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August 23, 2017

The Honorable Betsy DeVos
Secretary of Education
Submitted via regulations.gov

RE: Request for Comment- Evaluation of Existing Regulations (Docket ID: ED-2017-OS-0074)

Dear Secretary DeVos,

On behalf of the National Association of Charter School Authorizers (NACSA) I am writing to provide comments to assist in the Department of Education's efforts to evaluate existing regulations in accordance with Executive Order 13777.

At NACSA, we believe that every child deserves the opportunity to attend an excellent school, and that high-quality charter schools can help achieve that ideal. We work to improve public education by strengthening charter authorizing policies and practices.

The charter school model is built on the premise that strong student outcomes are possible when schools are granted increased autonomy over a range of operational and programmatic areas and, in exchange, are subject to strong accountability. It is an authorizer's responsibility to uphold this charter bargain.

In response to this Request for Comment, NACSA reviewed federal regulations and guidance documents to identify policy areas that would benefit from re-examination. As you know, charter schools, just like all public schools, are subject to federal laws, regulations, and Department guidance. The majority of laws and regulations apply to charter schools in exactly the same way as traditional public schools, while some regulations may apply slightly differently. A handful apply only to charter schools that receive federal Charter School Program grant funds. With this in mind we focused our review on regulations and guidance that: (1) apply only to charter schools; (2) have an outsized impact on charter schools; and/or (3) affect the ability of charter school authorizers to perform necessary oversight functions.

The resulting comments, detailed on the following pages, are categorized by authorizing program and include recommendations and our rationale for review. In some cases, we are encouraging the Department to retain regulations or guidance that help authorizers perform necessary oversight functions or protect charter schools from state or district overreach. *We also plan to submit additional detailed comments pertaining to the non-regulatory guidance governing the Charter School Program in a separate letter.*

Thank you for your consideration. We look forward to continuing our work with the Department of Education and Congress to advance our shared goals. Please feel free to contact Amanda Fenton at amandaf@qualitycharters.org with any questions.

Regards,

Greg Richmond
President & CEO

Regulations and Guidance applying to the Charter Schools Program

Help Legacy Grantees Make Use of New Program Flexibilities

Relevant Citations:

- NCLB Sec. 5202(d)(1)
- NCLB Sec. 5204(f)(3)
- NCLB Sec. 5204(f)(4)
- Charter Schools Program, Title V, Part B of the ESEA Nonregulatory Guidance (issued January, 2014)

Description:

The Charter School Program State Educational Agencies grant (CSP SEA) was eliminated and re-imagined as the Expanding Opportunity Through Quality Charter Schools State Entity (State Entity) grant program through the Every Student Succeeds Act (ESSA). As a result, the CSP SEA grants exist only as a “legacy” grant program, administering funds to SEAs awarded grants in FY16 or earlier according to previous CSP SEA grant regulations and guidance. This cohort of legacy grantees includes more than a dozen states that combined have charter sectors that serve more than two thirds of all charter school students in the country. The impacted states have a long history of success growing high quality charter schools, with ten of the impacted states recipients of back-to-back CSP grants for over eleven year.

When Congress re-imagined the CSP SEA program as the State Entity grant program through ESSA it significantly improved many of the laws governing the program by increasing flexibility for state grantees and for individual charter schools across several program areas. Under the new program states have much more flexibility to expend funds to grow innovative, successful charter schools and to engage in activities that improve the performance of all charter schools across the state.

Unfortunately, under current Department policy, legacy grantees under the old program enjoy few of these benefits. Instead they are faced with a quixotic choice: go through the burdensome and unpromising task of petitioning the Department for multiple individual program waivers to pursue activities that are already allowed for new grantees; or submit a separate application for a new grant under the State Entity program and be required to administer two separate charter school start-up grant programs—with two sets of state bureaucracies, federal reporting requirements, and federal rules—simultaneously. Neither option is in the best interests of the Department, states, or the charter sector.

It is in the best interest of all parties to find a third alternative that makes it possible for states with legacy grants to pursue grant activities that are allowed under the ESSA-authorized State Entity grant program. This helps current grantees use new flexibilities and helps facilitate a smooth programmatic transition for the many existing grantees that will likely be awarded future grants under the State Entity program.

We recommend the Department either (1) grant existing legacy grantees waivers to pursue grant activities that are allowed under the ESSA-authorized Charter School Program State Entity grant program, or (2) create an expedited process to review and approve waiver requests of legacy SEA grantees.

The following statutes, regulations, and guidance would be the relevant subjects of the waiver requests.

NCLB-era statute:

The Secretary has the authority to waive these statutes in accordance with NCLB Sec. 5204(e) and ESSA Secs. 4(a)(2) and 4(b). If waivers cannot be universally granted we strongly encourage the Department to redouble its efforts to expedite the review of waiver requests by these legacy CSP grantees.

- **Grant states more flexibility to award subgrants to successful charter schools pursuing replication and significant expansion.** Waive NCLB Sec. 5202(d)(1), which in practice prevents states from awarding grants for many forms of successful replication and expansion that CSP statute is meant to encourage. Allow charter schools to receive an additional subgrant, which is consistent with ESSA Sec. 4303(e)(2).
- **Give charter schools more flexibility to expend subgrant funds on impactful projects.** Waive NCLB Sec. 5204(f)(3), and modify the associated guidance in Section D of *Charter Schools Program, Title V, Part B of the ESEA Nonregulatory Guidance*, and allow schools to use funds for activities consistent with ESSA Sec. 4303(h).
- **Grant states more flexibility to use administrative funds for statewide improvement initiatives.** Waive NCLB Sec. 5204(f)(4) and allow states to use funds for statewide activities that improve the quality of *all* charter schools in the state consistent with ESSA Sec. 4303(c)(1).

NCLB-era Guidance:

Charter Schools Program, Title V, Part B of the ESEA Nonregulatory Guidance (issued January, 2014) contains nonregulatory guidance that applies to the legacy SEA Charter School Program grantees. Ultimately, we understand that the entire document will need to be closely examined, revised, and reissued under the new authority of the State Entity program. In the meantime, one provision should be revised or waived immediately to provide grantees with the flexibility Congress intended.

- **Modify guidance on allowable admissions procedures to reflect new ESSA law.** ESSA statute specifies the circumstances under which a charter school receiving a CSP sub-grant may choose to use something other than a strict open lottery—such as a weighted lottery or priority for students matriculating from an affiliated school—in its admissions process. NCLB statute was not as clear and, to address this uncertainty, the Department issued non-regulatory guidance on the subject in 2014. That guidance is much more restrictive than ESSA and limits many schools’ ability to use admissions processes that are compliant with federal law and otherwise allowed in their state. The current NCLB-era guidance concerning lotteries and admissions, (contained in Sections C-2 and E) should be revisited and the new statute-based standard contained in ESSA Secs. 4303(c)(3)(A), 4310(2)(g), and 4310(2)(h) should be applied to legacy grantees.

Regulations and Guidance within Title I Impacting Charter Schools

Protect Charters from Overreach by Guarding State Charter School Law

Relevant Citations:

- ESSA 1111(c)(5) [USC Title 20 6311 (c)(5)]
- Repealed regulations 200.12(c)(2) and 200.21(d)(3)
- NCLB Guidance
 - ESEA Flexibility FAQs, issued August 3, 2012, Questions A-10a through A-10d
 - The Impact of the New Title I Requirements on Charter Schools, issued July 2004, Questions A-2 and A-11

Description:

ESSA Title I statute 1111(c)(5) includes an important provision that ensures states and authorizers can continue to use state charter school law to hold charter schools accountable for their actions. This language, which was also included in NCLB, protects the charter bargain of autonomy and accountability that is at the core of every charter agreement.

Faced with confusion and inconsistent implementation at the state level, during the NCLB and NCLB-waiver eras, authorizers and charter schools requested that the Department of Education—under both Presidents Bush and Obama—issue additional non-regulatory guidance to reinforce the law’s intent and ensure that Title I driven school improvement efforts would not impede charter-based accountability. Both Departments did so and, at the request of charter schools and authorizers, the Department of Education included similar language in the final Title I accountability regulations issued in November 2016.

The package of Title I accountability regulations was subsequently repealed in March 2017. In the process, the regulations that give primacy to state law in matters of charter accountability were also repealed.

We strongly encourage the Department of Education to pursue regulations or issue non-regulatory guidance that protects charter school accountability from state or school district overreach. State systems for Title I accountability must *complement and make use of* authorizer-led accountability in state charter school law, as ESSA intends. We appreciate that the Department referenced the underlying Title I statute 1111(c)(5) in its revised consolidated state plan template, but we do not believe that reference alone is enough to protect authorizers and charter schools from state or school district overreach.

Guidance can be based on the language that was in the Title I accountability regulations (200.12(c)(2) and 200.21(d)(3)) which combined make it clear that:

- (1) Charter schools are still subject to accountability per state charter school laws;
- (2) A decision by an authorizer to revoke or non-renew a charter school supersedes any notification from the State that such a school must implement an improvement plan; and
- (3) When appropriate, accountability actions driven by state Title I accountability policies should be done in coordination with a charter school’s authorizer.

Such language still represents significantly streamlined direction compared to guidance issued on charter school accountability under NCLB and under NCLB-waivers

We also encourage the Department to raise awareness of the ESSA transition’s potential to impact the work of charter school authorizers. Charter school authorizers often rely on the information provided by state assessment and accountability systems when they are performing oversight functions and enforcing contractual accountability. As states modify these foundational systems, states, charter schools, and authorizers may need to explore a range of state policy or practice changes in the near and long term to keep charter autonomy and accountability functioning smoothly through the transition period. **Authorizers and states can also use this opportunity to examine their reporting requirements and find ways to smartly streamline, consolidate, and coordinate these requirements, thus reducing the reporting burden on individual charter schools.**

At NACSA we are working with authorizers to help them assess the transition’s impact and proactively prepare for the change. The Department can join in this effort by disseminating NACSA’s work and promoting best practices in transition planning to charter schools and authorizers across the country.

Other Regulations and Guidance Impacting Charter Schools

Federal Guidance Helps Authorizers Protect the Rights of Students with Disabilities

Relevant Citations:

- US Department of Education, Office of Special Education and Rehabilitative Services, FAQs about the Rights of Students with Disabilities in Public Charter Schools under the Individuals with Disabilities Education Act (December 28, 2016)
- US Department of Education, Office of Special Education and Rehabilitative Services, FAQs about the Rights of Students with Disabilities in Public Charter Schools under Section 504 of the Rehabilitation Act of 1973 (December 28, 2016)

Description:

Just as in traditional public schools, charter schools have the legal and moral responsibility to provide an excellent education to students with disabilities. However, the legal structure of charter schools varies considerably from state to state—and, at times, from school to school—when it comes to who provides these services and how that responsibility is overseen. The US Department of Education issued several guidance documents in late 2016 to help states, authorizers, and charter schools understand and fulfill their responsibilities.

The guidance documents address the important role authorizers play in ensuring the charter schools they approve and oversee: (1) have the expertise and capacity to fulfill their special education responsibilities; and (2) are providing appropriate services to all students. The documents also elude to some of the complexity surrounding this work. While state charter law nearly always, to some degree, charges authorizers with ensuring special education compliance, it does not always give authorizers the corresponding legal capabilities to investigate or remedy special education complaints. As a result authorizers in some states are more likely to turn to federal guidance and investigatory actions to help them fulfill their responsibilities to appropriately oversee special education.

We encourage the Department to retain the FAQs and guidance documents on IDEA and Section 504 issued in December 2016. We also encourage the Department to continue its leadership in the area of civil rights investigation and enforcement. Such activities are important safeguards for vulnerable students and help authorizers fulfill their responsibilities amidst ambiguous state laws.