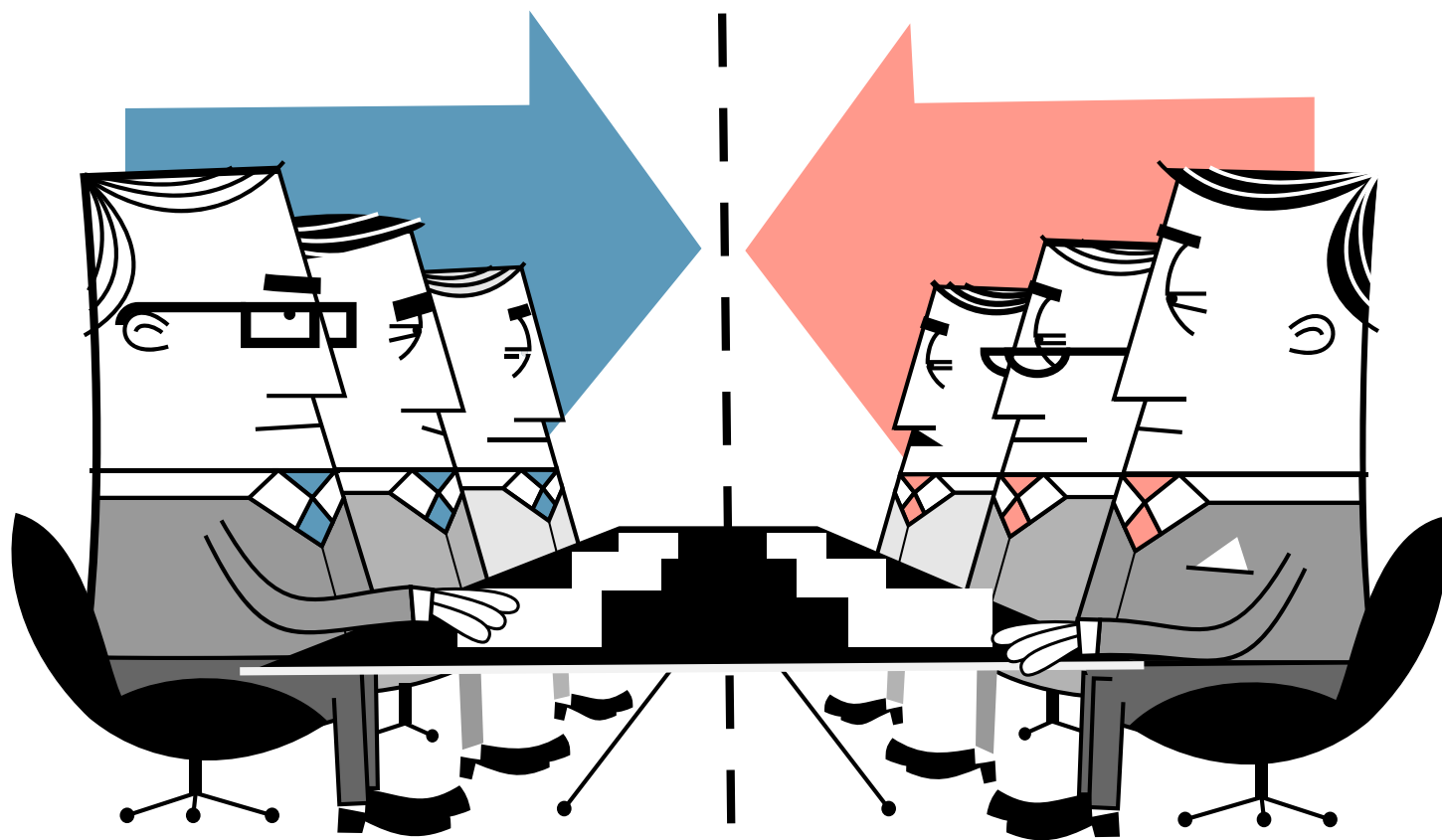




BECAUSE WE HAVE TO

Is the Department of Education just running through the motions with its negotiated rulemaking sessions?

By Nicole Kardell, Ifrah Law



Several months have elapsed since the Department of Education released its first draft of the new gainful employment rule. After two sets of revisions and three rounds of negotiations, we appear no closer to a final rule. The outcome from the negotiation sessions is that the opposing sides remain polarized. No one can even agree as to what types of metrics, let alone what metric ranges, to use to determine whether career programs actually prepare students for gainful employment and thus qualify for Title IV funds.

It is even hard to anticipate what direction the DOE is going to take in its proposed final draft: Is it going to be more stringent than the version of the rule that was thrown out in federal court in 2012? The first draft of the new rule, published in August 2013, was described as leaner and meaner than the original, using only one type of metric, debt-to-earnings ratios, but incorporating more rigorous standards than the earlier rule and affecting a larger pool of schools. The second draft, published in November 2013, piled on more metrics, including loan repayment and a program cohort default rate (PCDR), and maintained the more rigorous standards. It appeared that the DOE was listening mainly to detractors of for-profit education and heaping more regulatory burdens onto

the industry. Then, the DOE released a third draft of the rule in December 2013, shortly before the final negotiating session. The third draft dropped the loan repayment metric and took away automatic ineligibility for PCDR of 40 percent or more. These revisions greatly disturbed for-profit education detractors – they believed the DOE was backpedaling. Needless to say, the third and final negotiating session involved little negotiating and a lot of rhetoric.

Since no consensus was achieved among negotiators at the end of the last round, the final draft remains entirely in the hands of the DOE. The three negotiated rulemaking sessions appear to have been largely a waste of time for participating negotiators and attendees. The lack of progress calls into question the efficacy of having negotiated rulemaking in the first place. Why bring together representatives of interested parties to draft regulatory language if they cannot effectively negotiate?

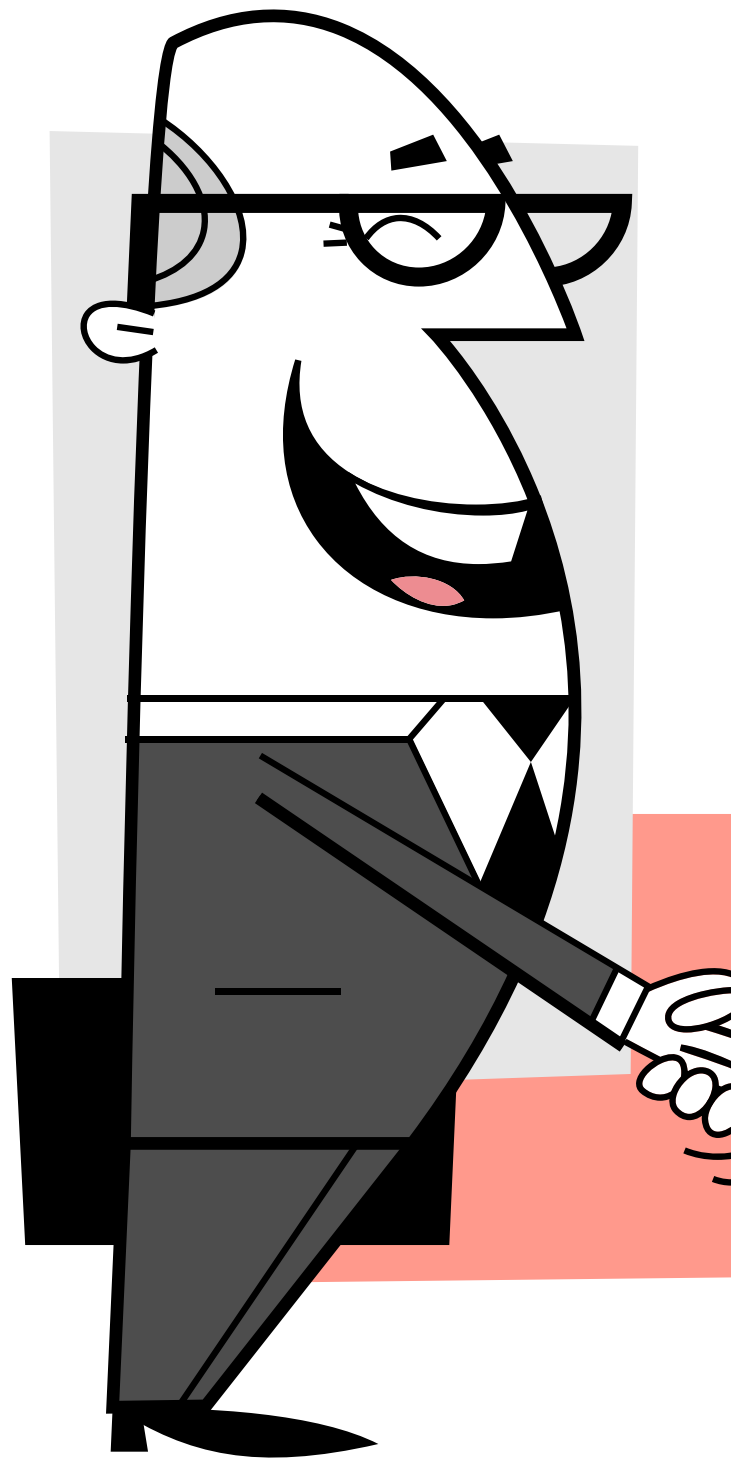
But the negotiators are not to blame for the failed sessions. The DOE is. There are several problems with the direction of the negotiating sessions that could have been remedied by a little effort on the part of the DOE.

Much of the time allotted for the first session of negotiations was taken up by process – discussing procedural rules, reviewing the agenda, deciding what to discuss. Did the participants need to convene in person to address all these items? Even if certain formalities must be addressed in person, there are ways to expedite the process and not absorb almost half of a session (e.g., presession circulation, review and response to questions).

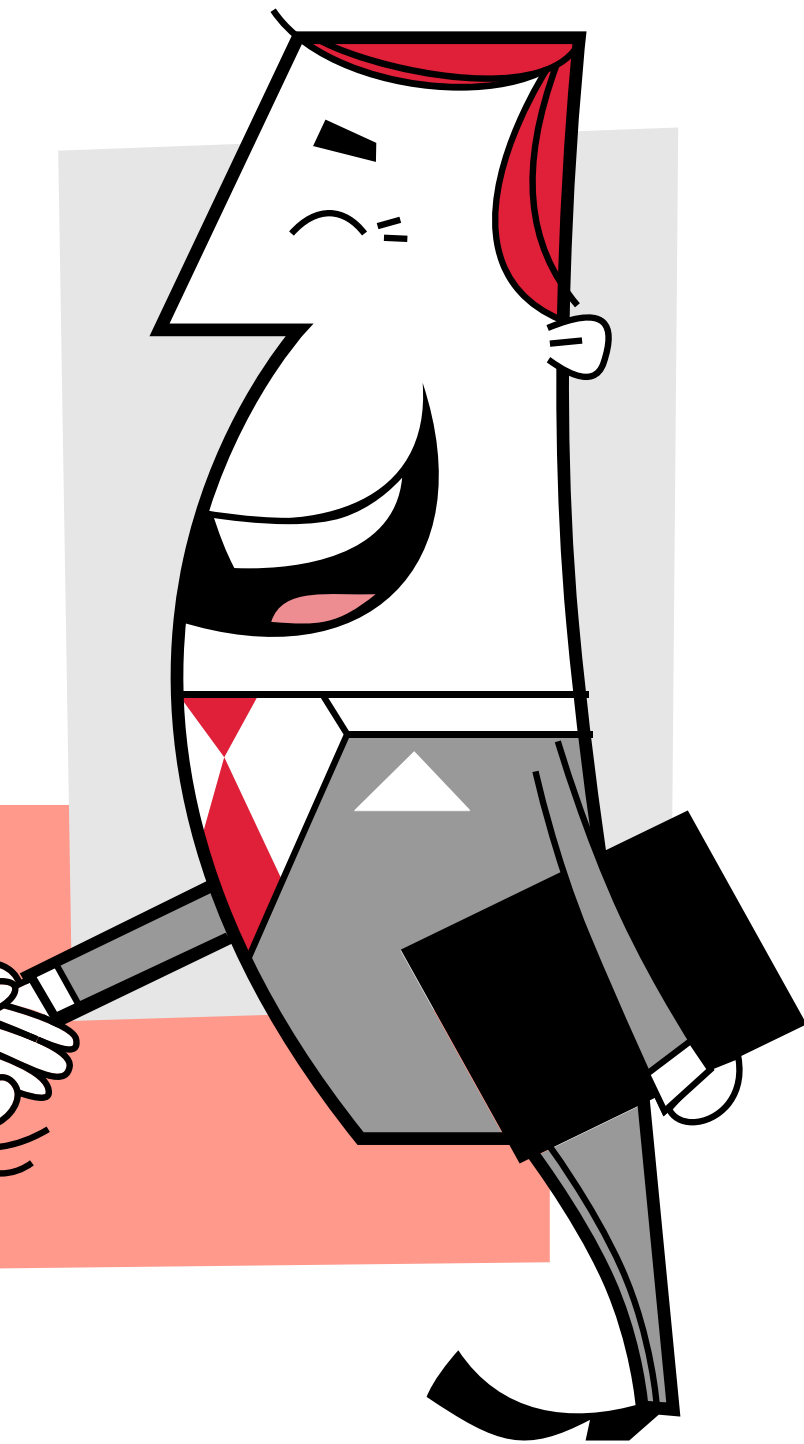
The DOE should have provided draft regulatory language well in advance of each of the sessions to allow negotiators the time to thoroughly review and prepare for negotiations. The first draft of the new rule, which set the tone for the negotiating rounds and provided the basis for discussions, was published only six business days before the first session. The second draft, which

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more than doubled the length of the first draft and incorporated significant new metrics, was published five business days before the second session. The third draft, which apparently blindsided some negotiators, was published a mere two days before the final round. Moreover, there was no data analysis for the second draft, and negotiators complained about lack of available data during the other rounds. How could the negotiators effectively discuss and deliberate with little time to prepare and with inadequate data to assess the best metrics to use? It is no wonder there was no consensus at the end of the day, especially when the negotiators are strongly positioned on opposite sides of a highly contentious subject.



So why does the DOE bother with negotiated rulemaking sessions if they don't seem very productive? Because it has to. As the DOE notes on its website: "The Department is specifically required by law to use negotiated rulemaking to develop NPRMs (Notice of Proposed Rulemaking) for programs authorized under Title IV of the Higher Education Act of 1965." The impetus for such a requirement is to reduce the threats of litigation and general dissatisfaction that can ensue from rulemaking and to involve interested parties in the rulemaking process to ensure a more palatable regulation that still satisfies policy goals. But this rationale is undercut when the negotiated rulemaking process is ineffectively carried out.



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A skeptic might wonder if the DOE does not actually want this rulemaking process to succeed. The DOE preserves control over regulatory language when negotiators cannot agree. If consensus among negotiators is reached at the end of the negotiated rulemaking sessions, then the language consented upon will be the language used in the NPRM: “Only under very limited circumstances may the Department depart from this language.” However, if consensus is not reached, the DOE may develop new regulatory language for all or a portion of its NPRM.

It is more likely that the DOE is simply unorganized, cannot get its data together and is stumbling into the negotiated rulemaking sessions. But even so, the failed negotiated rulemaking sessions raise a couple of questions.

Will failures in the negotiating process provide a basis to challenge the final new rule? And if the DOE cannot get its act together to effectively oversee gainful employment rule negotiations, how can we possibly believe it will be able to oversee the complex compliance process that will result from the new rule?



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