly burdensome.”

Not every negotiating team got stuck.

Team III, which tackled accreditation issues, actually finished a bit early in its last rounds, while Team II, which dealt with loans, also reached consensus on its agenda after winning key concessions from the Department on issues such as cohort default rates and conflict of interest issues.

For Mary Lyn Hammer, president of Champion College Services, the ability



Default expert **Mary Lyn Hammer** seeks clarification of the Department's stance.

to reach consensus on the agenda was particularly rewarding.

“They just did not seem as flexible this time around,” Hammer said. “There was a lot of saying ‘no,’ but they did come a lot further than we expected.”

Hammer played a key role in negotiating a whole new subchapter for cohort default rates, though she did not get everything she was looking for—additional appeal rights factoring in the economy were rejected by the Department.

“They said they were not needed because of deferment and other options that are available to students,” said Hammer, whose company helps schools manage defaults. “I don’t think they see how the economy affects loan repayment.”

Negotiators were also able to get the Department to move away from its position of publishing default rates as drafts before they are finalized or corrected. While rates will still be published, it won’t be until after they are corrected.

While the schools did not get everything they wanted, Hammer said it was progress.

“We are better off than where we started in the negotiations,” she said.

Schools were also able to negotiate some positive changes in the preferred lender programs, successfully excluding private education loans made by the



Elaine Neely delves into the details of the proposed regs.

schools themselves. The Administration was originally not going to allow any exclusion at all.

There was a lot more that Hammer said should have been included, such as an expanded appeals process for schools, but time pretty much narrowed the agenda.

“What we accomplished was huge,” Hammer said. “It really comes down to the wire. I’ve done this three times and this time it was overwhelming.”

It’s quite possible she and some of the other negotiators could be back at it later this year.

As the first five teams were wrapping up their work, the Administration announced two new sessions of negotiated rulemaking. One of the panels will deal with issues related to foreign medical and nursing schools and their eligibility to participate in U.S. financial aid programs.

The other panel is expected to examine several issues related specifically



Ray Testa briefs AACS government affairs committee member **Mez Varol** and chair **Christine Gordon**.

to the proprietary sector, including issues relating to their participation in Title IV.

Negotiators could find themselves back at the table by September. Most said they would go if called upon.

“There were six items published that were within my range of expertise,” Testa said. “I wouldn’t nominate myself, but I would be up to accepting the challenge.”