
April 12, 2022

Porscheoy Brice
U.S. Department of Education
400 Maryland Avenue, SW
Room 3E209
Washington, DC 20202-5970

**RE: American Center for Law and Justice's Comment in Opposition to Proposed Rule: "Proposed Priorities, Requirements, Definitions, and Selection Criteria—Expanding Opportunity Through Quality Charter Schools Program (CSP)—Grants to State Entities (SE Grants); Grants to Charter Management Organizations for the Replication and Expansion of High-Quality Charter Schools (CMO Grants); and Grants to Charter School Developers for the Opening of New Charter Schools and for the Replication and Expansion of High-Quality Charter Schools (Developer Grants)" – [Docket ID ED-2022-OESE-0006]**

Dear Ms. Brice:

The American Center for Law and Justice (ACLJ) submits the following comments, on behalf of itself and more than 98,000 of its members,[1] opposing the adoption of the above-referenced Proposed Rule issued by the Department of Education ("The Secretary") on March 14, 2022. *See* 87 Fed. Reg. 14,197.

The ACLJ is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have argued before the Supreme Court of the United States in a number of significant cases involving the freedoms of speech and religion.[2]

The Proposed Rule should not be adopted because (1) it exceeds the Secretary's statutory authority and (2) the Secretary has not provided a meaningful "Notice and Comment" period, thus violating the Administrative Procedures Act (APA).

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[1] These comments are joined by ACLJ members who have signed our Petition to Save the Charter Schools, available at https://aclj.org/school-choice/demand-school-choice--give-every-child-equality-of-opportunity-and-justice.

[2] *See Summum v. Pleasant Grove*, 555 U.S. 460 (2009); *NOW v. Scheidler*, 547 U.S. 9 (2006); *McConnell v. FEC*, 540 U.S. 93 (2003); *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997); *Lamb's Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384 (1993); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990); *Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569 (1987).

## I. BACKGROUND

Charter schools started thirty years ago with an enabling law in Minnesota.[3] Forty-five States, plus the District of Columbia, have charter schools operating within their jurisdictions.[4] They are a type of public school,[5] even though they are often confused with private schools. Among their strengths, charter schools are more accountable to parents and have a "built in flexibility and autonomy to design and implement classroom instruction."[6] Charter schools serve a diverse range of students. For the 2019-2020 school year, nationwide enrollment was reported as 4.5% Asian, 22.5 % Black, 30.9% Hispanic, and 36% White.[7]

From 1999 to 2013, the number of charter schools grew at a rate of 6 to 8 percent a year.[8] But growth slowed to less than 2 percent by 2016.[9] Facing opposition from partisan and self-serving teachers' unions, new charter schools are encountering multiplying regulations that increase the cost of starting or running a charter school.[10] Often, school districts block access to facilities or make compliance with State regulations more difficult; bureaucratic burdens and "onerous administrative requirements" are imposed on both new and existing charters.[11]

Organized opposition to charter schools is unfortunate. Over the years, the academic achievement of charter school students has a trend of greater gains than traditional public school students.[12] Further, black students and students of low socioeconomic status have the greatest gains by attending charter schools.[13] Critically, this academic improvement is independent of demographic characteristics. The explanation for these successes is relatively simple: "improved teaching and learning environments in the charter sector account for most, if not all, of the improvement not explained by background characteristics."[14]

According to Congress, the purpose of the Charter School Program, as set forth in 20 U.S.C. § 7221 (ESEA), is to support innovation in public education, provide financial assistance for the starting of charter schools, increase the number of high quality charter schools, evaluate the impact of charter schools and their practices, encourage States to support charter schools, expand

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[3] Frederick M. Hess, *Taking Stock After 30 Years of Charter Schools*, AEI (June 23, 2021), https://www.aei.org/op-eds/taking-stock-after-30-years-of-charter-schools/.
[4] *Charter School Policies*, EDUC. COMM'N OF THE STATES, https://reports.ecs.org/comparisons/charter-school-policies-01 (last visited Apr. 4, 2022).
[5] Hess, *supra* note 3.
[6] *Id.*
[7] *Freestanding by demographics Across Time*, NAT'L ALL. FOR PUB. CHARTER SCHS. (Feb. 9, 2022), https://data.publiccharters.org/digest/tables-and-figures/freestanding-demographics-across-time/.
[8] Robin J. Lake, et. al, *Why is Charter Growth Slowing*, EDUC. NEXT (Jan 30, 2018), https://www.educationnext.org/why-is-charter-school-growth-slowing-lessons-from-bay-area/.
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] M. Danish Shakeel & Paul E. Paterson, *Charter Schools Show Steeper Upward Trend in Student Achievement than District Schools*, EDUC. NEXT (Sept. 8, 2020), https://www.educationnext.org/charter-schools-show-steeper-upward-trend-student-achievement-first-nationwide-study/.
[13] *Id.*
[14] *Id.*

opportunities for children, strengthen the charter school authorization process, and support quality, accountability, and transparency in the operation of charter schools.[15]

The Charter School Program comprises six grant programs, of which only three are affected by the Proposed Rule. The affected grant programs are State Entity (SE) Grants, Charter Management Organization (CMO) Grants, and Charter School Developer Grants.[16] As discussed below, the Proposed Rule's impact on these three programs violates the law.

## II. LEGAL ANALYSIS

### A. The Proposed Rule exceeds the Secretary's statutory authority by adding two new conditions to the Charter School Program.

#### 1. The Secretary may not change the Charter School Program grants.

"[T]he power to execute the laws starts and ends with the laws Congress has enacted." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 632 (1952). "Congress has the exclusive power to spend and has not delegated authority to the Executive to condition new grants on compliance [discussing a law enforcement grant]. . . . And when it comes to spending, the President has none of 'his own constitutional powers' to 'rely' upon." *City & Cty. of S.F. v. Trump*, 897 F.3d 1225, 1233-34 (9th Cir. 2018) (citing *Youngstown*, 343 U.S. at 585). Moreover, an "agency literally has no power to act . . . unless and until Congress confers power upon it." *La. Pub. Serv. Com v. FCC*, 476 U.S. 355, 374 (1986). An Agency may not act "contrary to constitutional right, power, privilege, or immunity; . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or] without observance of procedure required by law." 5 U.S.C. § 706(2)(B)-(D).

#### 2. The Secretary's Proposed Rule incorrectly adds two new conditions to the Charter School Program: (1) collaboration with a traditional public school and (2) a community impact analysis.

##### a. The Secretary lacks statutory authority to require collaboration with a traditional public school.

Under the Proposed Rule, an "applicant must propose to collaborate with at least one traditional public school or traditional public school district in an activity."[17] This means an applicant must *now* secure an agreement from the school district before it even applies for a starting grant. (Collaboration means the sharing of resources such as curriculum or professional development opportunities *and* transparent enrollment and retention practices or a shared transportation plan.[18])

The ESEA is intended to increase the number of high quality charter schools and their practices to encourage States to support charter schools and to expand opportunities for children.[19]

[15] 20 U.S.C. § 7221.
[16] 87 Fed. Reg. 14,197.
[17] *Id.* at 14,199.
[18] *Id.*
[19] 20 U.S.C. § 7221.

The Secretary is to award grants to State Entities on the "basis" of the following: (a) the flexibility afforded to the charter school by the enabling statute, (b) the ambitiousness of the State Entity's objectives, (c) the likelihood that subgrantees will meet those objectives and improve educational results for students, (d) the State Entity's plan to assist the subgrantees, and (e) the State Entity's plan to solicit and consider input from parents and other members of the community on the implementation and operation of charter schools in the State. 20 U.S.C. § 7221b(g)(1).

Neither collaboration nor traditional public schools are mentioned in the "basis" for the awarding of grants. As the requirement of collaboration gives the public school or school district a *de facto* veto over charter schools, this Proposed Rule not only exceeds the authority granted by Congress, but it also violates the clear text of the ESEA. Congress did not intend collaboration to be a requirement to receive a Charter School Program grant. The Secretary lacks the authority to change the express will of Congress.

The Proposed Rule's novel requirement is clearly meant to restrain the expansion and growth of charter schools. The historic tension between traditional public and charter schools is no secret.[20] By purporting to place what amounts to a heckler's veto power in traditional public schools, the Secretary has clearly chosen a side. But the ESEA does not allow him to do that.

The enmity traditional public schools possess toward charter schools is demonstrably real, and the intended impact of the Secretary's Proposed Rule is easy to see. Here are a few examples: A popular charter school in Nashville, Tennessee, with a successful record was denied an additional campus by the school board.[21] Just this February, in Newark, New Jersey, three charter schools (two of them designated as academically high performing and with waitlists) were denied permission to add new seats, a new grade, or open an additional high school.[22] The Napa County Office of Education denied a petition for a charter school in California on March 28, 2022.[23] Indeed, new charter schools are authorized only an average of 44% of the time.[24]

A clear purpose of the Charter School Program, as expressed by Congress, is to "*increase the number of high-quality charter schools available to students across the United States*."[25] Because school boards are not likely to approve a new charter school, much less "collaborate" with them, the Proposed Rule not only exceeds the statutory authority granted to the Secretary by

[20] Robin Chait, *Bridging the Divide: Collaboration Between Traditional Public Schools and Charter Schools*, WEST ED. (Feb. 8, 2019), https://www.wested.org/wested-insights/collaboration-between-traditional-public-schools-and-charter-schools/#.

[21] Juliana Kim, *Another Charter School Is Coming To West Nashville, After The New State Commission Voted In Favor Tuesday*, WPLN News (Oct. 12, 2021), https://wpln.org/post/another-charter-school-is-coming-to-west-nashville-after-the-new-state-commission-voted-in-favor-tuesday/.

[22] Patrick Wall, *New Jersey Blocks Expansion Of Three Newark Charter Schools, Continuing Slowdown Of Charter Growth*, CHALKBEAT NEWARK (Feb. 9, 2022), https://newark.chalkbeat.org/2022/2/9/22925671/new-jersey-charter-school-expansion-denied-newark.

[23] Howard Yune, *Napa County Office of Education Rejects Petition for Mayacamas Charter School*, NAPA VALLEY REGISTER (Apr. 1, 2022), https://napavalleyregister.com/news/local/napa-county-office-of-education-rejects-petition-for-mayacamas-charter-school/article_6c50ce87-abeb-5151-b5fc-3fc480389718.html.

[24] *Charter School Pipeline Analysis*, NAT'L ASS. OF CHARTER SCH. AUTHORIZERS, https://www.qualitycharters.org/research/pipeline/analysis/#section1 (last visited Apr. 4, 2022).

[25] 20 U.S.C. § 7221(3) (emphasis added).

Congress, but it actually violates Congress' clearly expressed will. The Proposed Rule must be withdrawn.

### b. The Secretary lacks statutory authority to require an applicant to "conduct a community impact analysis."

According to Congress, "[a] State Entity desiring to receive a grant under this section shall submit an application to the Secretary at such time and in such manner as the Secretary may require. The application shall include the following . . . ."[26] The list that follows is extensive, and includes, for example: (a) a "description" of the "quality controls" that the State Entity will use to ensure that a sub-grantee school is "accountable"; (b) assurances that "each charter school receiving funds through the State Entity's program will have a high degree of autonomy over budget and operations, including autonomy over personnel decisions";[27] (c) how the State Entity "will work to ensure that charter schools are included with the traditional public schools in decisionmaking about the public school system in the State"; and (d) "how the eligible [subgrantee] applicant will solicit and consider input from parents and other members of the community on the implementation and operation of each charter school." 20 U.S.C. § 7221b (f)(1)(C).

Congress has provided a thorough list of the requirements charter schools must meet when applying for grants. The Proposed Rule, however, states that "we propose to require applicants for CMO Grants, Developer Grants, and subgrants under the SE Grant program to conduct a community impact analysis to inform the need, number, and types of charter schools to be created in a given community."[28] The Secretary's attempt to add an onerous additional requirement, clearly intended to make it harder for charter schools to obtain grant funding, is *ultra vires*. Congress simply has not vested the Secretary with the authority to condition grants on a new community impact analysis requirement. These kinds of studies are expensive and time consuming. It is reasonable to assume they are being layered on with the express intent of reducing the number of applicants that can meet them. Further, Congress has not vested the Secretary with the authority to condition these grant funds on the subjective whim of what the Secretary or his bureaucracy believes satisfies a sufficient "need, number, and types" standard for charter schools in a given community. This standard is not in the statute.

The ESEA does not authorize the Department of Education to require a "community impact analysis" in the application. A "community impact analysis" is not a matter of "such time or manner as the Secretary may require,"[29] and no application requirements discuss "need," "number," and "types" for an application by either the State Entity or the subgrantee. Importantly, the only statutory text in the ESEA regarding a number of charter schools pertains to the "increase" of charter schools sought by Congress in its statement of purpose. Therefore, the Proposed Rule exceeds the statutory grant of authority to the Secretary and infringes upon the congressional power of the purse. The Proposed Rule should be withdrawn.

[26] *Id*. § 7221b(f)
[27] *Id.* § 7221b.
[28] 87 Fed. Reg. at 14,200.
[29] 20 U.S.C. § 7221b.

**B. The Secretary has not provided a meaningful "Notice and Comment" period.**

The "APA mandates that agencies 'give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments.'" *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2386 (2020) (citing 5 U.S.C. § 553(c)). A "meaningful opportunity to comment on any proposed regulation" means, in most cases, a period not less than 60 days.[30] The Secretary, however, promulgated the Proposed Rule in the Federal Register on March 14, 2022, with the comments period closing on April 13, 2022, thirty days later. The Notice provides *no rationale* for shortening the comment period. Further, exigent circumstances identified as possible grounds for shortening this period, such as a loss of life, are clearly inapplicable here. Therefore, the Secretary has violated the requirements of 5 U.S.C. §553(c), and the Proposed Rule should be withdrawn.

## CONCLUSION

The growth of the charter school movement is good for families and students. Congress has expressed its favor for this movement and has provided an opportunity for funding to help fuel the movement's expansion. We urge the Secretary to continue to keep that door open – and not place *ultra vires* obstacles in the way of these children, as the Proposed Rule intends. Accordingly, the ACLJ and its members oppose the Proposed Rule and urge the Secretary to withdraw it and administer the Charter School Program grants as Congress envisioned and directed in the ESEA.

Thank you for the opportunity to provide comment on this critical matter.

AMERICAN CENTER FOR LAW & JUSTICE

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[30] Regulatory Planning and Review, Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993).