April 18, 2022

SUBMITTED VIA FEDERAL eRULEMAKING PORTAL
(www.regulations.gov)

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

Re: Comment on the Department's 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)

Agency/Docket Number: ED-2022-OESE-0006
Document Number: 2022-05463

Dear Secretary Cardona:

The Defense of Freedom Institute for Policy Studies ("DFI") is a national nonprofit organization dedicated to defending and advancing freedom and opportunity for every American family, student, entrepreneur, and worker and to protecting the civil and constitutional rights of Americans at school and work. DFI envisions a republic where freedom, opportunity, creativity, and innovation flourish in our schools and workplaces.

On March 14, 2022, the U.S. Department of Education's ("ED" or "Department") Office of Elementary and Secondary Education ("OESE") published a notice concerning proposed priorities, requirements, definitions, and grant selection criteria relating to the award of federal grants to applicants in its Charter School Program ("CSP").[1] Congress first authorized the CSP in 1994,[2] and it most recently reauthorized the program in 2015.[3] In the CSP's long history, the

[1] *See* https://www.federalregister.gov/documents/2022/03/14/2022-05463/proposed-priorities-requirements-definitions-and-selection-criteria-expanding-opportunity-through.
[2] Title X, Part C of the Elementary and Secondary Education Act of 1965 (ESEA), as amended, 20 U.S.C. § 8061 *et seq*. (1994).
[3] Every Student Succeeds Act, 20 U.S.C. § 6301 *et seq*. (2015).

proposed rule marks the first time that ED has attempted to substitute its own policy preferences toward charter schools in defiance of statutory limitations imposed by Congress.

ED proposes a rule that would, contrary to statute:

- Discourage CSP grant applications,[4]
- Require charter schools to secure sponsorship by a traditional public school,
- Require charter schools to conduct "community impact" analyses that would undermine the ability of disadvantaged students to choose charter schools,
- Institute grant selection criteria designed to favor awards to less innovative charter schools, and
- Severely diminish the role of States in the control and administration of their own charter school programs. The proposed rule would not only place undue burdens on State education agencies ("SEAs"), other State entities, and CSP subgrantees, but it would also effectively compel grant administrators to carry out the proposed ED policies, rather than faithfully executing applicable state laws.

The proposed rule runs counter to the intentions and letter of the CSP statute, and each of the proposed requirements defies Congress's statutory requirements for ED's administration of the CSP. The proposed rule constitutes impermissible rulemaking because the CSP statute is unambiguous and leaves no room for the policy preferences proposed by the Department. In addition, the proposed rule fails to realistically explain the likely burdens it would place on States and CSP subgrantees (charter schools).

Legislative and Political Context of the Proposed Rule

ED's proposed rule was published just days after bipartisan Congressional passage of the Fiscal Year ("FY") 2022 Omnibus Appropriations Bill.[5] That bill provided level funding of $440 million for the Charter School Program, to the relief of the charter-school community. Congress had once again reiterated its concrete support for the program, perhaps recognizing a 7% increase in charter school enrollment nationwide during the 2020-2021 school year.[6] The timing of the proposed rule

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[4] Editorial Board, "Opinion: The Biden administration's sneak attack on charter schools," THE WASHINGTON POST (April 2, 2022), https://www.washingtonpost.com/opinions/2022/04/02/biden-administrations-sneak-attack-charter-schools/.

[5] Tony Romm, "Senate passes bill to avert shutdown, extend $14 billion in Ukraine aid," THE WASHINGTON POST (March 10, 2022), https://www.washingtonpost.com/us-policy/2022/03/10/senate-vote-funding-ukraine-russia/.

[6] Debbie Veney and Drew Jacobs, "Voting With Their Feet: A State-Level Analysis of Public Charter School and District Public School Trends," NATIONAL ALLIANCE FOR PUBLIC CHARTER SCHOOLS (September 2021), https://www.publiccharters.org/sites/default/files/documents/2021-09/napcs_voting_feet_rd6.pdf.

suggests an intentional effort to preclude Congress from using the appropriations bill to thwart ED's attempt to rewrite the CSP law through its regulations.

The proposed rule reflects growing hostility to charter schools by the labor unions representing teachers, "which hold significant sway in the [Democratic] party, [and] are among the [charter school] movement's fiercest critics."[7] For most of the history of charter schools, the teacher unions largely tolerated their growth, even as enrollment in these autonomous, often non-union schools tripled between 2005 and 2017. Families were pleased with how charter schools served their children, with the "biggest gains [in student performance documented] for African Americans and for students of low socioeconomic status."[8] Other studies revealed that charter schools "benefit disadvantaged students who attend them as well as the students who don't" and "substantial gains in academic achievement, especially for lower-income and minority students, amounting to weeks, or even months, of additional classroom learning each year."[9]

By the National Education Association's 2017 annual conference, union leadership had determined they needed to push back on the growing charter-school sector.[10] The NEA's formal policy statement that year dubbed charter schools a "failed and damaging experiment" and called for the closure of "unaccountable" charter schools.[11] The union's latest policy statement echoes earlier ones and could have served as the blueprint for the Biden's Administration's proposed rule.[12]

In some ways, the proposed CSP rule merely codifies President Biden's electoral campaign promises. As a U.S. Senator and as Vice President to charter-school supporter President Barack Obama, Joe Biden had carved out a moderate position on charter schools. During the 2020 campaign, he slinked away from his mild public support for charter schools. The Biden-Sanders

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[7] Laura Meckler, "Biden administration proposes tougher rules for charter school grants," THE WASHINGTON POST (March 21, 2022), https://www.washingtonpost.com/education/2022/03/21/biden-charter-schools-funding/.
[8] M. Danish Shakeel and Paul E. Peterson, "Charter Schools Show Steeper Upward Trend in Student Achievement than District Schools: First nationwide study of trends shows large gains for African Americans at charters," EDUCATION NEXT (Winter 2021), https://www.educationnext.org/charter-schools-show-steeper-upward-trend-student-achievement-first-nationwide-study/.
[9] Max Eden, "Issues 2020: Charter Schools Boost Results for Disadvantaged Students and Everyone Else," MANHATTAN INSTITUTE (January 28, 2020), https://www.manhattan-institute.org/issues-2020-charter-schools-benefits-for-low-income-minority-students.
[10] Stephen Sawchuk, "NEA's New Vision for Charters Looks a Lot Like Traditional Public Schools," EDUCATION WEEK, July 4, 2017, https://www.edweek.org/teaching-learning/neas-new-vision-for-charters-looks-a-lot-like-traditional-public-schools/2017/07.
[11] Tim Walker, NEATODAY (July 15, 2017), https://www.nea.org/advocating-for-change/new-from-nea/failed-and-damaging-experiment-nea-takes-unaccountable-charter.
[12] NEA Policy Statements, 2021-2022. *See* https://www.nea.org/about-nea/governance-policies/nea-policy-statements.

Unity Task Force of 2020 recommendations, and later the Democratic Party's Platform, called for "conditioning federal funding for new, expanded charter schools or for charter school renewals on a district's review of whether the charter will systematically underserve the neediest students." The candidate himself made confusing statements causing some to conclude (incorrectly) that he planned to abolish all charter schools.[13] Partly based on Biden's new-found critical opinions about charter schools, the NEA and AFT endorsed him and threw its unparalleled campaign infrastructure behind his election.[14]

Elections may have consequences, but campaign promises and union policy statements cannot displace duly enacted federal law. Congress enacted the CSP provisions in 2015 with unambiguous instructions to the Department on how to administer the statute. ED does not have the authority to twist or add to those provisions to suit its own purposes in the face of the CSP's clear, unambiguous statutory framework. If it wants to amend the law, it must request Congress to do so. Without substantial modifications that honor the statute, the Department's back-door effort to rewrite the CSP law is unlikely to withstand a court challenge.

The politics of the situation also may help explain why ED has allowed an abbreviated, 30-day comment period[15] on its radical changes to the CSP, as well as lack of outreach to the charter school community. Regardless of ED's reasons, it is clear that it ignored 20 U.S. Code § 7221f, which reads:

> "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 this subpart…"

If any such individuals were consulted, the Department has not announced it publicly.

Statutory Background of the Charter School Program

In 1994, the CSP was first authorized under Title X, Part C, of the Elementary and Secondary Education Act ("ESEA").[16] Congress directed ED to provide grants to SEAs to support the planning, design, and creation of charter schools, as well as to qualified applicants in States where the SEAs do not apply for CSP grants. In prioritizing grant awards to SEAs, Congress required ED

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[13] Valerie Strauss, Answer Sheet, THE WASHINGTON POST, August 28, 2020, https://www.washingtonpost.com/education/2020/08/28/trump-said-his-white-house-speech-that-biden-vowed-close-all-charter-schools-no-he-didnt/.

[14] Madeline Will, EDUCATION WEEK, March 23, 2020, https://www.edweek.org/policy-politics/endorsements-still-touchy-for-teachers-unions-in-presidential-election-season/2020/03.

[15] On April 11, 2022, ED issued a "Comment Extension Notice," adding five days to the original comment period. *See* https://www.regulations.gov/document/ED-2022-OESE-0006-10261.

[16] Improving America's Schools Act (IASA; P.L. 103-382).

to consider, *inter alia*, how the SEA's program will ensure that each charter school has a "high degree of autonomy."[17]

As reauthorized in 2015, the CSP requires SEAs or other State entities to use the federal grants to award competitive grants to charter school applicants (subgrantees). Congress's extensive definition of charter schools makes clear that it intended CSP grants to be made to schools that are public but operate independently of traditional public schools. It provided a clear definition of the kind of public schools it wanted to encourage and which CSP grant applicants could qualify as "charter school[s]"[18]:

> The term "charter school" means a public school that—
>
> (A) In accordance with a specific State statute authorizing the granting of charters to schools, *is exempt from significant State or local rules that inhibit the flexible operation and management of public schools*, but not from any rules relating to the other requirements of this paragraph;
>
> (B) Is created by a developer as a public school, or is adapted by a developer from an existing public school, and is operated under public supervision and direction;
>
> (C) *Operates in pursuit of a specific set of educational objectives determined by the school's developer and agreed to by the authorized public chartering agency*;
>
> (D) Provides a program of elementary or secondary education, or both;
>
> (E) Is nonsectarian in its programs, admissions policies, employment practices, and all other operations, and is not affiliated with a sectarian school or religious institution;
>
> (F) Does not charge tuition;
>
> (G) Complies with the Age Discrimination Act of 1975 [42 U.S.C. 6101 et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], title IX of the Education Amendments of 1972 [20 U.S.C. 1681 et seq.], section 504 of the Rehabilitation Act of 1973 [29 U.S.C. 794], the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.), section 1232g of this title (commonly referred to as the "Family Educational Rights and Privacy Act of 1974"), and part B of the Individuals with Disabilities Education Act [20 U.S.C. 1411 et seq.];

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[17] 20 U.S.C. § 7221b(f)(2).
[18] 20 U.S.C. § 7221i (emphasis added).

(H) *Is a school to which parents choose to send their children*, and that –

(i) Admits students on the basis of a lottery, consistent with section 7221b(C)(3)(A) of this title, if more students apply for admission than can be accommodated; or

(ii) In the case of a school that has an affiliated charter school (such as a school that is part of the same network of schools), automatically enrolls students who are enrolled in the immediate prior grade level of the affiliated charter school and, for any additional student openings or student openings, created through regular attrition in student enrollment in the affiliated charter school and the enrolling school, admits students on the basis of a lottery as described in clause (i);

(I) Agrees to comply with the same Federal and State audit requirements as do other elementary schools and secondary schools in the State, unless such State audit requirements are waived by the State;

(J) Meets all applicable Federal, State, and local health and safety requirements;

(K) Operates in accordance with State law;

(L) Has a written performance contract with the authorized public chartering agency in the State that includes a description of how student performance will be measured in charter schools pursuant to State assessments that tare required of other schools and pursuant to any other assessments mutually agreeable to the authorized public chartering agency and the charter school; and

(M) May serve students in early childhood education programs or postsecondary students.

In defining charter schools in this way, Congress provided absolute clarity that CSP grants were intended to support innovation, flexibility, and parental choice in results-oriented schools. Charter school subgrantees were intended to operate independently of the inflexible rules that apply to the operation and management of (traditional) public schools. ED's guidance and rulemaking regarding the CSP have consistently supported Congress's CSP definitions and intentions, until now. The Department's proposed rule has effectively rejected Congress's directives and adopted its own definition of a charter school. Congress has the authority to determine the statutory meaning and it did so; ED does not.

Statutory Purpose of the Charter School Program

ED's proposed rule, if implemented, would undermine the CSP's unambiguous statutory purposes. The "Expanding Opportunity Through Quality Charter Schools" section of ESSA[19] makes clear that Congress wanted the CSP to support innovation and flexibility in public schools, increase the number of high-quality charter schools, and expand opportunities for underserved students to attend charter schools—understanding that charter schools would create public-school options and healthy competition for traditional public schools.[20] While Congress agreed to expand charter schools to support innovation, choice, and competition among public schools, ED proposes to use the CSP to discourage innovation, depress parent choice, and undermine competition, presumably to protect heavily unionized, public education bureaucracies. It turns the CSP on its head, into the opposite of what was intended.

Congress mandated that State entity recipients of CSP grants provide assurances that they will "support the opening of charter schools through the start-up of new charter schools and, if applicable, the replication of high-quality charter schools, and the expansion of high-quality charter schools."[21] In addition, Congress required State entities to "work with eligible applicants" to ensure "access [to] all Federal funds that such applicants are eligible to receive, and help the charter schools supported by the applicants and the students attending those charter schools."[22] The law requires State charter school programs to "encourage collaboration between charter schools and local educational agencies on the sharing of best practices"[23] and that the State provide assurances to ED that "each charter school receiving funds through the State entity's program will have a high degree of autonomy over budget and operations, including autonomy over personnel decisions."[24]

Indicating the degree to which Congress directed ED to support rather than control State entities in supporting the growth of charter schools, it required that "State entit[ies] will work to ensure that charter schools are included with the traditional public schools in decisionmaking *about the public school system* in the State."[25]

Reacting to the lack of improvement of traditional public schools, Congress mandated that charter school operators be included in decision-making about traditional public schools. By design, Congress's actions insulated charter schools from control by traditional public schools and, instead, required traditional public schools to receive the input of charter schools. (The proposed

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[19] Title IV, Part C of the Elementary and Secondary Education Act of 1965 (ESEA), as amended by the Every Student Succeeds Act of 2015 (ESSA) (20 U.S.C. § 7221-7221j).
[20] 20 U.S.C. § 7221.
[21] 20 U.S.C. § 7221b(f)(1)(A)(i).
[22] 20 U.S.C. § 7221b(f)(1)(A)(iii).
[23] 20 U.S.C. § 7221b(f)(1)(B)(iii).
[24] 20 U.S.C. § 7221b(f)(2)(A).
[25] 20 U.S.C. § 7221b(f)(2)(F) (emphasis added).

rule requires the opposite, even to the extreme of requiring the sponsorship of a public school, discussed *infra*.)

In fact, Congress explicitly identified the selection criteria ED "shall" consider when awarding charter school grants to State entities, which include:

> (A) 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;
>
> (B) the *ambitiousness of the State entity's objectives for the quality charter school* program carried out under this section;
>
> (C) the likelihood that the eligible applicants receiving subgrants under the program will meet those objectives and improve educational results for students[.][26]

Congress also required that, prior to the award of charter school grants, ED consider a 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."[27] It did not require or suggest input from traditional public schools or school districts.

Under the statute, priorities for CSP grants were to favor State entities that use "best practices from charter schools to help improve struggling schools and local educational agencies" and where "at-risk students [are served] through activities such as dropout prevention, dropout recovery, or comprehensive career counseling services."[28] Congress's clear purpose and directives to ED were to empower innovative and flexible charter schools in the hope that new models would lead to improved charter student outcomes and provide constructive lessons for traditional public schools. A plain reading of the CSP statute(s) reveals that Congress did *not* intend to promote traditional public-school control of the management and operations of charter schools.

Repeatedly, Congress required ED deference to State charter school programs that rewarded charter school growth and innovation and that had plans in place to receive and apply the input of charter school operators for the improvement of traditional public schools. Reflecting its legislative intent to preserve the relative independence of charter schools, Congress even required that prior to the promulgation of "any [implementing] rules and regulations," ED "shall ensure that administrators, teachers, and other individuals directly involved in the operation of charter schools" are "consulted in the development" of those rules and regulations.[29]

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[26] 20 U.S.C. § 7221b(g)(1) (emphasis added).
[27] 20 U.S.C. § 7221b(g)(1)(E).
[28] 20 U.S.C. § 7221b(g)(2)(D)-(E).
[29] 20 U.S.C. § 7221f.

PROPOSED CHANGES TO CSP REQUIREMENTS

In its proposed rule, ED now seeks to impose its own charter school policy agenda over the clear statutory requirements of the CSP through a series of new requirements, re-aligned priorities, re-definitions, new selection criteria, and unjustified prohibitions. ED seeks to impose these radical changes affecting the award of CSP SE (State entity) grants, CMO (charter management organization) grants, and Developer (individual or group of individuals, including public or private nonprofit organizations) grants, which comprise three of the six CSP grant programs.

ED's proposed rule would substantially alter the requirements for innovative charter school grant applicants to compete for grant awards through imposition of various new requirements, including:

(1) Forcing "community engagement" activities designed to hinder the opening and expansion charter schools;
(2) Imposing "collaboration" requirements with traditional public schools that effectively put charter schools at the mercy of traditional public schools;
(3) Discouraging nearly any assistance or services from "for-profit" entities by charter school grant applicants (all of which are non-profit), even though traditional public schools regularly rely on "for profit" entities;
(4) Diminishing the role of States in the creation and replication of high-quality charter schools; and
(5) Changing selection criteria to favor grant applicants who most enthusiastically conform to the Department's capricious, non-statutory requirements.

The proposed rule's "community impact" requirements would compel CSP grant applicants to engage in an illogical process designed to force racial minorities and socioeconomically disadvantaged students to remain in traditional public schools.

In its "Proposed Application Requirements,"[30] ED dictates that each subgrant charter school applicant (CMO, Developer, and SE subgrant applicants) provide a "community impact analysis" showing sufficient community demand for the proposed school and "describing how the proposed charter school … would not increase racial or socio-economic segregation or isolation in [nearby traditional public] schools." Without statutory support, this onerous mandate will force racial minorities and socioeconomically disadvantaged students to remain trapped in their assigned traditional public schools, unless by some lucky quirk, that school is demonstrably over-enrolled. If ED seriously wanted to address racial and socio-economic segregation, it would appeal to Congress to abolish attendance zones, which have maintained segregation for generations. ED would not act to prevent needy children from escaping their current plight, as it now proposes.

[30] *See* Proposed Rule, "Proposed Application Requirements" (March 14, 2022), p. 14200.

ED seems to be worried, without any evidence, that charter schools are designed to attract white and well-off students away from traditional public schools and increase racial segregation in our schools. The truth is that charter schools attract a higher portion of racial minorities and low-income students than traditional public school districts.[31] White and affluent students tend to be pleased with their public schools, especially if they reside in isolated enclaves where low-income families are unable to find residences.

ED entirely omits from its consideration the potential educational benefits to racial minorities and socioeconomically disadvantaged students of receiving a better education at a charter school. The "community impact analysis" is a one-way street, designed to look only at potential costs (increased segregation) and not candidly account for real benefits that would accrue to racial minorities and socioeconomically disadvantaged students from attending high-quality public charter schools. ED's approach lacks statutory authority and contradicts the statutory purpose of the CSP to offer underserved students free charter schools and innovative alternatives to their traditional public schools.

"Collaboration" as a proposed priority for grant selection criteria would, contrary to statute, force a charter school applicant to gain the approval of its traditional public school competitor.

Continuing its new policy of making charter schools subservient to the interests of traditional public schools, ED proposes in its "Proposed Priority 2"[32] that charter school grant applicants "collaborate" with a traditional public school or school district. Following a grant award, the subgrantee must submit a written agreement to ED identifying the members of the collaboration, its purpose and duration, roles and responsibilities, benefits to members and students, and resources members of the collaboration will contribute. No statutory authority exits for this priority.

ED is correctly impressed by a number of charter-traditional collaborations across the country that have successfully improved educational outcomes for all students; however, ED fails to understand that those collaborations evolved over time when leaders from both sectors came to understand the mutual benefits of collaborating (occasionally with prodding from philanthropic and community leaders). By imposing this requirement upfront and solely on applicants, ED puts applicants at a severe disadvantage. In practical terms, charter schools would be forced to secure a sponsorship (not a collaboration) of a traditional school or district. As ED knows, traditional public schools are generally concerned about how a new school (or, more bluntly, competition) might impact their operations. They will reflexively refuse to accommodate any request for sponsorship.

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[31] *See* https://data.publiccharters.org/digest/charter-school-data-digest/who-attends-charter-schools/.

[32] *See* Proposed Rule, "Proposed Priority 2 – Charter School and Traditional Public School or District Collaborations That Benefit Students and Families" (March 14, 2022), p. 14199-200.

If ED dismisses this concern and argues that their non-statutory mandate might inspire the applicant to negotiate a constructive sponsorship, they would further run afoul of statutory intent. An applicant, desperate for federal startup funding, could easily bargain away core innovations and differentiators to secure a sponsorship (that Congress never anticipated or suggested incentivizing). The mandate would, as a result, cause applicants to become less innovative and more like existing schools—the exact opposite of what Congress intended.

As proposed by ED, charter school applicants would be required to gain the approval (via "collaboration" or sponsorship) of a traditional public school or school district to jointly provide, among other options, "curricular and instructional resources or academic course offerings," "professional development opportunities," or "safe, supportive, and inclusive learning environments." These mundane-sounding activities are core to a school's operations and culture, so the Priority 2 requirement runs directly counter to both the letter and spirit of the CSP law, in which Congress required assurances that "each charter school . . . will have a high degree of autonomy over budget and operations, including autonomy over personnel decisions."[33] The very nature of the requirement is that charter schools would have to forfeit their autonomy in order to secure the grant. Once again, the Department proposes to substitute its policy preferences for legislative requirements.

This proposed collaboration has been compared to "letting General Motors veto where Honda can sell cars."[34] It would force charter schools to gain the approval of a traditional public school (or school district) that directly competes for students and staff.

Congress never intended to empower a top-down, unilateral relationship between traditional public schools and charter schools. Rather, it mandated innovation, flexibility, and the independence for charter schools. To the extent it required "collaboration," it was to encourage charter schools and traditional school districts to share best practices.[35]

The "community engagement" requirements would force charter school grant applicants to engage in a farcical process designed to protect traditional public schools.

In its "Proposed Priority 1,"[36] ED requires each CMO and Developer grant applicant to actively solicit input from "community assets," including current and former educators and teachers, in order to inform the development of the charter school and decisions regarding curriculum,

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[33] 20 U.S.C. § 7221b(f)(2)(A).
[34] Robert Maranto, "The Biden Administration Declares War on Charter Schools," NATIONAL REVIEW (March 28, 2022), https://www.nationalreview.com/2022/03/the-biden-administration-declares-war-on-charter-schools/.
[35] 20 U.S.C. § 7221b(f)(1)(B)(iii).
[36] *See* Proposed Rule, "Proposed Priority 1—Promoting High-Quality Educator- and Community-Centered Charter Schools to Support Underserved Students" (March 14, 2022), p. 14198-99.

instruction, and day-to-day school operations. This requirement would impose on applicants the need to demonstrate ill-defined engagement with "community members and organizations" and appears designed to bolster the influence of non-public charter school (*i.e.*, traditional public schools and their allies) in the design and execution of the public charter school.

This community engagement requirement would almost necessarily involve taking guidance from people hostile to a new charter school, including current and former traditional public-school teachers, non-instructional staff, administrators, and their allies. Without stating it directly, this requirement would nonsensically force applicants to directly involve hostile representatives of the very institutions with which the grant applicant expects to compete for students. Moreover, it imposes a one-way burden on applicants to genuflect to entrenched "community assets," which have often been fully engaged in, and supportive of, traditional public schools.

This priority runs contrary to the CSP's statutory mandates to increase the number of high-quality charter schools and to "share best practices between charter schools and other public schools."[37] Instead, it would require charter school applicants to facilitate and promote the interests of their most devout opponents and the organizational allies of those opponents.

The proposed rule's burdensome and asymmetrical reporting requirements concerning purchases of services from "for-profit" entities and EMOs will erode school autonomy without regard for efficiency and student benefits.

Under the guise of financial transparency in "Proposed Requirement 2,"[38] ED requires grant applicants to unfairly report the retention of for-profit education management organizations ("EMO") and other for-profit entities. Charter school and charter management organizations ("CMO") applicants, all of which are nonprofit entities, occasionally hire EMOs and other for-profit organizations for management and educational services. ED claims to merely being diligent in its collection of this information.

This needlessly onerous burden is designed to discourage any charter school from hiring a for-profit entity. The long list of information that must be reported includes seven main items with three subpoints. For example, item (b) requires: "A detailed description of the terms of the contract, including the cost (*i.e.*, fixed costs and estimates of any ongoing costs or fees) and percentage such cost represents of the school's total funding, amount of CSP funds proposed to be used towards such cost (with an explanation of why such cost is reasonable), duration, roles and responsibilities of the management organization, and steps the applicant will take to ensure that it pays fair market value for any services or other items purchased or leased from the management organization, makes all programmatic decisions, maintains control over all CSP funds, and directly administers or supervises the administration of the grant in accordance with 34 CFR 75.701. Another item requires the applicant to enumerate any "real or perceived conflicts of interest."

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[37] 20 U.S.C. § 7221(4).
[38] *See* Proposed Rule, "Proposed Requirement 2 for CMO Grants and Developer Grants" (March 14, 2022), p. 14202.

The purpose of this proposed requirement is decidedly not to protect vulnerable nonprofits from being taken over by greedy for-profits. The CSP statute is already generally understood to prohibit a subgrantee from relinquishing full or substantial control of its charter school to an EMO; the subgrantee must establish and maintain proper internal controls and directly supervise or administer the school.

So why would ED place these enormous reporting burdens on charter school applicants? One answer is, unsatisfactorily, politics. President Biden has clearly stated he opposes for-profit charter schools, but because all CSP grant recipients are nonprofits, and only a couple of states ever allowed for-profit charter school operators, many in education assume he must be referring to any charter school that hires any for-profit entity for services. By piling on federal burdens, ED would discourage any charter applicant from ever hiring a for-profit entity and achieving the goal of ridding the sector of for-profit services. ED is acting in excess of its statutory authority and throwing aside school autonomy.

Non-profit CMOs should be free to propose and make the highest and best use of grant awards (as described in their grant applications and pursuant to all other requirements of federal law), including solutions from for-profit entities. The Department's for-profit reporting requirements reveal a preference for government monopolies and jobs, along with a subtle hostility toward market-based solutions or wisdom. Congress did not share those biases when it last authorized the CSP.

The proposed rule diminishes the role of States and charter-authorizing agencies in creating and replicating high-quality charter schools.

Through its proposed requirements, revised definitions, and altered selection criteria, ED would diminish State and local control over charter schools. When Congress enacted the CSP, it was well aware that each jurisdiction had its own unique approach to charter schools, and the program respected the individual laws and the primacy of state and local authority related to elementary and secondary education. ED's proposed constraints on the CSP program are contrary to Congressional intent in establishing federal grant resources for charter schools.

Currently, forty-four states and the District of Columbia have enacted charter school laws, enabling the sector to grow to approximately 3.4 million students and 206,000 teachers in 7,700 schools nationwide.[39] Charter school laws vary between jurisdictions on the role of the SEA and the process of charter-school authorizing. Although each jurisdiction is unique, the rule would impose additional requirements and restrictions for SEAs and charter authorizers in excess of the statutory authority granted by Congress in the CSP statute. A review of the proposed SE grant priorities illustrates the point:

[39] *See* https://www.publiccharters.org/about-charter-schools.

Proposed Requirement 1 for SE grants would require SEAs and other State entities to collect new "community impact" analyses from subgrant applicants that detail the level of "community support" and "over-enrollment of existing public schools," the demographic impact of any racial shifts from the traditional public school to the proposed charter school, and the decline in certain race-based enrollments that the traditional public school might suffer. SEAs would be required to collect "robust family and community engagement plans" from subgrant applicants and extensive details on how the charter school will "foster a collaborative culture." The proposed rule veers sharply away from the CSP statute by proposing that SEAs collect 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 . . ." [40] No statutory support exists for these requirements.

Proposed Requirement 2 for SE grants would require SEAs and other State entities to collect and report an onerous amount of information regarding any existing or even proposed contracts with any for-profit management organization (including non-profit CMOs operated by or on behalf of a for-profit entity), without regard to whether the EMO exercises full or substantial control over the charter school.[41] The rule intrudes on the prerogatives of SEAs and charter authorizers to regulate charter schools as envisioned by Congress for the CSP program. This unauthorized, unnecessary information collection requirement will inhibit educational innovation and render charter schools subservient and dependent upon the traditional public schools they were meant to challenge and improve. Similarly, it will shape the role of charter authorizers as their portfolio of CSP applicants is forced to become facilitators of community engagement, conduct ongoing community impact analyses, and support attempts to rid non-profit charter schools of any for-profit influence or expertise. This proposed requirement exceeds the Department's statutory authority.

Proposed Requirements 3, 4, and 5 for SE grants would force SEAs and other State entities to submit needlessly detailed descriptions of how they will review and evaluate subgrant applications, including assessments on "fiscal, programmatic, compliance" risks and monitoring, measuring, and training of subgrantees, as well as methodologies and calculations used by SEAs to evaluate subgrantees.[42] In short, going beyond the CSP statute, ED would leverage State entities to enforce ED's policy goals through assessments of subgrantee compliance with the proposed rule. This element of the proposed rule would gut the Congressional intent that States, not the Department, assess, monitor, and evaluate charter schools in their jurisdictions.

Proposed Requirement 6 for SE grants would force SEAs and other State entities to re-orient their grant-awarding priorities to match the new policy directives for "community-centered approach[es]", "assessments of community assets," "[m]eaningful and ongoing engagement" with community stakeholders (a policy ED neglected to practice in devising this proposed rule), and

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[40] *See* Proposed Rule, "Proposed Requirement 1 for SE Grants" (March 14, 2022), p. 14203-04.
[41] *See* Proposed Rule, "Proposed Requirement 2 for SE Grants" (March 14, 2022), p. 14204.
[42] *See* Proposed Rule, "Proposed Requirement 3 for SE Grants," "Proposed Requirement 4 for SE Grants," "Proposed Requirement 5 for SE Grants" (March 14, 2022), p. 14204-05.

the applicant's "collaboration with a least one traditional public school or school district . . . ."[43] These requirements and re-directed priorities lack statutory authority and would hinder the ability of SEAs to regulate charter schools in their jurisdictions in accordance with State law. Nothing in the CSP statute authorizes the Department to impose this requirement, which is little more than an attempt by ED to commandeer SEAs for federal regulatory purposes in excess of its statutory authority.

The proposed rule establishes new CSP grant selection criteria that ignores other criteria mandated by Congress in the statute.

Remarkably, out of thin air, ED conjures what it terms "addition[al]" criteria that ED grafts onto statutorily-mandated criteria that it acknowledges already exist ("[t]hese selection criteria would be used in addition to selection criteria in sections 4303(g)(1) and 4305(b)(4) of the ESEA, the CMO NFP, the Developer NFP, and 34 CFR 75.210 . . . as appropriate").[44] ED fails to justify this cavalier insertion of its own criteria (for SE, CMO, and Developer grants), which directly undermine Congress's "Selection Criteria; Priority" enumerated at 20 U.S.C. § 7221b(g)(1). That provision states as follows:

(1) Selection Criteria

> The Secretary shall award grants to State entities under this section on the basis of the quality of the applications submitted under subsection (f), after taking into consideration –
>
> (A) 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;
>
> (B) the ambitiousness of the State entity's objectives for the quality charter school program carried out under this section;
>
> (C) the likelihood that the eligible applicants receiving subgrants under the program will meet those objectives and improve educational results for students;
>
> (D) the State entity's plan to –
>
> (i) adequately monitor the eligible applicants receiving subgrants under the State entity's program;

[43] *See* Proposed Rule, "Proposed Requirement 6 for SE Grants" (March 14, 2022), p. 14204-05.
[44] *See* Proposed Rule, "Proposed Selection Criteria" (March 14, 2022), p. 14207-08.

(ii) work with the authorized public chartering agencies involved to avoid duplication of work for the charter schools and authorized public chartering agencies; and

(iii) provide technical assistance and support for –

(I) the eligible applicants receiving subgrants under the State entity's program; and

(II) quality authorizing efforts in the State; and

(E) 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.

Without ambiguity, Congress provided clear "Selection Criteria" for CSP grant awards. It left no space requiring ED rulemaking to "fill in the blanks" or to make additions. Had ED left CSP to continue as authorized by statute, there would have been no need to add criteria atop Congress's. Only because of ED's defenestration of the CSP statute due to its radical shift in policies did ED need to impose its own "addition[al]" criteria.

Indeed, Congress never authorized ED's addition of such requirements as "community impact analyses," one-sided "collaborations," with charter schools as the inferior partner seeking sponsorship, and assurances that students of particular racial and socioeconomically disadvantaged backgrounds would not flee traditional public schools for a chance at a better education at a charter school.

The CSP statute is not ambiguous concerning grant selection criteria. The Department's new selection criteria run counter to the clear statutory selection criteria expressly established by Congress in the CSP statute.

UNLAWFUL RULEMAKING

The proposed rule directly undermines the unambiguous statutory purpose of the CSP and is arbitrary, capricious, and not in accordance with law. "The authority to issue regulations is not the power to make law, and a regulation contrary to a statute is void." *Orion Reserves Ltd. P'ship v. Salazar*, 553 F.3d 697, 703 (D.C. Cir. 2009). ED's proposed rule is little more than a bureaucratic end run around statutory requirements established by Congress.

Through its proposed priorities, requirements, definitions, and selection criteria, ED accrues to itself legislative powers and ignores the statutory authority granted to it by Congress in disbursing grant awards to State entities, CMOs, and Developers. ED's proposed rule ignores the desire of Congress to increase the number of high-quality charter schools by encouraging States to assist in starting new charter schools, replicating high-quality charter schools, and expanding already

existing high-quality charter schools.[45] Congress required "assurances" that "each charter school receiving funds through the State entity's program will have a high degree of autonomy over budget and operations, including autonomy over personnel decisions."[46] ED undermines Congressional intent with substituted priorities, new requirements and definitions, and additional selection criteria.

The CSP implementing laws are replete with references making clear the intended role of States in using federal grants (SEs) to fund innovative, flexible, independent charters schools. For example, Congress mandated deference to States by requiring that "the State entity will ensure that the authorized public chartering agency of any charter school that receives funds under the State entity's program adequately monitors each charter school under the authority of such agency in recruiting, enrolling, retaining, and meeting the needs of all students."[47] Congress also directed that "the State entity will support charter schools in meeting the educational needs of their students . . . ."[48] Congress continued that "the State entity will promote quality authorizing, consistent with State law, such as providing technical assistance to support each authorized public chartering agency in the State to improve such agency's ability to monitor the charter schools authorized by the agency . . . ."[49] Congress did not seek to impose a "one-size-fits-all" nationwide structure for the creation and replication of high-quality charter schools. Rather, it deliberately ceded centralization to the laboratories of democracy (*i.e.*, the States and other charter-school authorities). This was not an oversight; it was entirely consistent with explicit Congressional intent in establishing the CSP.

Congress neither envisioned nor authorized a CSP in which ED would dictate the terms of the relationships between SEAs and subgrantees. To the contrary, it required that States would govern the creation and monitoring of charter schools.

In establishing selection criteria for the award of grant applications, Congress provided absolute clarity: "[t]he Secretary shall award grants to State entities . . . after taking into consideration - (A) 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"[50] and, among other similar requirements, "the ambitiousness of the State entity's objectives for the quality charter school program . . . ."[51] Congressional intent was clear: SEAs and applicable state laws were to be awarded grants based on the degree of flexibility and innovation they provided (and indicated in their SE grant applications) to charter schools.

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[45] 20 U.S.C. § 7221 *et seq*.
[46] 20 U.S.C. § 7221b(f)(2)(A).
[47] 20 U.S.C. § 7221b(f)(2)(C).
[48] 20 U.S.C. § 7221b(f)(2)(B).
[49] 20 U.S.C. § 7221b(f)(2)(E).
[50] 20 U.S.C. § 7221b(g)(1)(A).
[51] 20 U.S.C. § 7221b(g)(1)(B).

ED proposes to upend the relationship by substituting new federal priorities, requirements, definitions, and selection criteria where Congress unambiguously required deference to the SEAs and applicable State laws. ED's proposed rulemaking exceeds its statutory authority and is not entitled to deference. *See Holland v. Nat'l Mining Ass'n*, 309 F.3d 808, 815 (D.C. Cir. 2002) ("In reviewing an agency's statutory interpretation under the APA's 'not in accordance with law' standard, we adhere to the familiar two-step test of *Chevron, U.S.A., Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), provided that the conditions for such review are met.").

The Administrative Procedure Act ("APA")[52] provides that where the Department's action exceeds its statutory jurisdiction, authority, or limitations, the action is invalid.[53] Section 706(2)(A) provides that agency actions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" shall be held unlawful and set aside. Section 706(2)(C) requires that when the agency action is found to be "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," the action shall be held unlawful and set aside.

In assessing the permissibility of ED's proposed rule, it must first be established that the governing statute is silent or ambiguous on the specific issue.[54] Here, as discussed *supra*, the CSP statute is not at all silent on the matters now implicated by the proposed rule. Congress spoke directly to these matters and clearly intended for ED to provide grant awards to innovative charter school applicants who met certain criteria unconstrained by the same strictures of traditional public schools. The proposed rule would inevitably crush the innovative capabilities of charter schools with the newly constructed conditions (community impact analyses, insertion of new selection criteria, "collaboration" with traditional public schools, discouraged input from for-profit organizations, among other conditions) without basis in the CSP statute, well beyond and contrary to what Congress mandated. Accordingly, the proposed rule is unlawful and should be withdrawn.

In the event the Department asserts that the proposed rule actually attempts to fill an ambiguity in the CSP law, it must then demonstrate that its interpretation of the law is "rational and consistent with the statute."[55] Here, as discussed *supra*, ED's proposed rule runs counter to the plain Congressional intent within the statute. Lacking such a tie to the CSP statute, if there was an ambiguity in the statute requiring ED's interpretive efforts, its construction is inconsistent with the statute's clear purposes.

In short, the proposed rule substitutes ED's policy goals for Congressional intent at nearly every juncture in the CSP. It would force States to impose vast new requirements upon subgrantees and to solicit the sponsorship of traditional public school or school district in order to be considered for a grant (*i.e.*, "collaboration").

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[52] 5 U.S.C. §§ 551-559.
[53] 5 U.S.C. §§ 706(2)(A), (C).
[54] *Chevron, U.S.A., Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).
[55] *Sullivan v. Everhart*, 494 U.S. 83, 89 (1990).

ED has not merely exceeded its statutory mandate, but it has acted to thwart it and to provide failed traditional public schools with an effective veto power over the fiscal livelihood of charter schools – precisely the opposite of the CSP statute and Congressional intent. ED would act unlawfully because "[a]n agency has no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms." *Util. Air Regulatory Grp. V. EPA*, 573 U.S. 302, 325 (2014). Accordingly, ED's proposed rule is unreasonable, unlawful, and should be withdrawn.

In creating the CSP, Congress spoke with uncomplicated, ordinary language unambiguously lending itself to straightforward construction. Congressional intent was plain and expressly directed ED to facilitate the provision of grants to increase the number and impact of charter schools available to students across the country. Through its statutory construction, it commanded ED's deference to State laws, particularly in regard to the award of SE subgrants. Congress's comprehensive selection criteria implied no gap for further additions (*i.e.*, substitutions) by ED rule makers as ED now proposes.

With the proposed rule, ED has neither alleged to have, nor does it have, a basis for asserting CSP statutory ambiguity necessitating its regulatory action. Accordingly, with regard to the lawfulness of the proposed rule, "that is the end of the matter."[56] ED should withdraw its proposed rule.

UNDUE BURDEN ON STATES AND OTHER CSP GRANT APPLICANTS

The proposed rule would be unduly burdensome to CSP grant applicants, including CMOs, Developers, SEAs, other State entities, and their subgrantees (charter schools). ED admits that the rule would create additional burdens, as it estimates an additional 60 work hours per applicant, creating an additional $2,130,432 aggregate burden on applicants.[57] These added application and reporting responsibilities would place considerable, often nebulously described (*e.g.*, "community impact analysis") additional administrative burdens on SEAs, their subgrantees (charter schools), and other grant applicants who have otherwise excelled relative to their traditional public school counterparts to educate students during the pandemic.[58]

In its added requirements for "community engagement" for grant and subgrant applicants, ED's proposed rule includes imprecise descriptions of "community support" and "targeted staff and staff demographics" and effects on the demographic makeup of traditional public schools. These are significant requirements, as applicants are not armed with the academic research tools to conduct the requisite extensive sociological surveys and accurately report on the survey results to ED regulators. Similarly, the proposed rule would require "robust family and community engagement plan[s]" by applicants to be included with their CSP grant applications. Again, the applicant

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[56] *Chevron*, 467 U.S. at 843.
[57] *See* Proposed Rule, "Regulatory Impact Analysis" (March 14, 2022), (p. 14208-10).
[58] Katherine Fung, "Parents Are Opting for Charter, Home School as COVID Pushes Kids Out of Public Classrooms, NEWSWEEK (January 24, 2022), https://www.newsweek.com/parents-are-opting-charter-home-school-covid-pushes-kids-out-public-classrooms-1672194.

organizations are not designed to create these programmatic activities and ongoing engagements. In the proposed rule, ED seeks to shackle CSP grant applicants with nonsensical, extra-statutory bureaucratic burdens.

CSP applicants are not agencies possessing nearly limitless capacities to embark on the sociological inquiries *du jour*. Rather, successful CSP applicants are directed by Congress to be free of the very sort of bureaucratic requirements already imposed by ED and other governmental agencies on traditional public schools in order to pursue results-oriented educational objectives for charter school students.[59] Indeed, the ill-defined requirements imposed on grant applicants would necessarily strip from them their essential statutorily defined character (*i.e.*, ". . . exempt from significant State or local rules that inhibit the flexible operation and management of public schools . . . ."[60]).

The proposed new criteria would prioritize applicants who meet the additional analyses, penalizing applicants lacking in the resources to collect, analyze, and accurately report the immense sociological data that ED would require. ED incorrectly presumes that CSP grant applicants have access to an unlimited range of financial and staff resources, such as those accessible to ED and other agencies of the federal government.

ED has not adequately considered or realistically projected the actual burdens to be imposed on successful applicants and has, quite likely, significantly underestimated the associated costs in time and other resources on CSP applicants. ED's projections are simply untethered to the likely resources that successful CSP grant applicants would have to provide to ED (or to SEAs) under the proposed rule.

Because of ED's failure to provide realistic projections of the burdens of the proposed rule on CSP grant applicants, ED should withdraw the proposed rule.

CONCLUSION

Despite – or perhaps because of - the demonstrable success of charter schools in boosting the educational performance of previously underserved students, ED now proposes "new rules to sabotage"[61] federal grant awards for charter schools. The proposed rule appears designed to diminish the role of charter schools at a time when "American public education is broken"[62] and

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[59] 20 U.S.C. § 7221i(2)(C).
[60] 20 U.S.C. § 7221i(2)(A).
[61] Editorial Board, "A Case of Charter School Sabotage: Biden's regulators find another way to undermine school choice," THE WALL STREET JOURNAL (March 27, 2022), https://www.wsj.com/articles/charter-school-sabotage-biden-teachers-union-public-school-achievement-gap-hispanic-black-students-charter-schools-program-rules-11648224610.
[62] Michael R. Bloomberg, "Why I'm Backing Charter Schools: The public school system is failing. My philanthropy will give $750 million to a proven alternative," THE WALL STREET

the National Assessment of Educational Progress continues to show steady declines in key academic measurements among students in traditional public schools.[63]

The proposed rule's imposition of new priorities, definitions, and selection criteria would irreparably undermine an unambiguous statute by creating grantee requirements that by their design would fundamentally alter the very nature of charter schools as envisioned by Congress.

ED's proposed rule would force successful charter school grant applicants to become less educationally innovative and far more bureaucratic. Through proposed collaboration requirements, the proposed rule would force charter school applicants to seek the approval and written sponsorship of traditional public schools or school districts (the very schools from which underserved students have fled).

The objectively measurable educational and vocational benefits that have accrued to racial minorities and students from socioeconomically-disadvantaged backgrounds would be diminished as ED would require that applicants demonstrate that racial minority attendance at traditional public schools would not be impacted by flight to charter schools. The parents of these students would effectively be told that their children must remain in underperforming traditional public schools.

The proposed rule would virtually exclude successful non-profit CSP grant applicants from availing themselves of the expertise and efficient provision of services of for-profit entities. It would force applicants to devote tremendous resources, which they likely do not have, to collect, analyze, and present ill-defined community impact analyses and fails to realistically project the imposed burdens of the associated costs on grant applicants.

The proposed rule would clearly encroach on Congress's clear intent to promote innovative charter schools pursuant to State guidance and regulation – not a suffocating federal footprint. Similarly, ED now proposes imposition of its own selection criteria, despite Congress's explicit provision in the statute of the selection criteria it imposed on CSP applicants.

The proposed rule also constitutes impermissible rulemaking as it seeks to re-write an unambiguous statute with its own policy goals.

In summary, the proposed changes are contrary to existing law, are poorly conceived, would harm students long underserved by traditional public schools, and impermissibly substitute rogue policy priorities that defy statutory authority and Congressional intent.

DFI strongly urges ED to withdraw its proposed changes to the CSP.

JOURNAL (December 1, 2021), https://www.wsj.com/articles/michael-bloomberg-why-im-backing-charter-schools-covid-19-learning-loss-teachers-union-11638371324.

[63] *See* https://nces.ed.gov/nationsreportcard/.

Sincerely,

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