the
CENTER FOR EDUCATION REFORM
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August 1, 2016

Ms. Meredith Miller
U.S. Department of Education
400 Maryland Avenue, SW
Room 3C106
Washington, DC 20202-2800

RE: *Comments regarding Notice of Proposed Rulemaking on Elementary and Secondary Education Act of 1965, As Amended by the Every Student Succeeds Act –Accountability and State Plans*

Dear Ms. Miller:

On behalf of the Center for Education Reform (CER), an organization dedicated to expanding educational opportunities that lead to improved economic outcomes for all Americans and representing over 5 million charter school advocates in all states, I am writing in response to the Department of Education's May 31, 2016, Notice of Proposed Rulemaking (NRPM) related to accountability and state plans under the Elementary and Secondary Education Act (ESEA), as amended by the Every Student Succeeds Act (ESSA).

The role of the federal government in fostering the development of public charter schools dates back to 1997 with the establishment of the Public Charter Grant Program under then President Bill Clinton. Bi-partisan efforts by House Republican Frank Riggs Senate Democrat Joe Lieberman accomplished unprecedented support for this early and controversial reform from their respective chambers. The Center for Education Reform was present at that original envisioning of federal support for charter schooling.

That original vision was focused on incentivizing states to adopt charter laws that had three essential elements that were then – as now – most likely to yield high quality charter schools for a diverse pool of students. Priority for state charter funding was given to states that provided for multiple charter authorizers, had very high or no caps on the number of schools that could be open, and ensured that once opened, charter schools would have a high degree of operational flexibility. The program was simple and consequently it gave life to the strongest charter schools, most of which are still in operation. It also encouraged and expanded strong charter laws, which was the purpose of the program to start.

Unfortunately, that is no longer the case today as the Department has prescribed numerous rules over the years on charter schools that are not explicitly demanded by law, such as issuing guidance about how they govern themselves, abide state and local laws and manage contracts. The NPRM about which I write is the latest attempt by the federal government to impose a view of education process on charter schools that was not only never intended by states but not the purview of the federal government. Before I turn to the issue of the specific sections of the NPRM that are problematic for charter schools, it is important to provide context.

The original intent of the Public Charter Grant Program was both to provide start-up funds for under-resourced, new public charter schools and by their inclusion in that one limited area, to ensure the federal government respected these schools as part of the then-new fabric of public education, governed by state, and not federal law.

Congressional leaders in their negotiations that lead to ESSA made clear their intent in meetings and in writings. We engaged with them in a very clear and well-documented debate about whether and how the proposed language might serve to interfere with sovereign state policy created by each state's charter school law. It was agreed by both Majority and Minority staff members that the intent of the new language was not to impose any additional requirements on charter schools or charter school authorizers but to help ensure that continued federal support would require demonstration that the state or the various agencies assigned by state law to make policy governing charter schools were working to hold such entities accountable.

The original language proposed in the pre-conference version approved by the Senate of the Every Student Succeeds Act was:

> (B) a description of how the State or other appropriate entity will actively monitor and hold authorized public chartering agencies accountable to ensure high-quality authorizing activity, including by establishing authorizing standards and by approving, reapproving, and revoking the authority of an authorized public chartering agency based on the performance of the charter schools authorized by such agency in the areas of student achievement, student safety, financial and operational management, and compliance with all applicable statutes

To ensure that no additional requirements that supersede federal law were imposed, we recommended that language be changed to (underlined language ours):

> (B) a description of how the State will ~~actively~~ monitor and hold authorized public chartering agencies accountable to ensure high-quality authorizing activity, ~~including~~ <u>such as</u> by establishing authorizing standards and by approving, reapproving, and revoking the authority of an authorized public chartering agency based on the performance of the charter schools authorized by such agency in the areas of student achievement, student safety, financial and operational management, and compliance with all applicable statutes; <u>however, nothing in this subparagraph shall be construed to alter State law, policies, or procedures regarding the entity responsible for monitoring and holding accountable authorized public chartering agencies, including the entity that</u>

> establishes authorizing standards and approves, reapproves, and revokes the authority of an authorized public chartering agency.

While we were assured both parties agreed on this, in the end, there was a compromise and the final language was (Section 4303 ESSA):

> (xii)(I) in the case of a State entity not described in subclause (II), a description of how the State entity *will provide oversight* of authorizing activity, including how the State will help ensure *better* authorizing, such as by establishing authorizing standards that may include approving, monitoring, and re-approving or revoking the authority of an authorized public chartering agency based on the performance of the charter schools authorized by such agency in the areas of student achievement, student safety, financial and operational management, and compliance with all applicable statutes and regulations;

Sadly, while the final language was only slightly better than the original and not as clear as what we recommended, the record of the committee's the intent is clear – the state is to describe their processes, not be mandated by the federal government to conduct additional oversight activities. This working practice and intent of the law – and the delicate balance between fiduciary oversight and micromanagement – was top of mind by Congressional negotiators. Such respect should carry out throughout all of ESSA. Thus it was a shock to see the US Department of Education in the NPRM not only ignore the intent of Congress to respect state autonomy over charter schools, but to add additional requirements of states over charter authorizers and schools, that is not only not justified but any federal constitutional authority but conflicts with state laws governing education.

In the following section of the rulemaking, charter school authorizers are treated as Local Education Agencies (LEAs), which they are not in any state, save for one, the South Carolina Charter School District. Indeed, treating authorizers as LEAs goes counter to the "in accordance with state charter school law" requirement that is repeated throughout ESSA. This is the most egregious of the proposed rulemaking (§ 200.23(c)(1)):

> The proposed regulations also would permit a State to take certain additional improvement actions consistent with section 1111(d)(3)(B) of the ESEA, as amended by the ESSA. **Proposed § 200.23(c)(1) would permit a State to take additional improvement actions in (1) any LEA, or authorized public chartering agency consistent with State charter school law,** serving a significant number of schools identified for comprehensive support and improvement and not meeting State-established exit criteria, **or (2) any LEA, or authorized public chartering agency consistent with State charter school law, serving a significant number of schools implementing targeted support and improvement plans**. Such actions could include, for each school that does not meet State-established exit criteria following implementation of a comprehensive support and improvement plan, reorganizing the school to implement a new instructional model; replacing school leadership; converting the school to a **public charter school; changing school governance; closing the school; or, in**

the case of a public charter school, revoking or non-renewing the school's charter consistent with State charter school law.

Indeed, there are no provisions regarding charter schools or charter school authorizing anywhere else in ESSA, which is why the inclusion of charter schools and mis-characterization of authorizers as LEAs is a major overreach of federal power not only not intended in law but entirely in conflict with all state laws and practice.

We agree with the Foundation for Excellence in Education in their comments that, "This language presumes that state authorizing agencies are subject to federal school improvement requirements, which is not the case unless an agency is also an LEA. "

For example, in some states, authorizers such as state universities do not report to any department or state agency. They are accountable to their own boards of trustees and for state and federal laws governing their work, in the same way that a public university president does not report to their state's chief state school officer. We were concerned that such reality would be ignored in negotiations of rules and in fact, in in a meeting with US Department of Education regulators in the early summer of 2015, urged caution to ensure that proposed rules respect state authority. Instead of doing so, the regulators have added oversight where none previously existed – in Title 1 – impose additional oversight not only in the Public Charter School Grant Program but in section 1111(d)(3)(B) of the ESEA, as amended by the ESSA.

It is clear that the intent of Congress when they wrote ESSA was to grant expanded flexibility to states in their oversight and management of K-12 education. No new requirements should restrict a state's right to operate for or over charter schools, which were never envisioned by the federal Elementary and Secondary Education Act of 1965 or subsequent amendments, until the No Child Left Behind Act of 2001. In that, it was only to recognize charter schools as public schools and to further support the Public Charter School Grant Program.

The beauty of charter schools and what makes them frequently more effective than traditional public schools is their ability to be flexible and innovative. Complicated funding formulas and well-intentioned efforts to define quality at the federal level only serve to stifle innovation and make charter schools abide the same process- driven requirements as traditional public schools which have been begging for flexibility from process driven outcomes themselves. Indeed, this is at the heart of ESSA. As the national Business Roundtable argues in their comment the "regulations exacerbate an underlying issue in the law, which could result in states developing overly-complex systems of accountability, especially in the identification of schools for further assistance. In developing a final rule, we urge you to take into account the relative benefits of each additional requirement in the context of the complexity such requirements may add to the system."

The complexity of charter school laws and their differences state to state are vast. Demanding that states prove and account to the federal government for "quality" authorizing imposes new legal oversight on charter authorizers that often do not exist, and asks state education departments to micro-manage their work, and the work of schools, from Washington, to the local level. This cannot stand.

The federal government must not demand additional policy requirements on state charter school policy as it does in the NPRM, eg, "**Proposed § 200.23(c)(1) would permit a State to take additional improvement actions in (1) any LEA, or authorized public chartering agency consistent with State charter school law." The modifier "**consistent with state law" is not a sufficient modifier in that it imposes and expectation that states whose agencies are hostile or ill-informed about charter school policy will seek to impose using the first pre-coma clause of that and the subsequent sections of **§ 200.23(c).** The federal government can indeed ask for a description of what exists in law to provide for oversight of charter schools and charter school policy, though I'd argue that this too is an overreach, though it is clear in law. However, the requiring additional state action, consistent or not with state law, was not in the actual legislation and is a **very serious infringement of department rule making authority.**

We urge you strongly reconsider and abandon your approach to over-regulating our nation's charter schools and respect the intent of Congress with regards to charter schools. Your actions unchanged would manipulate statutory language to regulate charter schools, stifle school choice and hinder upward mobility for millions of students.

The success of the early federal role in charter schools that was adopted in the Clinton-era incentivized states to create healthy and strong charter school environments in ways that suited their own states' needs. The US Department of Education cannot and should not dictate or make further judgments, above the law, on which charter schools, authorizers and states should earn federal funds, other than to ensure that the states applying for funds have the basic fiduciary requirements of federal grant recipients in place consistent with the letter and the intent of the law.

Thank you for your consideration.

Jeanne Allen