

**The No Child Left Behind School Facilities and Construction Negotiated
Rulemaking Committee (the Committee)
Operating Procedures**

Accepted by the Committee April 12, 2010

I. Authorization.

Title 25, section 2005(a)(5) of the United States Code directs the Secretary of the Interior (Secretary) to establish a negotiated rulemaking committee (Committee). The Committee is to serve as an advisory committee subject to the provisions of the Federal Advisory Committee Act (FACA) (5 U.S.C. Appendix 2 *ff*) and the Committee's enabling charter. The Committee will negotiate according to the procedures of the Negotiated Rulemaking Act (5 U.S.C. 561 et seq.) in a manner that reflects the unique government-to-government relationship between Indian Tribes and the United States.

The Committee will also operate in consideration of Public Laws: 95 Public Law 561 (BIE Operated schools), 93 Public Law 638 (Contract schools), 100-297 ; along with Executive Order 57882 on Tribal Consultation,

II. Objective and Scope

The objective of the Committee is to prepare and submit to the Secretary:

- A. A catalog of school facilities that:
 - Incorporates the findings from the Government Accountability Office study evaluating and comparing school systems of the Department of Defense and the Bureau of Indian Affairs;
 - Rates such facilities with respect to the rate of deterioration and useful life of structures and major systems;
 - establishes a routine maintenance schedule for each facility;
 - Identifies the complementary educational facilities that do not exist but that are needed; and
 - Makes projections on the amount of funds needed to keep each school viable, consistent with the accreditation standards required pursuant to this Act. ((25 U.S.C. § 2005(a)(5)(A)(i))
- B. A report on the school replacement and new construction needs of Bureau-funded schools, and a formula for the equitable distribution of funds to address those needs (25 U.S.C. § 2005(a)(5)(A)(ii));
- C. A report on the major and minor renovation needs of Bureau-funded schools, and a formula for the equitable distribution of funds to address such needs (25 U.S.C. § 2005(a)(5)(A)(iii)); and

- D. Revised national standards for heating, lighting, and cooling in home-living (dormitory) situations (25 U.S.C. 2002(a))

The scope of the Committee's activity shall be:

- A. To meet in full committee over a period not exceeding two years, to carry on negotiations in pursuit of its objective;
- B. To take into consideration comments submitted to the Committee by the public or by any subcommittees established by the Designated Federal Officer (DFO).

III. Participation

- A. Participation as members is limited to representatives of the Federal Government, and Tribes whose students attend Bureau-funded schools either operated by the Bureau of Indian Education or by the Tribe through contract or grant.
- B. All members are appointed by the Secretary. The term "members" includes both primary and alternates.
 - I. In the absence of the primary, an alternate may serve as a representative for any member or Federal agency, as requested by the primary and assume all the rights and responsibilities of the absent member.
 - II. A primary without a designated alternate, may also submit written comments to the committee in their absence at a meeting and/or express their concerns or ideas to the DFO or Co-Chairs.
- C. The Assistant Secretary – Indian Affairs (AS-IA) will appoint a DFO (5 U.S.C. Appx. § 10(e)). The DFO will approve or call all of the advisory committee's and subcommittees' meetings, prepare and approve all meeting agendas, attend all committee meetings, and adjourn any meeting when the DFO determines adjournment to be in the public interest. The DFO may propound or approve guidelines providing details for the administration of the Committee's operations.
- D. Primary and alternate members nominated by Tribes represent those Tribes. Therefore, the consensus decisions of the Committee are expected to have the support of the sponsoring Tribes.
- E. The consensus of the Committee is determined by those members (primaries or alternates) present at the time of deliberation and decision.
- F. Alternates have an important and valuable role in the process. They should stay abreast of all discussions, issues, and information and be able to represent

fully their sponsor in the primary's absence. At the discretion of the DFO, alternates may be appointed to subcommittees.

- G. The primary and alternate shall represent a Tribe (or group of Tribes) and Federal agencies for the purposes of deliberating, consulting with constituents (the Tribe(s) or agencies they represent) on tentative agreements, and reaching consensus.
- H. At the request of the Committee, the DFO shall ask for the participation of the Secretary, the Assistant Secretary of Indian Affairs or other Indian Affairs policymakers at Committee meeting(s).
- I. The Committee will select four Committee Co-chairs (Co-Chairs) from its members. Along with DFO, the Co-Chairs will:
 - I. Plan agendas and work plans
 - II. Resolve impasses
 - III. Help enforce protocols and procedures
 - IV. Assist in general group "problem solving"
 - V. Develop a media protocol

IV. Decisionmaking

- A. In accordance with Tribal traditions, the Committee will operate by consensus. Consensus is defined as unanimous concurrence of the primaries after Committee discussion, or in the absence of a primary, his or her alternate. Members may choose to "abstain." Abstention is a non-vote, and therefore does not count against consensus.
- B. If a representative disagrees with a proposal, he or she should make every effort to offer an alternative satisfactory to all members. Members should not block or withhold consensus unless they have serious objections to the proposal. Consent means that members can accept, even if reluctantly, the agreement that emerges. The goal of the Committee is to reach consensus, recognizing that not all members will be equally satisfied with the outcome.
- C. If both the primary and the alternate are absent from a meeting in which consensus will be deliberated or decided, or if a primary without an alternate is absent, the absences will be equivalent to not dissenting.
- D. All agreements reached during negotiations are understood to be tentative until the Committee reaches formal consensus. Once consensus is achieved, Committee members may not thereafter withdraw their consensus.

- E. On matters of process (agenda setting, changing the agenda, sequencing issues, and other process decisions), should the Committee reach an impasse, the DFO after consultation with the Co-Chairs will render a decision to move the proceedings forward.

V. Agreement

- A. The goal of the Committee is to develop a Consensus Agreement Report that reflects a final consensus by the Committee.
- B. If the Committee reaches consensus it will transmit its report(s) to the Secretary through AS-IA. The report(s) will contain the Committee's recommendations to be used by the AS-IA when developing regulations, policies, standards, and/or guidelines.
- C. The Secretary will transmit its report to Congress without changes. The Secretary and/or AS-IA may provide an Addendum with comments on the Report(s) to Congress as they deem appropriate with a copy transmitted to the Committee

If AS-IA has an Addendum with comments on the Report(s), Committee members will request a Consultation with the Secretary to discuss those particular comments.

- D. 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 do the same.
- E. If the Committee does not reach consensus, Committee members will determine what to report to AS-IA about the Committee's efforts. As envisioned by the Negotiated Rulemaking Act, the Committee, through the facilitators, will transmit to AS-IA a report specifying any areas in which the Committee reached agreement, as well as the explanation for the disagreements, a description of the interests that must be satisfied to reach an agreement, and if possible, ways to address the differences. If a non-consensus report is submitted to AS-IA, as permitted by the Negotiated Rulemaking Act, any Committee member may include as an addendum to the report additional information, recommendations, or materials.
- F. If the Committee reaches final consensus on some but not all of the issues, AS-IA will, to the extent possible, include those areas of consensus in any subsequent administrative action and duly consider the dialogue and proceedings generated by the negotiated rulemaking process. Committee

member Tribes and their representatives may oppose or comment negatively on those aspects of action that are not based on a final consensus.

- G. Committee members and stakeholders should keep in mind that the duties of this Committee are solely advisory. While the report(s) generated by the Committee are intended to provide important guidance to the Department in developing regulations and other policy, ultimate responsibility for the agency's regulatory structure lies with the Secretary.

VI. Committee Meetings

- A. The negotiations will be conducted in accordance with the Federal Advisory Committee Act (FACA).
- B. All meetings of the full Committee will be announced in the Federal Register prior to the meeting and will be open to the public. Brief opportunities for oral public comment will be provided at least once during each Committee meeting. The Committee is not expected to respond to these comments during the oral public comment period. The time and manner of these comments shall be as determined by the DFO. Members of the public will be permitted to file written comments to the Committee through the DFO, before or after meetings. Comments provided to the Committee will become part of the public record.
- C. The DFO, with the Co-Chairs, is responsible for developing an agenda for all meetings of the Committee that will be distributed ahead of time. This agenda will be developed in accordance with FACA.
- D. The meeting agendas will lay out clear times for beginning and start times each day, major agenda items, and provide for at least two breaks, one in the morning and one in the afternoon, as well as one lunch break to begin no later than 12 noon each day. All members are expected to be present for the full meeting times and to be active and engaged. Cell phones, emails, conference calls, and other unrelated Committee activities should take place at breaks, at lunch, and in the evenings.
- E. Members may request caucuses by and among subgroups of Committee members at any time, with the DFO's concurrence. The facilitators and Co-Chairs also may request caucuses. No decisions, however, can be reached outside of full and public Committee deliberations.
- F. The Committee, in consultation with the DFO and the Co-Chairs, may form subcommittees or work groups to advance discussion, generate options, and

develop preliminary proposals. Subcommittees or work groups must be created by the full Committee, have a clear charge, and ensure participation of a diversity of interests. A subcommittee or work group is not a decision-making body. Alternates may participate actively in subcommittees and workgroups.

- G. Upon agreement of the DFO and Co-Chairs, the Committee may accept technical assistance from representatives of other organizations or may also seek technical assistance from its members' own organizations. Technical advisors have no authority to make decisions on behalf of the Committee, nor can they report directly to the Department of the Interior (DOI).
- H. The detailed minutes of each of Committee meeting as mandated by FACA will be prepared by the facilitators and, after review and approval by the Committee, will be made available to the public. The minutes will generally be written without attribution.

VII. Safeguards for Participation

- A. All members must act in good faith in all aspects of these negotiations. Members agree that specific offers made in open and candid problem solving conversations will not be used against any other member in future litigation or public relations. Good faith requires that individuals not represent their own personal or Tribe's or agency's views as views of the entire Committee, and that the views and opinions they express in the Committee deliberations are consistent with the views they express in other forums.
- B. Participating organizations and their representatives commit to making the negotiated rulemaking process the primary and central focus of their efforts to address issues related to the charter and to voluntarily curtail using other means to influence AS-IA on Committee issues during the negotiated rulemaking process. This does not mean participating organizations are relinquishing or waiving any legal rights.
- C. Members commit to the principles of decency, civility, and tolerance. Parties must be willing to envision and shape a positive future for the education of all Native American children, as affected by the school facilities adequate to meet daily functional needs. Parties accept that there are different views (locally, regionally, and nationally) and all members each have a legitimate interest and right to be part of determining the solutions. Committee representatives must exercise leadership within their respective constituencies to foster a climate of joint problem solving on the Committee and publicly, engage with their constituencies to keep them informed, and to ensure their constituents support rather than undermine the process.

- D. Committee members will not attribute statements to others involved in this negotiated rulemaking, seek to present or represent the views or position of other members or alternates, nor attempt to speak on behalf of the Committee as a whole in or to the media. Committee members agree to not divulge information shared in confidence during the proceedings to the public or media, even if requested. Media requests will be directed to and addressed by the Committee's Co-Chairs. "Media" for these purposes includes: print, television and radio; websites; and any other public information distribution mechanism. Committee members will abide by these operating procedures in all communications during the negotiated rulemaking process in and out of Committee meetings.
- E. The DFO or the Committee, with the facilitators and Co-Chairs, will periodically review and assess the Committee's progress to determine if the process is meeting their needs and the interests of the participants.
- F. The DFO with the Co-Chairs will ensure compliance with these The No Child Left Behind School Facilities and Construction Negotiated Rulemaking Committee (the Committee) operating procedures.
- G. Orderly conduct of meetings.
 - i. Personal attacks, name calling, and other such negative behaviors will be addressed immediately, either privately or publicly, by Committee members and the facilitators.
 - ii. The Committee may recommend to the DFO or Co-Chairs sanctions for violations of these operating procedures.
 - iii. Poor attendance, lack of participation, not participating in good faith, or other significant violations of these operating procedures are grounds for the DFO to recommend to the Secretary that a member be removed from the Committee. If the primary is removed, that seat will be filled by the alternate. In the case that no alternate exists or that both the primary and alternate have been removed, the Secretary will make every effort to fill the seat to represent that interest within the FACA approval process for membership.
- H. Any member of the Committee may withdraw from the negotiations at any time by notifying the DFO and Co-Chairs in writing.

VIII. Additional Roles and Responsibilities

Members shall:

- A. Arrive at the meetings prepared to discuss the issues on the agenda, having reviewed the documents distributed in advance.
- B. Strive throughout the process to bridge gaps in understanding, to seek resolution of differences, and to pursue the goal of achieving consensus on the content of the regulations under discussion.
- C. Make a good faith effort to participate in all scheduled meetings or activities, on time and in their entirety. If a member is not able to attend a given meeting, his or her designated alternate (if they have one) shall participate in the member's absence. Poor attendance may lead to a recommendation by the DFO to the Secretary that a member be dismissed from the Committee.
- D. Honor each speaker; no one will interrupt when another person is speaking.
- E. Refrain from making personal attacks, distributing personal or inaccurate information about other participants, or any other such negative behavior.
- F. Make every effort to stay on track with the agenda in order to move the negotiations forward, and avoid unproductive digressions.
- G. Share all relevant information with other Committee members in a timely manner. Members and alternates understand that a decision to withhold or not share key information in a timely manner will seriously compromise negotiations.

The progress of deliberations is the responsibility of each Committee member as well as the Committee as a whole. Should any member be concerned that another Committee member, agency personnel, DFO, or facilitator is in some way impeding progress, the member will raise the concerns in a spirit of helpful, constructive criticism. The goal is to move the deliberations forward and not to blame, attack, or accuse others.

IX. Role of Facilitators

- A. The facilitators serve at the discretion of the full Committee. The DFO, Co-Chairs, and facilitators are responsible for helping to ensure that the process runs smoothly, developing meeting agendas, preparing and distributing draft and final summaries, generating draft agreements, and helping the parties resolve their differences and achieve consensus on the issues to be addressed by the Committee.

- B. The facilitators have no decisionmaking authority and cannot impose any solution, settlement, or agreement among any or all of the parties.
- C. The facilitators will abide by the Ethical Standards of the Association of Conflict Resolution. In part, these standards require that: “The neutral must maintain impartiality toward all parties. Impartiality means freedom from favoritism or bias either by word or by action and a commitment to serve all parties as opposed to a single party.”
- D. The facilitators 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.
- E. The facilitators will be available, to the extent schedule and budget allow, to facilitate Committee sessions, caucus deliberations, subcommittee meetings, and work groups.
- F. The facilitators will be available to consult confidentially with Committee participants during or between meetings. Facilitators, if asked, are required to hold confidences even if that means withholding information that the facilitators would prefer to be made available to the full group. Confidentiality protections do not extend to threats or reports of criminal action.
- G. The facilitators may engage in shuttle diplomacy among various parties during the negotiation. Within the bounds of the Negotiated Rulemaking Act and the FACA, these deliberations may be conducted in confidence.
- H. Parties will express any concerns about the facilitators’ role or action: first, to the facilitators directly; or, as needed to: 1) the U.S. Institute for Environmental Conflict Resolution; and as appropriate, 2) the DFO and Co-Chairs.

X. Date of Termination

These operating procedures may be amended by the Committee and are subject to biennial review and will terminate two years from the date the Committee’s Charter is filed unless, prior to that date, the Charter is renewed under the provisions of Section 14(a)(2) of FACA.

XI. Consistency

These operating procedures are intended to be consistent with the Committee Charter and all applicable laws and regulations. In the event of any inconsistency or conflict, the statute, regulation, or the Committee's Charter shall govern.