



April 12, 2022

Submitted Via Regulations.gov

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

Re: ED-2022-0ESE-0006: 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)

Dear Deputy Assistant Secretary Ryder:

I write on behalf of Americans for Prosperity Foundation (“AFPF”)¹ and **yes. every kid. foundation**, nonpartisan 501(c)(3) nonprofit organizations. AFPF is committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. **yes. every kid. foundation** believes the purpose of education is to help all students discover, develop, and apply their unique abilities, establishing a foundation for a life of fulfillment and success. **yes. every kid. foundation** supports education policy that respects the dignity of every student, fosters a diversity of approaches, and is open to the free flow of ideas and innovation. AFPF and **yes. every kid. foundation** are national organizations dedicated to ensuring families have every available educational option to choose for their children. That includes the freedom to choose the education that best fits a student’s needs, whether it is a public school, private school, charter school, or homeschool.

The Expanding Opportunity through Quality Charter Schools Act (“Act”), 20 U.S.C.A. § 7221 *et seq.*, was intended to support innovation in public education; increase the number of high-quality charter schools available to students across the United States; support the sharing of best practices between charter schools and other public schools; expand opportunities for traditionally underserved students to attend charter schools; improve performance management, including transparency, oversight and monitoring; and support quality, accountability, and transparency in the operational performance of all authorized public chartering agencies.

AFPF and **yes. every kid. foundation** have serious concerns that the proposed priorities, requirements, definitions, and selection criteria for CSP SE Grants, CMO Grants, and Developer Grants, presented in ED-2022-0ESE-0006 (“Proposed Rule”) would have the opposite effect,

¹ See AMERICANS FOR PROSPERITY FOUNDATION, <https://americansforprosperityfoundation.org/>.

reducing innovation and quality in public schooling and reducing opportunities for students to attend charter schools.

Because it “is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress,” *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988), it may be assumed that the proposed priorities, requirements, definitions, and selection criteria that expressly contradict or undermine the intent expressed by Congress in the Act, or that overreach delegated authority, would be unlawful and subject to challenge.

The following goals of the Quality Charter School Act, and the expansion and innovation in charter schools that it promotes, would be imperiled by the Proposed Rule:

1. Expanding the Number of schools and Participation and Ensuring Quality – versus – Express Limitations on the Number of Charter Schools and Innovation.

The Act focuses on expanding the number and accessibility of charter schools, innovation, and increased quality. At 20 U.S.C. § 7221b (f), the Act requires State Entities seeking a grant to demonstrate how they will expand the availability of charter schools, including how they will:

- support startup of new charter schools and replication of high-quality charter schools, §§(f)(1)(A)(i);
- inform eligible charter schools and developers of the availability of funds and ensure access to funds, §§(f)(1)(A)(ii & iii);
- maximize charter school participation in Federal and State programs, §§(f)(1)(A)(v)(I);
- support the use of charter schools to improve or turn around struggling schools, §§(f)(1)(A)(vii); and,
- work with charter schools to promote inclusion and retention of students, §§(f)(1)(A)(viii).

The Act, 20 U.S.C. § 7221b (g), requires the Secretary to take into consideration in awarding grants the following:

- flexibility afforded by the charter school law;
- ambitiousness of the charter school program; and,
- the likelihood that grant recipients will improve educational results for students.

Similarly, the Act, 20 U.S.C. § 7221d, requires the Secretary to make grants to eligible charter management organizations for expansion or replication of existing charter schools based on the following:

- results such as, students assessment results, student attendance, retention, and graduation rates, 20 U.S.C. § 7221d(b)(3)(A)(i & ii);
- objectives, such as the number of schools in the program, 20 U.S.C. § 7221d(b)(3)(B)(i);
- program information regarding how students will be enabled to succeed and the instructional practices that will be used, 20 U.S.C. § 7221d(b)(3)(B)(ii); and,

- recruitment and enrollment plans to ensure the inclusion of children with disabilities, English learners, and other educationally disadvantaged students, 20 U.S.C. § 7221d(b)(3)(B)(iv).

The consistent theme among these provisions is the *expansion* of charter schools, the charter school program, and the use of such programs by students. The Proposed Rule by contrast abandons the focus on expansion and accessibility and would instead *curtail* new charter schools unless applicants demonstrate “that there is sufficient demand for the proposed project,” including:

- that there is unmet demand and over enrollment of existing public schools; and,
- that the proposed number of charter schools does not exceed the number of public schools needed to accommodate the demand in the community.

The Proposed Rule’s focus on *limiting* charter schools is directly contrary to the Act’s focus on expansion in numbers, innovative approaches, and accessibility.

2. Statutory Protection from Public School Control Would be Replaced by *de facto* Public School Veto against Competing Charter Schools.

The Act, 20 U.S.C. § 7221b (g) gives priority to State Entities that protect charter schools from domination by traditional public school authorities by:

- allowing at least one entity that is not a local educational agency to be an authorized public chartering agency, or having an appeals process for the denial of an application for a charter school;
- ensuring equitable financing, relative to traditional public schools; and,
- providing assistance in obtaining funding for facilities.

The Proposed Rule, by contrast, undermines that statutory independence and invests *de facto* veto power in public schools over proposed charters by requiring a charter school applicant to convince a traditional public school to become a collaborator with the proposed charter school, and to provide a letter and written Memorandum of Understanding from the school or school district committing to that collaborative relationship. The MOU must be signed by officials authorized on behalf of the charter school and each partnering traditional public school or school district. This requirement empowers traditional public schools to deny or slow walk the establishment of a new charter school by either declining to collaborate, demanding lopsided division of burdens between the existing and proposed school on the collaborative project; or delaying provision of the letter and/or signed Memorandum of Understanding. Placing proposed charter schools at the mercy of traditional public schools is contrary to the statutory protection for proposed charters against undue interference or inequitable treatment by existing authorities.

3. Freedom to Innovate and Share Best Practices Would be Replaced by Mandatory Assumption of Public School Burdens.

While the Act, 20 U.S.C. § 7221b, includes an aspirational goal of sharing best practices between charter schools and traditional public schools, *e.g.* 20 U.S.C.A. §§ 7221(4), 7221a(a)(3)(B), 7221b(f)(1)(A)(ix) & (B)(iii), it does so by allowing freedom for charter schools to implement innovative ideas and winnow out the winning ideas for sharing and implementation

by public schools. The Act does not impose an upfront burden on charter schools to resolve or shoulder particular challenges faced by traditional public schools.

The Proposed Rule at Proposed Priority 2, by contrast, burdens applicant charter schools with existing public school challenges by mandating collaborative plans that must describe the resources each member of the collaboration will contribute to provide services and resources, including:

- curricular and instructional resources or academic course offerings;
- professional development opportunities for teachers and leaders;
- a shared transportation plan and system; and/or,
- other collaborations designed to address a significant barrier or challenge faced by both charter schools and traditional public schools and improve student outcomes.

While sharing innovation and collaborating to improve services and reduce costs across the public school spectrum is a laudable aspiration, the upfront burden of developing such a plan on charter schools as a condition for participation in the Act’s grant-making program would have a chilling effect on new or expanding charter schools and thus is contrary to the letter and spirit of the Act.

4. The Act’s Encouragement of Diverse Student Bodies Across Characteristics Would be Hampered, not Helped, by the Proposed Rule’s Focus on Community Demographics.

The Act imposes two mandatory diversity elements *requiring* each State Entity awarding subgrants, to the extent practicable and applicable, to ensure that subgrants: “(A) are distributed throughout different areas, including urban, suburban, and rural areas; and (B) will assist charter schools representing a variety of educational approaches.” 20 U.S.C. § 7221b (d)(4). Consistent with the rest of the Act, these requirements promote expansion, accessibility, and innovation.

The Act, 20 U.S.C. § 7221(6), states as one of its purposes, the expansion of “opportunities for children with disabilities, English learners, and other traditionally underserved students to attend charter schools and meet the challenging State academic standards” Section 7221b (c)(3)(B) states that “[n]othing in this paragraph shall be construed to prohibit schools from specializing in providing specific services for students with a demonstrated need for such services, such as students who need specialized instruction in reading, spelling, or writing.” Again, the focus is on expansion, accessibility, and innovation.

The Act, 20 U.S.C. § 7221d (b)(5)(A), gives priority to applicants who “plan to operate or manage high-quality charter schools with racially and socioeconomically diverse student bodies;” while 20 U.S.C. § 7221d (b)(5)(D) gives priority to applicants who “propose to operate or manage high-quality charter schools that focus on dropout recovery and academic reentry.”

The Proposed Rule, by contrast, shifts focus away from broad access and increasing opportunity for the underserved to a new focus on demographics, including the demographic composition of staff populations—which are not addressed by the Act and are thus wholly outside

the authority delegated by Congress. The proposed new requirements run the gamut, requiring applicants to:

- Describe the school’s targeted student and staff demographics and how the applicant plans to establish and maintain racially and socioeconomically diverse student and staff populations;
- Analyze academic achievement, demographics, and enrollment trends of schools and school districts from which students are, or will be, drawn to attend the charter school;
- Analyze the proposed charter school’s demographic projections and compare such projections with the demographics of public schools and school districts from which students are, or will be, drawn to attend the chart school; and,
- Describe steps the applicant has taken or will take to ensure that the proposed charter school would not hamper, delay, or in any manner negatively affect any desegregation efforts in the public school districts from which students are, or would be, drawn to attend the charter school.

None of these proposed requirements is authorized by the Act and all exceed the Agency’s authority. And, while the first task may in some cases provide supporting information for proposed charters seeking the statutory priority for schools with racially and socioeconomically diverse student bodies, the mandatory nature of the Proposed Rule would impose a costly burden on *all* applicants. This shift not only lacks sense, but actively undermines the purposes of the Act where the demographics of the community are unlikely to reflect statutory goals such as providing for “English Learners” or “students who need specialized instruction in reading, spelling, or writing.” Without a demonstrated correlation between a community’s demographic characteristics and the Act’s stated goals, requiring a charter applicant to reflect the demographic make-up of the community can only serve to limit the programs that are needed most.

Thank you very much for your time and attention. If we can provide any additional information or otherwise be of further assistance, please do not hesitate to contact me.

Respectfully submitted,

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