COMMITTEE ON
EDUCATION AND LABOR
U.S. HOUSE OF REPRESENTATIVES
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Ms. Porscheoy Brice
U.S. Department of Education
400 Maryland Avenue SW, Room 3E209
Washington, DC 20202– 5970

To Whom it May Concern:

Your proposed priorities, requirements, definitions, and selection criteria for the various grant programs authorized under the Expanding Opportunity Through Quality Charter Schools Program (CSP) are significantly concerning. The proposed priorities are not permitted by the statute and prevent the CSP from achieving the primary purpose of the program: to provide educational opportunities for students, particularly traditionally underserved students.

Authority

The Secretary lacks the statutory authority to create new priorities and requirements for the CSP. The notice itself acknowledges this, stating that these priorities do not derive from the statute. The notice describes these priorities as additional to the statute and supplementary to the requirements in the law:

> "In addition to these statutory application requirements, we established additional application requirements for CMO Grants and Developer Grants in the CMO NFP and Developer NFP, respectively. As a supplement to the application requirements in the ESEA, CMO NFP, and Developer NFP, the Department proposes new application requirements and assurances…"[1]

This is an overreach of authority because the state entity grant in the statute does not provide the Secretary any authority to add criteria to the application. [2]

[1] Federal Register / Vol. 87, No. 49 / Monday, March 14, 2022 / Proposed Rules, Page 14200
[2] 20 USC 7221b(f)

The provisions of the notice regarding the replication and expansion grants for high-quality charter schools (the CMO competition) are a similar overreach because the statute does not give authority to the Secretary to add any criteria to the application.[3] Congress was clear in its decision about what should be considered in that process. It specified clear and deliberate requirements around the application and extended no invitation to the Secretary to add any other information he or she deemed appropriate. Any language that would have allowed such addition was removed from law in the last reauthorization. While the authority to add criteria was left in other programs (the per pupil facilities program under this section of the law does include the allowance to contain such information as the Secretary may require[4]), here this authority was deliberately omitted.

Further, the statute includes a clear and finite list of selection criteria and priorities in both the state entity and the CMO competitions.[5] Congress did not include any qualifying phrases such as "at a minimum" or "any other criteria" in these grant programs as was done in other grant programs authorized under the *Elementary and Secondary Education Act* (ESEA). This demonstrates a clear, intentional act of limiting the criteria to those explicitly included in the statute. The statute is unambiguous about what is—and what is not—to be considered as criteria in each program, and it does not empower the Secretary to add anything to the criteria. One theme throughout the last reauthorization was limiting the authority of the Secretary. This proposal exceeds that authority and therefore runs afoul of the statute and should be rescinded.

Policy Concerns

In addition to the legal concerns, there are ample policy concerns to justify rescinding this notice. Taken as a whole, these priorities are intended to limit severely the ability of state and local authorities to utilize the appropriated money for these programs to faithfully meet the intended purposes of the law:

> **(1)** to improve the United States education system and education opportunities for all people in the United States by supporting innovation in public education in public school settings that prepare students to compete and contribute to the global economy and a stronger Nation;
> **(2)** to provide financial assistance for the planning, program design, and initial implementation of charter schools;
> **(3)** to increase the number of high-quality charter schools available to students across the United States;
> **(4)** to evaluate the impact of charter schools on student achievement, families, and communities, and share best practices between charter schools and other public schools;
> **(5)** to encourage States to provide support to charter schools for facilities financing in an amount more nearly commensurate to the amount States typically provide for traditional public schools;

[3] 20 USC 7221d(b)
[4] 20 USC 7221b(k)(5)
[5] 20 USC 7221b(g) and 20 USC7221d(4)and(5)

> **(6)** to expand opportunities for children with disabilities, English learners, and other traditionally underserved students to attend charter schools and meet the challenging State academic standards;
> **(7)** to support efforts to strengthen the charter school authorizing process to improve performance management, including transparency, oversight and monitoring (including financial audits), and evaluation of such schools; and
> **(8)** to support quality, accountability, and transparency in the operational performance of all authorized public chartering agencies, including State educational agencies, local educational agencies, and other authorizing entities.[6]

These purposes were carefully negotiated by House and Senate Republicans and Democrats and signed into law by President Obama.

CMO Grants and Developer Grants Priorities
The notice is facially flawed because it fails to provide applicants a clear picture of what is required to win a grant successfully. The requirements of providing "meaningful and ongoing engagement" and "including an assessment of community assets" are too vague to be actionable for any entity that is applying for the grant. Charter school developers will have to wait for additional guidance from the Department to know what these terms mean. Further, the term "engagement" is subjective which empowers the peer reviewers to determine if the engagement was deemed "meaningful." While the notice provides a proposed definition for community asset, the definition is too general to provide any clarity.[7]

In addition to this obscurity, these requirements will provide teachers unions and other traditional public school leaders a virtual veto over any new school. The notice seems to disregard the steps that were carefully enacted by each state that dictate how to open a charter school. Requiring additional and ongoing consultation and community evaluation ignores the careful research, planning, and approval already required for a charter school to open. While collaboration and consultation with the community is beneficial to all parties, these additional requirements are not rooted in the statute.

The community collaboration requirement claims it benefits students and families, but the requirement itself undermines the mission of charter schools, which is to provide students, families, and school leaders new opportunities for learning by offering more autonomy to the schools but greater accountability to parents and students. The notice mandates collaboration with traditional public school on specific topics. Despite its claim to support students and families, this priority's insistence on collaboration clearly values traditional public schools over students, families, and the charter schools they choose to establish and attend as alternatives. Further, collaboration is only beneficial if it is voluntary and driven by mutual interest. Collaboration dictated from a third, biased party is as ineffective as it is unnecessary: charter schools already regularly initiate partnership with traditional public schools, recognizing the value of sharing educational methods.

[6] 20 USC 7221
[7] Federal Register / Vol. 87, No. 49 / Monday, March 14, 2022 / Proposed Rules, page 14207

A final issue is that the notice mandates this collaboration as a requirement for new charter applicants without a complementary mandate for public schools to collaborate when requested. This sets up a situation where new charter schools may fail to meet criteria due to circumstances they cannot control. In fact, it is likely schools will refuse to collaborate when requested. Unless a district is authorizing the school, it is unlikely the district will partner with a new school that will potentially take away some of their current student body; in fact, they have every reason to refuse this partnership out of self-interest. If the purpose of this notice is to support the primary purpose of this program, it should at least mandate this collaboration to both parties; but as it currently stands, the notice empowers districts to disadvantage charters and render them uncompetitive for state and CMO grants.

Proposed Application Requirements

This section of the notice argues the Secretary should unilaterally change the application requirements for state entity, CMO, or developer grants. The notice fails to explain why this judgment supersedes that of Congress which clearly laid out the application requirements in each of the programs. This proposal seems to assume that charter schools open randomly with the goal of forcing student attendance. In fact, each school is opened in accordance with the thoughtfully developed state law and attendance is entirely voluntary, unlike attendance at traditional public schools.

Every state with a charter school has a state law that indicates what is needed to open the school. While some state's laws are stronger than others, all of them have a clear process that is required to open a school. That process has been developed by the state legislature and agreed to by the governor. The federal grant program is meant to supplement those state efforts, not to second-guess its requirements. For example, the federal program permits the use of a weighted lottery for admission if the state has not prohibited it.[8] The federal law is meant to support strong charter school practices that may help improve education options for students in all schools, which is why the law already requires applicants to address community engagement during the state application.[9]

The proposed priorities provisions are also vague. An example is the vague requirement for evidence demonstrating that the number of charter schools proposed to be opened does not exceed the number of public schools needed to accommodate the demand in the community.[10] This requirement is unclear and leaves many issues undefined: what is demand in the community? How is need defined? What evidence is sufficient to prove unmet demand? The notice does not provide definitions for these provisions. Even if a state has similar criteria, such as ensuring that there is "sufficient" demand, as drafted the term "sufficient" is left for peer reviewers to interpret. This leaves the final decision to authorize the school in the hands of these peer reviewers rather than in the hands of elected state representatives.

This notice includes provisions that would deter or prohibit new schools from opening. By limiting their ability to contract with the best manager deemed appropriate by the school leaders (in accordance with state law), the notice will prohibit the schools from engaging with the

[8] 20 USC 7221b(c)(3)(i).

[9] 20 USC 7221b(f)(1)(C)

[10] Federal Register / Vol. 87, No. 49 / Monday, March 14, 2022 / Proposed Rules, page 14202

community and from developing school curriculum to serve students who may need help they are not receiving from traditional public schools. .

State Entity Grantees
The notice creates new priorities for subgrants awarded by the state. This issue is already addressed in law which clearly requires that the state shall include a description of the subgrant award process. Furthermore, the statute clarifies the assurances required and supported by the state, the state monitoring, and other requirements which are consistent with state law.[11] Again, the notice is vague and not determinative of what the requirements may be from year-to-year or application-to-application. No additional priorities should exist as no authority exists in the law to empower the Secretary to issue them. The only priorities included should be those included in the statute.

Proposed Assurances
The Department rightly asserts the need for consistency in policy implementation but wrongly extends this consistency only to the notice of proposed priorities rather than to the statute itself. The assurances required under the law were carefully debated and negotiated by Congress and the law as written was agreed to by the President. While the statute includes provisions related to operation of a charter school, transparency about that operation, and management of the process, it does not provide any authority to limit the business decisions of the school or authorizer beyond requiring the school to be authorized and operated in accordance with state law. Unlike other requirements that are vague and overly broad, this provision micromanages schools and exceeds the authority of the federal government to regulate charter school operations in a state. Some requirements, such as the requirement to hold a hearing "in the school districts or community" regarding the impact of the school over a host of issues, are unworkable for the school. As noted elsewhere in these comments, the statute already lays out how community engagement is to be handled and is unambiguous that it is the state's power to describe what kind of community engagement is required by the schools the state would fund. This notice circumvents Congress, state legislatures, and authorizers to create burdensome requirements with the likely effect of keeping many schools from opening or continuing to operate.

The notice adds another unauthorized requirement related to control of the school. While the statute requires a written performance contract that complies with all federal and state audit requirements, meets all safety requirements in state law, and operates in accordance with state law,[12] it does not prohibit a school from contracting with whatever management entity it deems most appropriate for students. However, the notice repeatedly discusses "full or substantial" control and cites the regulations that require the grantee to directly administer the grant. That phrase is vague and not rooted in the law or the regulations. "Full and substantial," despite the notice including a litany of reporting requirements, remains ambiguous in application.

Proposed Definitions
As noted previously, some of the proposed definitions are vague and leave applicants unable to determine both how to meet the requirements and whether it makes sense to apply. It is worth noting the definition of educator as stated in the notice is anyone remotely connected to the

[11] 20 USC 7221b(f)(1)(C) and (2)
[12] 20 USC 7221i(2)

school (except a parent) which, when applied to consulting and impact requirements, can greatly skew the value of the analysis and limit any credibility of such analysis.

Selection Criteria
At the end of this winding document of extraneous charter school program requirements, the notice includes "selection criteria that align with the proposed requirements and assurances, identify for peer reviewers the factors considered to be essential to conducting a high-quality peer review, and are designed to aid in identifying the applicants most likely to succeed with implementing high-quality charter schools that are driven by the needs of families and their communities. These selection criteria would be used in addition to selection criteria in sections 4303(g)(1) and 4305(b)(4) of the ESEA…."[13] Yet again, the notice clearly highlights that these requirements are in addition to the statutory requirements. Further, while it claims the provisions are driven by the needs of families and their communities, the criteria referenced do not speak of actual parent or student engagement. The selection criteria included is a laundry list of detailed requirements and provisions that are beyond the expertise of the peer reviewers, include vague requirements that make the review more subjective, and add requirements not required by the statute.

Conclusion
The notice states, "We will determine the final priorities, requirements, definitions, and selection criteria after considering responses to this document and other information available to the Department. This document does not preclude us from proposing additional priorities, requirements, definitions, or selection criteria, subject to meeting applicable rulemaking requirements."[14] This notice makes non-elected U.S. Department of Education employees the arbiters of the final requirements grantees must adhere to in order to receive funding. These priorities exceed the Secretary's authority, are overly broad and vague, and are counter to the purpose of the federal grant program. The law as written was developed with thoughtful consultation with stakeholders, Members of Congress, their constituents, and the administration. The requirements in the law were carefully debated and determined. The Secretary should rescind these priorities and implement the grant programs as negotiated on a bipartisan basis by Congress and agreed to by the President.

Sincerely,

Virginia Foxx

Virginia Foxx
Ranking Member
Committee on Education and Labor

[13] Federal Register / Vol. 87, No. 49 / Monday, March 14, 2022 / Proposed Rules, page 14207
[14] Federal Register / Vol. 87, No. 49 / Monday, March 14, 2022 / Proposed Rules, page 14208