Understanding Rulemaking and the Regulatory Process

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Federal Agencies with Direct Effects on Public Schools
What is Rulemaking?

• Rulemaking is the process that federal agencies use to make rules (or “regulations”).
• Agencies are required to follow a set of procedures prescribed in law and executive order when issuing rules.
• These procedures comprise the federal rulemaking process.
• Rules carry the force and effect of law.
Rules have the power of law, but are...

- Less cumbersome
- Easier to change
- Less political (in theory)

...and

- No sign-off by another branch required.

BUT

- Rules must stay within the scope of the statute authorizing them.
Rulemaking – Laws that Provide for the Process

• APA, Administrative Procedure Act (1946)
  • Governs the process by which federal agencies develop and issue regulations.
  • Requires notices of proposed and final rulemaking to be published in the Federal Register.
  • Provides opportunities for the public to comment on notices of proposed rulemaking.

• CRA, Congressional Review Act (1996)
  • Allows Congress to review new federal regulations issued by agencies and to overrule a regulation by passage of a joint resolution.

• Executive Orders
  • Reagan (OIRA), Clinton (“Significant” rules), Trump (1-in, 2-out), Biden (repealed 1-in, 2-out)
Statute Authorizes Rulemaking

1. Agency Develops Draft Proposed Rule
2. OIRA Reviews Draft Proposed Rule
3. Agency Publishes Proposed Rule
4. Agency Receives Comments and Makes Changes to Proposed Rule
5. OIRA Reviews Draft Final Rule
6. Agency Publishes Final Rule

Judicial Review
Congressional Review

Advocacy Institute Online
Interim Final Rules

• An interim final rule is a rule published first as a final rule with the opportunity to comment at the time the rule is promulgated, rather than earlier at the “proposed rule” stage.

• Interim final rules are most often used when a statute requires an agency to act within a specified time shortly after the law takes effect or during emergencies.
Side Ramps, Exits, Slow-Downs, Reversals

• Rule revisions, revocations

• Court challenges

• Petitions for rulemaking
Extra-Regulatory Guidance

• Is informative and persuasive but does not carry the power of law
  • Dear Colleague Letters
  • Response letters
  • Q&As
  • Technical Assistance
The School Board Member Voice

You can provide input:

• Informally
  • Call or email the agency.
  • Participate in stakeholder meetings, listening sessions, site visits when an agency offers them.
  • By connecting with your state school boards association.

• Formally
  • Submit comments via the Federal eRulemaking Portal, mail, or hand delivery.
Highlights: NSBA input to federal agencies

Formal Comments
• Dept. of Ed. -- Title IX Regulations addressing sexual harassment procedures
• Dept. of Ed. – Letter re: Equitable Services for Private Schools
• Federal Communications Commission -- Distribution of the Homework Gap funding
• Dept. of Homeland Security – Public Charge regulations
• Federal Trade Commission – COPPA Rule changes

Formal Letters
• Dept. of Ed. – Requests for clarification on
  o Bullying/Harassment guidance
  o Effective Communications guidance
  o Title IX regulations
• Dept. of Ed. – Stakeholder input on
  o Civil Rights enforcement areas including CRDC collection
  o Special education services after pandemic-related closures

Formal Statements at hearings and listening sessions
• U.S. Department of Education Office for Civil Rights
• Federal Commission on School Safety
• Federal Civil Rights Commission

Informal Meetings and Calls
• MANY
Resources

Q & A