PACIFIC LEGAL FOUNDATION

April 11, 2022

VIA REGULATIONS.GOV

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

Re: Proposed Priorities, Requirements, Definitions, and Selection Criteria: Expanding Opportunity through Quality Charter Schools Program: Grants to State Entities; Grants to Charter Management Organizations for the Replication and Expansion of High-Quality Charter Schools; etc., Docket (ED-2022-OESE-0006)

Dear Secretary Cardona:

Pacific Legal Foundation files this comment to object to the Department's proposed rule, *Proposed Priorities, Requirements, Definitions, and Selection Criteria: Expanding Opportunity through Quality Charter Schools Program: Grants to State Entities; Grants to Charter Management Organizations for the Replication and Expansion of High-Quality Charter Schools; etc.*, 87 Fed. Reg. 14197 (Mar. 14, 2022). The Department of Education is obligated to dispense federal grants to charter management organizations and state entities in order to "increase the number of high-quality charter schools available to students across the United States." 20 U.S.C. §§ 7221(3). It cannot refuse because it disfavors giving parents and students choice in which school to attend. Yet the proposed rule improperly sets out new criteria for grant awards that appear designed to decrease charter school programs. While the Department lacks the authority to issue any new criteria, the proposed factors will punish high-quality charter schools who provide an alternative to failing public schools, most particularly in school districts that enroll large numbers of minority students. Worse, these proposed grant priorities would only allow awards to applicants who actively engage in unconstitutional race-based decision making. All the while, the proposal comes from an agency employee, and lacks even the blessing of a properly-appointed officer of the United States. The Department should immediately withdraw its proposed rule.

STATEMENT OF INTEREST

Pacific Legal Foundation is the nation's leading public interest organization advocating, in courts throughout the country, for the defense of individual liberty and economic opportunity and against government overreach. PLF is deeply concerned about agency

action that exceeds constitutional limits, particularly when it intrudes into areas of educational choice and, most especially, when it requires racial discrimination. PLF's attorneys have long been at the forefront of challenging administrative overreach and have regularly defeated unlawful agency action in the courts. PLF's attorneys have also routinely challenged unconstitutional efforts to racially rebalance public schools. PLF therefore submits this comment to allow the Department to reconsider its proposal and follow appropriate statutory and constitutional limits on its authority.

RELEVANT FACTS

I. Statutory Background

The federal Charter Schools Program helps pay costs to start and expand public charter schools. In 2015 Congress passed a significant expansion to that program—the Expanding Opportunity Through Quality Charter Schools Act, codified at 20 U.S.C. § 7221 *et seq*. The Act allocated funding for the creation and expansion of charter schools nationwide. Its "purpose" was direct—to "provide financial assistance for the planning, program design, and initial implementation of charter schools" in order to "increase the number of high-quality charter schools available to students across the United States." 20 U.S.C. §§ 7221(2), (3).

To accomplish its purpose, the Act obligates the Secretary of Education to distribute hundreds of millions in dollars in grants annually. *See* 20 U.S.C. §§ 7221a(b), 7221b, 7221d. Most of these funds are directed toward "supporting the startup of new charter schools, the replication of high-quality charter schools, and the expansion of high-quality charter schools." 20 U.S.C. § 7221a(a)(1). Some of the grants are earmarked for state entities eligible to "award subgrants to eligible applicants to enable eligible applicants to open and prepare for the operation of new charter schools, open and prepare for the operation of replicated high-quality charter schools, or expand high-quality charter schools. 20 U.S.C. §§ 7221b(b)(1)(A)-(C). Other funds are set aside for direct grants to "charter management organization[s]" for the "replication and expansion of high-quality charter schools." 20 U.S.C. § 7221d(b). A "high-quality charter school" is one that has "demonstrated success" in raising academic achievement, including for economically disadvantaged students, students from major racial and ethnic groups, children with disabilities, and English learners. 20 U.S.C. § 7221i(8).

Congress also set forth clear criteria guiding awards under the Act. For grants to state entities the Secretary of Education is directed to award grants "on the basis of the quality of the applications submitted" "after taking into consideration" five criteria: (1) "the degree of flexibility afforded by the State's charter school law and how the State entity will work to maximize the flexibility provided to charter schools under such law;" (2)

"the ambitiousness of the State entity's objectives for the quality charter school program carried out under this section; (3) "the likelihood that the eligible applicants receiving subgrants under the program will meet those objectives and improve educational results for students;" (4) "the State entity's plan to" "monitor" subgrant applicants and "provide technical assistance and support" to them; and (5) "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). The Secretary is also directed to "give priority to a State entity to the extent that the entity meets the following criteria:" (1) the State allowed at least one "public chartering agency" that was "not a local educational agency" or at least had "an appeals process for the denial of an application for a charter school;" (2) the State "ensures equitable financing, as compared to traditional public schools, for charter schools and students in a prompt manner;" (3) the State provides charter schools with funding, or assistance concerning access to facilities; (4) the State "uses best practices from charter schools to help improve struggling schools and local educational agencies," (5) the "State entity supports charter schools that serve at-risk students through activities such as dropout prevention, dropout recovery, or comprehensive career counseling services;" and (6) the "State entity has taken steps to ensure that all authorizing public chartering agencies implement best practices for charter school authorizing." *Id*. § 7221b(g)(2). Notably, the statute does *not* include any delegation of authority for the Secretary to consider or implement new criteria or priorities. *See id*.

For direct awards, the Secretary of Education is likewise required to consider three criteria. 20 U.S.C. § 7221d(b)(4). The Secretary "shall select eligible entities to receive grants" based on: (1) "the degree to which the eligible entity has demonstrated success in increasing academic achievement for all students and for [economically disadvantaged students, students from major racial and ethnic groups, children with disabilities; and English learners] attending the charter schools the eligible entity operates or manages;" (2) "the eligible entity has not operated or managed a significant proportion of charter schools that have been closed" or "had the school's charter revoked due to problems with statutory or regulatory compliance; or have had the school's affiliation with the eligible entity revoked or terminated, including through voluntary disaffiliation;" and (3) "the eligible entity has not experienced significant problems with statutory or regulatory compliance that could lead to the revocation of a school's charter." The Secretary is also ordered to "give priority to eligible entities that" meet one or more of four factors: (1) "plan to operate or manage high-quality charter schools with racially and socioeconomically diverse student bodies," (2) "demonstrate success in working with schools identified by the State for comprehensive support and improvement" as being low performing; (3) "propose to use funds to "expand" or "replication" high-quality charter schools to serve high school students; or (4) "propose to operate or manage high-quality charter schools that focus on dropout recovery and academic reentry." 20 U.S.C.

§ 7221d(b)(5). As with awards to State entities, the Secretary is not delegated authority to consider additional criteria or impose additional priorities. *See id*.

Congress limited the regulatory discretion of the Secretary of Education in two targeted provisions. In 20 U.S.C. § 7221f, Congress provided that, to "the extent practicable, the Secretary shall ensure that administrators, teachers, and other individuals directly involved in the operation of charter schools are consulted in the development of any rules or regulations required to implement" "any … program administered by the Secretary that provides education funds to charter schools or regulates the activities of charter schools." In 20 U.S.C. § 7221h, Congress wrote, "To the extent practicable, the Secretary and each authorized public chartering agency shall ensure that implementation of this subpart results in a minimum of paperwork for any eligible applicant or charter school." According to the Senate's committee report, these provisions were part of a broader effort to require "the Department of Education to examine the impact, including costs, burdens, and benefits of regulations before issuing them, as well as to gather ample stakeholder input, including individuals such as Federal, State, and local administrators, parents, teachers, principals, school leaders, and charter school leaders." U.S. Senate, Committee on Health, Education, Labor and Pensions, *Report to Accompany Every Child Achieves Act of 2015*, *S.1177*, S.R. Rep. No. 114-231 at 33 (2015). "The intent is that the Secretary will thoughtfully gather feedback and consider impact before issuing new regulations." *Id*.

II. The Biden Administration's Regulatory Proposal

On March 10, 2022, Congress appropriated $440 million for the federal charter school program for 2023. *See* Public Law No. 117-103, Title III.

During his campaign President Biden made his views of charter schools clear, saying he was "not a charter school fan." *See* Grabien, *Joe Biden on Why He Is 'Lukewarm' on Charter Schools: 'I Am Not a Charter School Fan,'* (Feb. 26, 2020) *available at* https://grabien.com/story.php?id=275743. No wonder then, a day after Congress appropriated funds to the charter school program, the Department of Education released its proposed rule dramatically undermining the grant program.

The proposed rule, which allows only a 30-day comment period, proposed new "priorities," application "requirements," and mandatory "assurances" for both state entities and charter schools seeking funds under the expansion act. The Department claimed authority to do so with a general citation to "Title IV, part C of the [Elementary and Secondary Education Act of 1965] (20 U.S.C. 7221-7221j)." 87 Fed. Reg. at 14198. It was signed by Ruth E. Ryder, Deputy Assistant Secretary for Policy and Programs, Office of Elementary and Secondary Education. *Id*. at 14210.

For grants made directly to charter management organizations, the Department proposed two "priorities." *Id*. at 14200. The priorities will be designated as "absolute," "competitive preference" or "invitational" in a forthcoming notice and if absolute, would exclude any applicant who did not meet them. *Id*.

Proposed Priority 1 says that an "an applicant must provide a high-quality plan that demonstrates how its proposed project would" implement "meaningful and ongoing engagement with current and former educators, including current and former teachers, including in founding the school, board governance, school-level decision-making related to curriculum and instruction, and day-to-day operations of the school;" and would use "a community-centered approach that includes an assessment of community assets, informs the development of the charter school, and includes the implementation of protocols and practices designed to ensure that the charter school will use and interact with community assets on an ongoing basis to create and maintain strong community ties." *Id*. at 14199.

Proposed Priority 2 builds on this collaboration requirement, saying "an applicant must propose to collaborate with at least one traditional public school or traditional school district in an activity that is designed to benefit students and families served by each member of the collaboration, designed to lead to increased educational opportunities and improved student outcomes," and includes curricular requirements, and transportation and retention plans. *Id*. "In its application, an applicant must provide a letter from each partnering traditional public school or school district demonstrating a commitment to participate in the proposed charter-traditional collaboration." *Id*. at 14199-200.

Next, the applications for either charter management organizations or state entities would include three new requirements. *Id*. at 14201. Proposed Requirement 1 for charter management organizations is very troubling. It says that "[e]ach applicant must provide a community impact analysis that demonstrates that there is sufficient demand for the proposed project and that the proposed project would serve the interests and meet the needs of students and families in the community or communities from which students are, or will be, drawn to attend the charter school[.]" *Id*. This analysis would have to include, among other things, "[d]escriptions of the community support and unmet demand for the charter school, including any over-enrollment of existing public schools or other information that demonstrates demand for the charter school, such as evidence of demand for specialized instructional approaches," "[d]escriptions of the targeted student and staff demographics and how the applicant plans to establish and maintain racially and socio-economically diverse student and staff populations," an "analysis of the proposed charter school's demographic projections and a comparison of such projections with the demographics of public schools and school districts from which students are, or will be, drawn to attend the charter school," and "[e]vidence that

demonstrates that the number of charter schools proposed to be opened, replicated, or expanded under the grant does not exceed the number of public schools needed to accommodate the demand in the community[.]" *Id*. at 14201-02. The applications would also need to include a "robust family and community engagement plan designed to ensure the active participation of families and the community," including how "the charter school has engaged or will engage families and the community to develop an instructional model that will serve the targeted diverse student population and their families effectively." *Id*. at 1402. A school must also include a "description of the 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, including efforts to comply with a court order, statutory obligation, or voluntary efforts to create and maintain desegregated public schools, and that it would not otherwise increase racial or socio-economic segregation or isolation in the schools from which the students are, or would be, drawn to attend the charter school." *Id*.

Proposed Requirement 2 sets out complex reporting requirements to safeguard against for-profit management of the charter schools. *Id*. Finally, Proposed Requirement 3 requires an applicant to describe timing and budgeting issues for the proposed school. *Id*. at 14203.

The proposed requirements for state entities require the state to ensure that subgrant applicants follow virtually identical Proposed Requirements 1-3. *See id*. at 14203-04. Notably, this includes a requirement that a subgrant applicant provide "[e]vidence that demonstrates that the number of charter schools proposed to be opened, replicated, or expanded under the grant does not exceed the number of public schools needed to accommodate the demand in the community," and evidence that the proposed charter school would not otherwise increase racial or socio-economic segregation or isolation in the schools from which the students are, or would be, drawn to attend the charter school." *Id*. at 14203-04.

State entities will also face Proposed Requirement 4, which requires "a detailed description, including a timeline, of how the [state entity] will monitor and report on subgrant performance," Proposed Requirement 5, which requires a description of how any subgrants would be awarded, and Proposed Requirement 6, which requires the state entity to "give priority in awarding subgrants" to schools that use a "community-centered approach" and engage in "collaboration with at least one traditional public school." *Id*. at 14204-05.

Next, once a charter management organization or state entity has been awarded a grant, it must provide a series of "assurances" to the Department. *Id*. at 14205. Many of these

assurances relate to the charter school's governance and funding, and require extensive disclosures to the public. *See id*. at 14205-06. However, "[e]ach applicant for a CMO Grant, Developer Grant, or subgrant under the SE Grant program, without regard to whether there are any desegregation efforts in the public school districts in the surrounding area, must provide an assurance that it (or, in the case of an applicant for a CMO Grant, each charter school it proposes to fund) will hold or participate in a public hearing in the school districts or communities in which the proposed charter school will be located to obtain information and feedback regarding the potential impact of the charter school, including the steps the charter school 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, including efforts to comply with a court order, statutory obligation, or voluntary efforts to create and maintain desegregated public schools, and that it would not otherwise increase racial or socio-economic segregation or isolation in the schools from which the students are, or would be, drawn to attend the charter school." *Id*. at 14206.

The Department also proposed definitions for the terms set out in the new priorities, requirements and assurances. *Id*. at 14207. Notably, the Department said that "underserved student" means any student who faced certain criteria, including, with respect to race or ethnicity, any "student of color," a "student who is a member of a federally recognized Indian Tribe," an "English learner" or a "migrant student." *Id*.

Finally, the Department explained the proposed selection criteria it would employ when making grant awards. *Id*. It would first consider the "quality of the community impact analysis," including how the proposed school "will address the needs of all students and families in the community, including underserved students; will ensure equitable access to diverse learning opportunities; and will not otherwise increase racial or socio-economic segregation or isolation in the schools from which the students are, or would be, drawn to attend the charter school." *Id*. The Department would also consider the "extent to which the proposed charter school is supported by families and the community, including the extent to which parents and other members of the community were engaged in determining the need and vision for the school and will continue to be engaged on an ongoing basis in school decision-making." *Id*. The Department would further consider the school's management plan, and, for state entities, the "project design" from the entity. *Id*. at 14208.

DISCUSSION

The Department's proposed rule is unlawful for multiple, independent, reasons. First, the Department has no authority to issue any criteria beyond those already set out by

Congress. Second, these specific criteria improperly inhibit expansion of charter schools—which is exactly opposite to the statutory purpose for the grant program. Third, the proposed rule would likely require applicants to engage in unconstitutional efforts to racially rebalance school districts. Finally, because the proposal was not issued by an officer of the United States, if it became a final rule it would be invalid under the Appointments Clause.

I. The Proposed Rule Conflicts with the Expanding Opportunity Through Quality Charter Schools Act

A. Legal Standard

"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). Thus, "an agency literally has no power to act ... unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). The Administrative Procedure Act (APA) directs a court to "hold unlawful and set aside" an agency's rule that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," "contrary to constitutional right" or "in excess of statutory jurisdiction [or] authority." 5 U.S.C. § 706(2)(A), (B), (C).

"Agency authority may not be lightly presumed." *Michigan v. EPA*, 268 F.3d 1075, 1082 (D.C. Cir. 2001). An agency "may not construe the statute in a way that completely nullifies textually applicable provisions meant to limit its discretion." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 468, 485 (2001).

"In determining whether an agency's regulations are valid under a particular statute, as the Supreme Court's decision in *Chevron* instructs, [a court must] begin with the question of whether the statute unambiguously addresses the 'precise question at issue.'" *New Mexico v. Dep't of Interior*, 854 F.3d 1207, 1221 (10th Cir. 2017) (quoting *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842 (1984)). "If Congress has spoken *directly* to the issue, that is the end of the matter; the court, as well as the agency, must give effect to Congress's unambiguously expressed intent." *Id.* (citation omitted).

"*Chevron* does not require Congress to explicitly delineate everything an agency cannot do before we may conclude that Congress has directly spoken to the issue. Such a rule would create an 'ambiguity' in almost all statutes, necessitating deference to nearly all agency determinations." *Contreras-Bocanegra v. Holder*, 678 F.3d 811, 818 (10th Cir. 2012) (en banc) (citation omitted); *see also Texas v. United States*, 497 F.3d 491, 503 n.9 (5th Cir. 2007) ("[C]ongressional silence...[cannot] be used as a panacea justifying rulemaking authority untethered from any trace of congressional intent."). "[A] statute's silence on a given issue does not confer gap-filling power on an agency unless the question is in fact

a gap—an ambiguity tied up with the provisions of the statute." *New Mexico*, 854 F.3d at 1223 (citation omitted). "[N]o matter how important, conspicuous, and controversial the issue, and regardless of how likely the public is to hold the Executive Branch politically accountable, an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress. And in our anxiety to effectuate the congressional purpose of protecting the public, we must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000) (citations omitted); *see also Whitman*, 531 U.S. at 468 ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.").

"[W]hen Congress has directly addressed the extent of authority delegated to an administrative agency, neither the agency nor the courts are free to assume that Congress intended the Secretary to act in situations left unspoken." *Texas*, 497 F.3d at 502. "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." *Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974).

B. The Department Has No Authority to Issue Additional Selection Criteria

First, and most fundamentally, the Department proceeds without any delegation of regulatory authority. The Act is remarkable in that it pointedly includes no provision allowing the Secretary to designate additional criteria or priorities for awarding grants. *See* 20 U.S.C. §§ 7221b, 7221d. Instead, it lists *exhaustive* factors that the Secretary must consider in the relevant applications, and priorities for making awards. But without a delegation of rulemaking authority, the Secretary has "literally has no power to act." *See La. Pub. Serv. Comm'n*, 476 U.S. at 374.

Moreover, the Department's suggestion that it has implicitly delegated authority under the Act cannot be sustained. The proposed rule claims legal authority from "Title IV, part C of the [Elementary and Secondary Education Act of 1965] (20 U.S.C. 7221–7221j)." 87 Fed. Reg. at 14198. As there is no express delegation of authority anywhere in that statute, one would have to be implied from context. But several aspects of the statute's design foreclose such an implication.

First, Congressional clarity on what criteria and priorities the Secretary must use suggests that it did not intend for the Secretary to expand upon them. The statute is clear as to which state entities and charter management organizations should receive grants. State entities must meet five criteria, and the Secretary must apply six priorities. 20 U.S.C. § 7221b(g). Charter management organizations must meet three criteria and the Secretary

must apply four priorities. 20 U.S.C. § 7221d(b). This specificity dooms the Secretary's present attempt to set out new "priorities," "requirements," "assurances" and "selection criteria." Because the "statute limits a thing to be done in a particular mode, it includes the negative of any other mode." *See Nat'l R.R. Passenger Corp.*, 414 U.S. at 458.

Second, aside from just the negative implication of its set factors, Congress' inclusion of regulatory limitations in the Act also forecloses an expansive reading of the Secretary's implied authority. To the extent that Congress envisioned the Secretary might attempt to issue rules "to implement" the Act (as opposed to altering the established criteria), it required the Department to "ensure that administrators, teachers, and other individuals directly involved in the operation of charter schools are consulted." 20 U.S.C. § 7221f. It also demanded that the Secretary not overburden applicants with onerous application requirements—requiring the Department to "ensure that implementation of this subpart results in a minimum of paperwork for any eligible applicant or charter school." 20 U.S.C. § 7221h. Congress wanted to make sure the Secretary "will thoughtfully gather feedback and consider impact before issuing new regulations," so as not to overburden charter school applicants. *See* Senate Report, S.R. Rep. No. 114-231 at 33. How then can the Secretary justify its massive expansion of the application process based on an implicit delegation of authority from Congress? Congress plainly meant to foreclose such expansive measures.

Without a source of authority, the Secretary's efforts to impose any new criteria, much less priorities or assurances, exceeds the Department's authority. It thus would be impermissible no matter its content.

C. The Proposed Rule Actively Undermines the Statutory Purpose of the Act by Trying to Reduce the Number of Charter Schools

The proposed rule is also invalid because it attempts to negate the Act's core purpose—to "increase the number of high-quality charter schools available to students across the United States." 20 U.S.C. § 7221(3). The new criteria appear to have been designed specifically to *attack* the exemplary successes of high-quality charter schools across the nation, and ensure that no new or expanded schools can serve the educational needs of children.

i. The "Sufficient Demand" Requirement Targets the Most Successful Charter Schools

The proposed rule's "sufficient demand" requirement is tailored to make sure that the most successful charter schools cannot be replicated or expanded. Charter management organizations "must provide a community impact analysis that demonstrates that there is sufficient demand for the proposed project," including "unmet demand for the charter

school, including any over-enrollment of existing public schools or other information that demonstrates demand for the charter school, such as evidence of demand for specialized instructional approaches." 87 Fed. Reg. at 14201. They also must provide "[e]vidence that demonstrates that the number of charter schools proposed to be opened, replicated, or expanded under the grant does not exceed the number of public schools needed to accommodate the demand in the community[.]" *Id*. at 14202. State entities must likewise ensure subgrantees meet the same type of "unmet demand" and provide "[e]vidence that demonstrates that the number of charter schools proposed to be opened, replicated, or expanded under the grant does not exceed the number of public schools needed to accommodate the demand in the community." *Id*. at 14203-04. In other words, applicants must prove that *too few* existing schools are available for students, not that the existing schools have *failed* their existing students.

The proposed regulations are attacking a chimera— the problem has never been a lack of space in existing schools. As the Department's own research indicates, "Between fall 2009 and fall 2018, public charter school enrollment increased steadily, from 1.6 million students in fall 2009 to 3.3 million students in fall 2018—an overall increase of 1.7 million students. In contrast, the number of students attending traditional public schools decreased by 0.4 million between fall 2009 and fall 2018." U.S. Department of Education, Institute of Education Sciences, National Center for Education Statistics, *Public Charter School Enrollment*, *Condition of Education* (May 2021) https://nces.ed.gov/programs/coe/indicator/cgb. This is hardly surprising, of course, since enrollment in public charter schools must draw students from *somewhere*.

Charter schools exist as an alternative to failing to schools. That's their statutory purpose. Congress created the grant program to help "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[.]" 20 U.S.C. § 7221(a). This means that students seeking a quality education will be drawn to them *instead* of their failing public schools.

If we look to the most successful examples of charter schools, it's no wonder that they invariably draw students from schools that are *under-enrolled*. In 2018, for instance, "the District of Columbia had the highest percentage of public-school students enrolled in charter schools (45 percent)." U.S. Department of Education, Institute of Education Sciences, National Center for Education Statistics, *Public Charter School Enrollment*, *Condition of Education* (May 2021) https://nces.ed.gov/programs/coe/indicator/cgb. Unsurprisingly, public schools in the district were under-enrolled. *See* Luke Lukert, *Enrollment Declines in DC Public Schools as More Opt for Charter Schools, Home Schooling*, WTOP (Dec. 2, 2021) https://wtop.com/dc/2021/12/enrollment-declines-in-dc-public-schools-as-

more-opt-for-charter-schools-home-schooling/. Meanwhile, DC charter schools continued to be high performing, while they serve largely disadvantaged students. *See* DC Public Charter School Board, *School Quality Report*, https://dcpcsb.org/families/school-quality-report. Parents in the district obviously recognize that charter schools are a better option for their children than the failing, yet under-enrolled, public schools.

This is just one of scores of examples of charter schools drawing students away from under-performing and under-enrolled schools. Look to Philadelphia, or Detroit to see successful charter schools providing alternatives even when there's *room* in public schools. *See*, *e.g.*, School District of Philadelphia, *Fast Facts*, https://www.philasd.org/fast-facts/; Detroit Public Schools, *District Profile 2016-17*, https://dpscd.detroitk12.org/schools/reports/profiles/district_profile.pdf. Or even look to places like rural Alaska—public schools are not at capacity, yet they also have highly-successful charter schools available to students. *See*, *e.g.*, Kenai Peninsula Borough School District, *Five-Year Enrollment Projection, 2022-23 through 2026-27*, (Nov. 9, 2020), https://kpbsd.org/WorkArea/DownloadAsset.aspx?id=43258; Alaska Dept. of Education & Early Development, *Aurora Borealis Charter School Profile*, https://education.alaska.gov/compass/ParentPortal/SchoolProfile?SchoolID=249010. The point of these schools is not to just house excess enrollment; they provide a better alternative.

The Department is going after these success stories to undermine the availability of charter schools. None of the examples listed above could prove, with evidence, that their local school districts lack adequate space to accommodate existing students. And thus, in the Department's view, none of these remarkable successes should be replicated or expanded.

ii. The Community Collaboration Requirement Is a Competitor's Veto

The Department's requirement for community collaboration will allow local districts to veto any proposal without any reason. Part of the reason charter schools thrive is that they foster innovation and competition among schools. *See* 20 U.S.C. § 7221(1). That also necessarily means that public schools that lose student enrollment to charter schools will be unlikely to voluntarily collaborate or further charter schools' efforts.

The Department now stresses that it won't award grants without local cooperation. Community cooperation is paramount in Proposed Priority 1 and 2, and each "applicant must provide a letter from each partnering traditional public school or school district demonstrating a commitment to participate in the proposed charter-traditional collaboration." 87 Fed. Reg. at 14199-200. Community support and collaboration also shows up in the "requirements," for both charter management organizations and state

entities. *See id*. at 14201-04. It also is the central consideration in the selection criteria. *Id*. at 14207-08.

In essence, this requirement is a competitor's veto. If a failing public school does not want to lose students, and accompanying funding, it will have every incentive to simply withhold collaboration and doom any charter school applicant. That doesn't serve students who will miss out on educational opportunities. It is instead yet another means of undermining the grant program in its entirety. [1]

iii. The Proposal Is Designed to Punish Charter Schools for Successfully Serving Minority Students

The twin requirements that charter schools both meet the racial and ethnic diversity found in their host districts while also reducing racial segregation or isolation in schools is an offensive effort to punish charter schools for successfully serving minority students. Congress told the Department to measure the success of charter schools, in part, based on "the degree to which the eligible entity has demonstrated success in increasing academic achievement for all students and for [economically disadvantaged students, students from major racial and ethnic groups, children with disabilities; and English learners] attending the charter schools the eligible entity operates or manages." 20 U.S.C. § 7221d(b)(5). The Department now proposes that applicants must include "[d]escriptions of the targeted student and staff demographics and how the applicant plans to establish and maintain racially and socio-economically diverse student and staff populations." 87 Fed. Reg. at 14201. It also proposes to adopt selection criteria based on whether an applicant "will address the needs of all students and families in the community, including underserved students; will ensure equitable access to diverse learning opportunities; and will not otherwise increase racial or socio-economic segregation or isolation in the schools from which the students are, or would be, drawn to attend the charter school." *Id*. at 14207. Yet at the same time, the Department says it is a "requirement" that any "proposed charter school [] 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, including efforts to comply with a court order, statutory obligation, or voluntary efforts to create and maintain desegregated public schools, and that it would not otherwise increase racial or socio-economic segregation or isolation in the schools from which the students are, or

[1] PLF has also been a leader in litigation and advocacy concerning similar types of need requirements. *See* Pacific Legal Foundation, Certificate of Need Laws—The "Competitor's Veto," https://pacificlegal.org/the-competitors-veto/. Experience reveals the obvious—certification of need and competitor approval requirements allow existing entities to abusively limit competition and deprive the public of beneficial alternatives.

would be, drawn to attend the charter school." *Id*. at 14202; *see also* 14203-04, 14206. The final selection criteria also require that a charter school will "not otherwise increase racial or socio-economic segregation or isolation in the schools from which the students are, or would be, drawn to attend the charter school." *Id*. at 14207

Relevant statistics show that few of the most successful existing charter schools could meet these requirements. Comparing enrollment in traditional and charter schools nationwide, we see two predominant traits. First, "in the large majority of states, the race/ethnicity student demographics of charter schools are almost identical to those of the surrounding school district." National Alliance for Public Charter Schools, *Details from the Dashboard: Charter School Race/Ethnicity Demographics* at 1 (May 21, 2012) https://www.publiccharters.org/publications/details-dashboard-charter-school-raceethnicity-demographics; *see also* National Alliance for Public Charter Schools, *Student Race/Ethnicity Demographics by State and School Type, 2019-20* (Feb. 9, 2022), https://data.publiccharters.org/digest/tables-and-figures/student-race-ethnicity-demographics-by-state-and-school-type-2019-20/. Occasionally, however, we see charter schools with higher enrollment for minority students than surrounding school districts (or vice-versa). *See Details from the Dashboard* at 4-9.

In either circumstance, however, these schools would violate the new requirements and priorities. For the vast majority of schools that simply reflect the community from which they draw students, they would be accused of violating the new rule's dictate that they "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 … [or] otherwise increase racial or socio-economic segregation or isolation in the schools from which the students are, or would be, drawn to attend the charter school." *See id*. at 14202. Look, for instance, at Detroit, where 86.7% of public school students were black, but 85.9% of charter school students were black. *Details from the Dashboard* at 2. While these numbers are obviously nearly identical, the charter schools could be said to violate the new priorities in two ways. First, both charter and public schools are racially "isolate[ed]," even though they reflect community demographics. Furthermore, by enrolling slightly fewer black students, the charter schools could be accused of hampering desegregation efforts in the public schools, because the public schools are more racially isolated than the charter schools. But then, if we look to somewhere like Gary, Indiana, where charter schools slightly over-enroll black students relative to public schools, they can certainly be accused of increasing racial segregation among their students. *See id*. In other words, in school districts where racial and ethnic minorities predominate among enrollment, there's nothing a charter school can do that won't result in racial isolation.

Indeed, the Department acknowledges this conundrum, yet dismisses it without

adequate explanation. The Department says that it recognizes "the student body of [a] charter school would be racially or socio-economically segregated or isolated due to community demographics" when "an applicant [] proposes to operate or manage a charter school in a racially or socioeconomically segregated or isolated community[.]" 87 Fed. Reg. at 14200-01. Yet it just notes that the charter school in that situation "would be eligible to *apply* for funding," even though an ultimate decision will still be based on the "community impact analysis," and whether "the proposed charter school would not increase racial or socio-economic segregation or isolation in those schools." *See id*. (emphasis added). The Department also says that "as autonomous public schools that create their operational, curricular, and policy procedures, charter schools are well positioned to draw on the knowledge and expertise of families and other stakeholders in the community to help shape school practices." *Id*. at 14201. This seems to suggest that unavoidable racial "isolation" will certainly count against charter schools, but that the Department thinks that charter schools are "well positioned" to manipulate enrollment to avoid that outcome. *See id*.

But what happens if charter schools took the Department's advice, and tried to alter their enrollment *against* existing racial and ethnic demographics to avoid racial isolation? They would be accused, not only of illegal discrimination, but of not maintaining "racially and socio-economically diverse student and staff populations." *See* 87 Fed. Reg. at 14201. Charter schools are supposed to "increas[e] academic achievement for all students," including "students from major racial and ethnic groups." *See* 20 U.S.C. § 7221d(b)(5); 20 U.S.C. § 6311(c)(2). The Department also has proposed that charter schools analyze the "proposed charter school's demographic projections and a comparison of such projections with the demographics of public schools and school districts from which students are, or will be, drawn to attend the charter school," and then prove that the schools will still "establish and maintain racially and socio-economically diverse student and staff populations," that is representative of its community. 87 Fed. Reg. at 14201. But charter schools can't do that for many school districts unless they also reflect the reality that many districts served by charter schools have predominate enrollment by minority students.

The Department's Catch-22 is no doubt intentional. By creating an impossible conflict concerning racial demographics, the Department can take whichever convenient excuse it wants to deny applicants grants. But that means that the grants won't increase the number of high-quality charter schools, which will deprive the children caught in the Department's trap of a high-quality education.

The Department has plainly set out a plan to reduce the number of charter school opportunities across the country, contrary to the wishes of Congress. This dooms the proposed priorities. Indeed, even if the statutory statement of purpose was somehow not

binding on the agency, it would certainly be arbitrary and capricious for the Secretary to issue rules that undermine the Act's stated intent. *See AT & T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 388 (1999) ("[T]he Act requires the FCC to apply some limiting standard, rationally related to the goals of the Act, which it has simply failed to do."); *D.C. v. United States Dep't of Agric.*, 496 F. Supp. 3d 213, 245 (D.D.C. 2020) (rule that "obstructs the purpose of [a] statutory provision" was arbitrary and capricious).

II. The Proposed Rule Raises Constitutional Concerns

A. The Proposed Rule Impermissibly Demands Racial Quotas

Under the Equal Protection Clause of the Fourteenth Amendment, schools "cannot impose a fixed quota or otherwise define diversity as some specified percentage of a particular group merely because of its race or ethnic origin." *Fisher v. University of Texas at Austin*, 136 S. Ct. 2198, 2208 (2016). They must not otherwise "'assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin,'" as such a practice "would amount to outright racial balancing, which is patently unconstitutional." *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003) (citation omitted). This follows from the "simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 730 (2007) (citation omitted). Quota systems are impermissible because they insulate some "category of applicants with certain desired qualifications from competition with all other applicants." *Grutter*, 539 U.S. at 334 (citation omitted).

Moreover, the government cannot condition an award, even a "gratuitous governmental benefit," on the "extortionate demand" that an applicant "cede a constitutional right in the face of coercive pressure." *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 607 (2013). Likewise, the government can't force an entity, like a school, to violate the constitutional rights of a third party. *See Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2001) (government use of its "coercive power" to order private conduct subject to constitutional scrutiny). Thus, when the government conditions contract awards on an applicant engaging in racial discrimination, it is subject to strict scrutiny under the Equal Protection clause. *See e.g.*, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237-38 (1995) (race-based presumptions in government contracting awards subject to strict scrutiny).

As discussed above, the Department seems insistent on creating a trap that punishes charter schools for either accurately reflecting the demographics of their community and therefore perpetuating racial isolation of minority students or attempting to overtly

reduce racial segregation or isolation among students and therefore failing to have adequate minority enrollment. If charter schools tried to navigate this impossible requirement, they no doubt would be forced to act race-consciously and at the Department's direction. Indeed, the only way to ensure a "specified percentage of a particular group merely because of its race or ethnic origin" in a school it to enact a "patently unconstitutionally" "racial balancing" approach and treat children not as individuals, equally deserving of opportunity, but solely on the basis of their racial group. *See Grutter*, 539 U.S. at 329. Even if the Department genuinely believed such precise balancing was a worthwhile goal, it would come at the cost of overt and unlawful discrimination against whatever racial group the Department views to be out of balance. The Department cannot insist, for instance, that charter schools in Detroit refuse to enroll additional black students in order to avoid allegations of not remedying racial segregation endemic in the school district at large. Yet that's exactly what the proposed priorities do.

B. The Proposed Rule Was Not Issued by a Properly Appointed Officer of the United States

"The President is responsible for the actions of the Executive Branch and cannot delegate that ultimate responsibility or the active obligation to supervise that goes with it." *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1978-79 (2021) (citation omitted). And while "no single person could fulfill that responsibility alone" and "thousands of officers wield executive power on behalf of the President in the name of the United States. That power acquires its legitimacy and accountability to the public through a clear and effective chain of command down from the President, on whom all the people vote." *Id*. at 1979 (citation omitted).

The Appointments Clause thus provides:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Art. II, § 2, cl. 2.

An "officer" who exercises "exercis[es] significant authority pursuant to the laws of the United States," must therefore be appointed, at least, by the "head of a department." *Arthrex*, 141 S.Ct. at 1980. Taking "final agency action constitutes significant authority

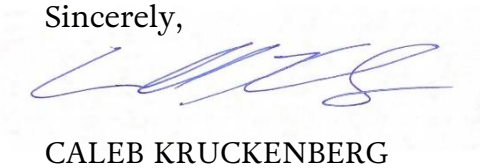
pursuant to the laws of the United States," which must be performed by a properly-appointed officer. *Ass'n of Am. Railroads v. U.S. Dep't of Transp.*, 821 F.3d 19, 37–38 (D.C. Cir. 2016) (citation omitted); *see also U.S. Dep't of Transp. v. Ass'n of Am. Railroads*, 575 U.S. 43, 64 (2015) (Alito, J., concurring) ("nothing final should appear in the Federal Register unless a Presidential appointee has at least signed off on it").

The proposed rule was not issued by an officer of the United States, and thus any final rule that might result would proceed from an invalid action. As a proposed final rule that sets out mandatory criteria for allocation of funding appropriated by Congress, whoever issued the rule was exercising significant authority on behalf of the Department. Only an "officer" of the United States could do so, and likely only a Presidentially-appointed one at that. *See Arthrex*, 141 S.Ct. at 1980. The proposed rule, however, was issued by a career civil servant who was not appointed by the President or even the Secretary of Education. *See* 87 Fed. Reg. at 14210. As the proposed rule was issued without appropriate oversight from the President, it is invalid. *See Arthrex*, 141 S.Ct. at 1980.

CONCLUSION

The Department's frontal attack on public charter schools is a disservice to underserved students across the country and a direct violation of the obligations imposed on the Department by Congress. If the Department believes that Congress is wrong about charter schools, it is free to make its voice heard and lobby for legislative changes. It may not simply disregard Congressional orders. The proposed rule should be rescinded.

Sincerely,



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