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Hilary Malawer
Assistant General Counsel,
Office of the General Counsel,
U.S. Department of Education,
400 Maryland Avenue SW.,
Room 6E231,
Washington, D.C. 20202

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

Dear Ms. Malawer:

On behalf of the National Alliance for Public Charter Schools (National Alliance) I am writing to provide comments to assist the U.S. Department of Education (ED or the Department) in evaluating existing regulations in accordance with Executive Order 13777. As public schools, charter schools are affected by the same regulations and non-regulatory guidance that govern all public schools. There are sometimes unique implications of these requirements and guidance for charter schools since federal laws, regulations and guidance are typically written with traditional schools and districts in mind.

The results of our review of current regulations and guidance under the Elementary and Secondary Education Act (ESEA), Individuals with Disabilities Education Act (IDEA), and the McKinney-Vento Homeless Assistance Act are addressed below. The National Alliance would welcome the opportunity to follow up with appropriate offices to provide additional details as to how to address our recommendations.

Title I, Part A of the Elementary and Secondary Education Act

- 1. Clarify flexibility in Title I to use funds to expand access to high-quality charter schools and implement a district-wide improvement strategy.** ESEA, as amended by the Every Student Succeeds Act (ESSA), can support the use of the Title I school improvement set-aside (Section 1003(a)) to replicate charter schools, or to expand the capacity of high-performing charter schools, in order to serve students attending schools identified for comprehensive support and improvement. Under the No Child Left Behind (NCLB)-era

School Improvement Grants program (SIG), school improvement efforts shifted into a building-focused strategy and the Department’s regulations and guidance did not encourage or empower state and local educational agencies (SEAs and LEAs) to implement a student-based strategy of expanding access to seats in high-quality schools. ESSA creates opportunities for states and districts to implement improvement strategies that include replication and expansion of high-quality charter schools to improve outcomes for students.

The following table outlines different strategies supported under Sections 1003 and 1111 that a state might want to implement to address the needs of students attending comprehensive support and improvement (CSI), and in some cases targeted support and improvement (TSI), schools.

ESEA Authority	Title I 7% Set-Aside (Section 1003(b)) School Improvement Strategy
Section 1003(b)(1)(B) (SEA provision of services with LEA approval)	Convert an existing school identified for CSI into a public charter school.
Section 1003(b)(1)(A) (Uses of Funds – authority to make grants competitive)	Prioritize strategies that incorporate charter school conversion, replication, or expansion in applications for Section 1003(b) sub-grants.
Section 1003(b)(1)(B)) (SEA provision of services with LEA approval) Section 1111(d)(3)(B)(i)-(ii)(Additional authority for SEA to act in LEAs with identified schools that aren’t improving)	Award funds directly to proven public charter operators to open new schools serving students who currently attend eligible schools.
Section 1003(b)(1)(B) (SEA provision of services with LEA approval) Section 1111(d)(3)(B)(i) (Additional authority for SEA to act in LEAs with identified schools that aren’t improving)	Using Section 1003(a) funds, award expansion grants to high-quality charter schools or networks to expand their capacity to serve students attending eligible schools.
Section 1003(b)(1)(B) (SEA provision of services with LEA approval) Section 1003(b)(2)(C)(Requirement for states, as appropriate, to ensure that identified schools receive operational flexibility in implementing support and improvement activities)	Attract high-performing networks to open schools (or to restart low-performing schools)in an LEA with significant numbers of students attending eligible schools.
Section 1003(b)(1)(B) (SEA provision of services with LEA approval) Section 1003(b)(2)(C) (Authority for states to ensure that schools receive operational flexibility in implementing support and improvement activities) Section 1111(d)(3)(B)(i) (Additional authority for SEA to act in LEAs with identified schools that aren’t improving)	Award grants to LEAs or nonprofit organizations to attract and develop high-potential school leaders, such as through a leadership development program.

The National Alliance recommends that the Department issue guidance clarifying that States may take the above actions when implementing the school improvement set-aside under Section 1003. This guidance should also clarify that, when designing improvement strategies that include replication or expansion of successful charter schools, SEAs and LEAs must ensure that the needs of all students enrolled in the identified low-performing schools are addressed, such as by guaranteeing spots for such students in the newly replicated or expanded charter schools. In this way the LEA will be able to demonstrate that funds are being expended to serve the students they are intended to benefit under Title I. In order to ensure that these schools can also access the Charter Schools Program (CSP) start up grants, however, guidance would help to clarify that prioritizing these students does not disqualify schools under the CSP. (See #3 under Charter Schools Program recommendations that begin on page 9.)

2. **Clarify that Title I accountability provisions as they relate to charter schools must be overseen in accordance with state charter school law.** ESEA Section 1111(c)(5) is an important provision that ensures that states and charter-school authorizers can continue to use state charter school law to hold charter schools accountable for results. This language, which was also included in the law under NCLB, protects the charter bargain of autonomy in exchange for high accountability that is at the core of every charter agreement.

The provision is intended to ensure that, for Title I purposes, a charter school meeting the accountability requirements set forth in its charter will not be exempt from ESEA accountability requirements—nor will meeting ESEA requirements exempt a school from having to meet the performance targets in its charter. For example, a school that meets the terms of its charter but, under the state’s accountability system, has subgroups performing at a level causing the school to be identified for targeted support and improvement would be so identified and should develop and implement a plan to improve those subgroups’ performance, even if the school meets the terms of its charter. Similarly, if a charter school meets ESEA requirements but fails to meet the performance targets in its charter, the authorizer could still close or take other action with respect to the school, consistent with state charter school law and the charter. These provisions should be implemented consistent with the guidance that the Department issued to states with ESEA waivers: in the case of charter schools, an authorizer’s decision to revoke or decline renewal of a charter based on academic performance will override the intervention by the state. In other words, low-performing charter schools can be shut down, if doing so is called for under the schools’ charters, rather going through the Title I support and improvement process. Further, timelines associated with interventions for CSI and TSI should not delay an authorizer’s ability to require improvements and/or close a charter school through its own charter review or revocation processes.

As a result of confusion and inconsistent implementation at the state level during the NCLB and NCLB-waiver eras, authorizers and charter schools requested that ED issue additional non-regulatory guidance to reinforce the law’s intent and ensure that Title I-driven school improvement efforts do not impede charter-based accountability. Both the Bush and

Obama Administrations did so and, at the request of charter schools and authorizers, the ED also included similar language in the final Title I accountability regulations issued in November 2016, now repealed.

We strongly encourage the Department of Education to issue new 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 ESEA intends.

Guidance can make it clear that:

- Charter schools are still subject to the accountability provided for in state charter school laws;
- 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 under Title I; and
- When appropriate, accountability actions triggered by state Title I accountability policies should be taken in coordination with a charter school's authorizer.

- 3. Provide flexibility for states to apply different methodologies for differentiating school performance when considering the performance of special-purpose schools.** It is important that, in implementing the Title I accountability requirements, states are able to apply appropriate methodologies for schools that have different missions or school populations than do typical elementary and secondary schools. These include schools, both charter and non-charter, that serve students who have previously dropped out, that serve recent immigrants, or that have other distinctive missions and structures. In the repealed Title I accountability regulations, Section 200.18(d)(1)(iii) would have allowed States to apply different methodologies for “annual meaningful differentiation” when measuring the performance of special-purpose schools. With the repeal of those regulations, that very important clarification is no longer an explicit Department policy. Moreover, although the March 2017 “Revised State Template for the Consolidated State Plan does allow alternative methodologies for certain schools, it appears to apply only to schools “for which an accountability determination cannot be made (e.g., P-2 schools).” This is insufficient. We believe that it is highly appropriate to apply an alternative to a wider range of schools, including schools that do have students in the tested grades. Further, we believe that the statute provides sufficient flexibility to allow a broader approach, as evidence by the fact that the Department clarified its permissibility in the former regulations.

We recommend that the Department issue guidance clarifying that a state may use a different methodology, covering any or all aspects of the Title I accountability system, for holding accountable all varieties of special-purpose schools. In other words, the policy would be broader than that provided for in the former regulations, which covered only the state's procedures for annual meaningful differentiation. For example, it is important that states have the flexibility to use an alternative methodology for determining which schools

have less than a 67 percent graduation rate (for the purpose of identifying schools for comprehensive support and improvement) when looking at schools established to serve certain categories of students, such as over age and under credited students.

- 4. Clarify that Title I does not mandate teacher certification or licensure for charter school teachers.** ESSA eliminated the mandate that all teachers meet the definition of a “highly qualified teacher” (HQT). Several states, however, previously embedded HQT into their charter school policy by stating that charter school teachers had to meet the HQT standard for subject-matter mastery in lieu of certification. Now that HQT is eliminated under ESSA, some states believe that Title I requires them to replace HQT with a new standard for charter school personnel funded by Title I. Section 1111(g)(2)(J) of the ESEA only requires the SEA to provide an assurance that the State will “ensure that all teachers and paraprofessionals working in a program supported with funds under [Title I, Part A] meet applicable State certification and licensure requirements, including any requirements for certification obtained through alternative routes to certification.” We appreciate the Department’s March 13 communique to Title I directors which stated that “... charter school teachers (like all other public school teachers) must be licensed and certified only as required by applicable State law.” We believe that this issue should be more formally addressed in non-regulatory guidance. We also believe that ED needs make it absolutely clear that Title I does not require a state to require licensure for charter school teachers – it is entirely a state decision. Moreover, if a state does not have credential requirements for charter school teachers, it should not have to create new ones in order for those teachers to be funded with Title I funds. If a state doesn't have an applicable standard, it does not need to create a new one, but defer to charter law for purposes of Title I.
- 5. Clarify that parent “right-to-know requirements” in Section 1112(e)(1)(B)(ii) are to be implemented consistent with state charter school law.** This provision of ESEA requires that a Title I school give parents timely notice that their child has been “assigned, or has been taught for 4 or more consecutive weeks by, a teacher who does not meet applicable state certification or licensure requirements at the grade level and subject area in which the teacher has been assigned.” Given confusion surrounding the term “applicable”, we believe it would be helpful to provide guidance clarifying that if a teacher meets applicable requirements in state charter school law, the school is not required to notify parents. This policy would also apply to situations in which states permit charter schools to have a certain number or percentage of teachers who are not certified.
- 6. Clarify that Title I “Supplement, Not Supplant” requirements do not apply to single school LEAs.** ESSA made major changes to the statutory requirement that LEAs use Title I funds only to supplement, and not supplant, state and local funding (ESEA Section 1118(b)). Last year, the previous Administration developed new supplement not supplant (SNS) regulations but did not issue those regulations in final. Those proposed regulations contained an important clarification that the requirement to demonstrate compliance with the “supplement, not supplant” requirement did not apply to single school districts. With those regulations not in place, we recommend that the Department issue guidance

containing the clarifying language on single-school LEAs. This clarification should also be disseminated in relevant guidance and templates to auditors.

- 7. Revise the Title I allocation guidance to address the equitable distribution of Title I funds and the reservation of funds for district-wide services.** The Department's guidance on within-district allocations to charter schools (including "[Local Educational Agency Identification and Selection of School Attendance Areas and Schools and Allocation of Title I funds to those Areas and Schools](#)") should be revised to ensure that district-authorized charter schools are equitably treated when the LEA reserves funds for district-wide services. For example, Q5 in the aforementioned document does not specifically mention charter schools when it lists the entities with whom an LEA should consult.

McKinney-Vento Act: Education for Homeless Children and Youths Program

Education for Homeless Children and Youths Program Guidance. The most recent (March 2017) guidance describes the requirements for subgrants to LEAs in [section G](#). We recommend that the Department issue additional guidance that addresses the importance of considering the needs of single-school LEAs, such as charter school LEAs, in which homeless students comprise a significant percentage of the enrollment, even if the number of homeless students enrolled in such a school is small when compared to the numbers enrolled by large urban school districts. It would be helpful if states are encouraged to find ways to make awards to those schools so that homeless students attending them are not denied the benefits of the program merely because they attend a such a school.

In addition, it would be help if the guidance provided a clarification of the requirement (in section 722(g)(1)(F)(iii) of the McKinney-Vento Act) that the state plan include a description of the state's procedures for ensuring that homeless children and youth who meet the relevant eligibility criteria do not face barriers to accessing academic and extracurricular activities. The guidance would clarify that this requirement does not prohibit charter schools from maintaining application deadlines.

Elementary and Secondary Education Act: Charter Schools Program Guidance

- 1. Update enrollment guidance:** The Charter Schools Program Nonregulatory Guidance issued January, 2014 contains information on enrollment procedures that applies to the pre-ESSA SEA Charter School Program grantees but is no longer accurate under the new statute. Given the changes made to the program in ESSA, we believe that the enrollment-related information in this document needs to be rewritten. We include recommendations for what needs to be addressed, but given the complexity of some of these issues we would also like to be able to provide additional input as the guidance is developed.

- A. Revise parameters for weighted lotteries:** Section 4303(c)(3)(A) states that, under certain circumstances, charter schools receiving CSP funds may use a weighted lottery that provides a slight advantage to all or a subset of educationally disadvantaged students so long as the use of such a lottery is not prohibited by state law. Prior to ESSA, states wishing to enroll students using a weighted lottery had to request an amendment to their approved CSP grant application and meet certain criteria set forth in guidance. ESSA sets a different, more straightforward standard for the use of weighted lotteries than is provided for in current ED guidance. (Current ED guidance requires a positive demonstration that such lotteries were expressly permitted in law or policy.) Guidance questions E-3 and E-3a should be rewritten to align with ESSA. In particular, the requirement that state law, policy, regulation, or attorney general opinion expressly grant permission for operators to use weighted lotteries should be removed, as well as the detailed application process that requires the Department to approve a state's system.

In addition, the guidance should make clear that schools receiving CSP funds are able to use a weighted lottery for any or all of the categories of educationally disadvantaged students. This will make clear to SEAs that charter schools are able to use a weighted lottery to preference more than one subset of educationally disadvantaged students (i.e. economically disadvantaged, students with disabilities, migrant students, limited English proficient students, neglected or delinquent students, or homeless students).

Finally, in some states, operators are required to provide geographic preference to students living inside a specific catchment zone or neighborhood(s). Operators in these jurisdictions are at a disadvantage when competing for CSP monies because CSP recipients can only provide preference for "educationally disadvantaged" students (or subset of students) and geography/place of residence does not typically qualify as an indicator of educational disadvantage. To remedy this, new guidance should clarify CSP recipients may use weighted lotteries subject to Section 4303(c)(3)(A) and subject to the mandates set forth in the relevant provisions of state charter school statutes and/or authorizer policies or contracts.

- B. Permit preferences for students from schools that recently closed.** Individual communities, such as New Orleans, have begun experimenting with universal enrollment systems that provide students that attended recently closed schools with a slight preference in charter school lotteries. We believe small lottery preferences such as these can help these students in need enroll in more effective schools, and guidance can clarify that such preferences are allowed. Research from the Center for Research on Education Outcomes (CREDO) on the impact of school closures on student performance shows that "the quality of the receiving school made a significant difference in post-closure student outcomes."

- C. **Re-state that set-asides are not permissible:** New guidance should address “set-asides” or quotas for student subgroups and how such set-asides are not permitted within the context of open enrollment for schools receiving CSP funds.
- D. **Do not define “educationally disadvantaged” students:** In addition, the new guidance should not include a definition of “educationally disadvantaged” students. This term is not defined in the statute, and previous regulations that defined the term are no longer in effect. States should be able to designate which students meet those requirements. Since the statute does not define who those students are, guidance should remain silent.
- E. **Address feeder patterns and automatic enrollment:** Revised guidance should make it clear that the statute permits recipients of CSP grants and subgrants to automatically enroll students applying to a school from another school in its network – that a 6th grader can be prioritized to enroll in the applicable “feeder” middle school, as allowed under Section 4301(2)(H). In addition, we believe the definition of “regular attrition” should be left to states.

Question E-4, which addresses exemptions to lottery requirements, should be retained. Maintaining current automatic enrollment provisions will help ensure that charter schools work well for families – particularly those with students in a school that is undergoing a charter school conversion. Moreover, sibling priorities reduce burdens that disproportionately impact low-income families when students have to attend different schools. To not permit founders, teachers and staff to enroll their children at their school would also create significant barriers to identifying and retaining high quality personnel.

- 2. **Clarify flexibility in local uses of funds:** ESSA changed the requirements for local uses of CSP funds in order to grant significant new flexibility to charter schools in the use of their subgrant for non-sustained costs, and thus section D of the non-regulatory guidance should be rewritten. While we do not want the Department to provide an extensive list of what might be permissible, or to define “non-sustained costs,” it would be helpful to clearly communicate the increased amount of flexibility. For example, for the first time charter schools may purchase school buses with CSP funds in order to meet the transportation needs of their students. A specific acknowledgement that such a cost that could meet the “non-sustained” requirement would be helpful.
- 3. **Clarify the use of CSP for charter school restarts, new starts and expansion under Section 1003 and CSP open-enrollment requirements:** The CSP requires charter schools to offer open enrollment in order to receive a grant under the program. However, charter schools that receive funding under Section 1003 to restart, newly open or expand in order to serve students attending schools identified for CSI under Title I must automatically enroll students attending those schools that wish to remain. These schools should not be disqualified from CSP funding for prioritizing the enrollment of students attending CSI schools. Regulations

for SIG permitted charter school “restarts” to also receive CSP funding. The absence of Title I regulations should not prevent turnaround schools from accessing the CSP. We recommend that the Department issue guidance clarifying this point.

Elementary and Secondary Education Act: Charter Schools Program State Entities Program Priorities

Eliminate non-statutory competitive preference priorities in the current grants to state entities program: The 2017 [competition](#) included two competitive priorities that are not in the statute. In both instances the non-statutory priorities are unnecessary because of new application requirements that all applicants are required to address. Moreover, including them as competitive priorities creates another layer of implicit requirements that aren’t entirely consistent with the language statute. In addition, they replaced priorities that were in the statute, such as equitable funding for charter schools and state facility policies. They should be removed for future competitions for the reasons outlined below:

- **Competitive priority one - periodic review and evaluation.** Because of the addition of new language to the CSP addressing state accountability for authorizer quality and annual review of data (particularly in Section 4303(f)(2)(E)), this priority was removed from the statute by ESSA.
- **Competitive priority two – charter school accountability:** The priority that was included in the 2017 competition was intentionally replaced in the statute with clearer, more precise language. Continuing to include it as a priority, at the expense of other priorities that aren’t outright requirements for states but serve to prioritize states with high-quality charter school laws, undercuts the reforms made in the statute. It also creates confusion, by having almost similar, but not identical language for ensuring that renewal is based primarily on student achievement. The statute intentionally referred to all students, but the competitive priority effectively requires state charter school law to look at subgroup performance as one of the most important factors. (Section 4303(f)(1)(C)(I)-(II) and (f)(2)(E))

Elementary and Secondary Education Act: Grants for the Replication and Expansion of High Quality Charter Schools

Remove non-statutory absolute priority for upcoming competitions. The FY 2018 competition required that least 60 percent of the students across all of the charter schools the applicant currently operates or manages be individuals from low-income families. This absolute priority from past competitions prior to the reauthorization of ESEA was not included in the statute in order to open the competition to entities seeking to open intentionally diverse schools, particularly economically diverse schools. Based on poverty data from about 60 schools implementing intentionally diverse models, three quarters would not meet this threshold, with

the average poverty rate at 52 percent. Such a priority also contradicts the intent of the first competitive priority to attract such providers to open intentionally diverse schools. This priority should not be used as an absolute priority in future competitions.

Elementary and Secondary Education Act: Charter Schools Program National Activities

We support a competition for national activities funding in FY 2018 under Section 4305(a)(3) that sets out a vision for strengthening the charter school community through strategic national investments that will strengthen state and developer capacity to open high-quality schools as well as meet parental demand. We would specifically like to see the following investments:

1. Strengthen Charter Schools by prioritizing technical assistance to State Charter School Organizations:

Due to their limited resources, staff capacity, and technical ability, many state charter school organizations (CSOs) monitor the health and performance of the charter schools in their state informally approaches rather than through more rigorous analytical approaches. State report cards and other assessment data can provide snapshots, but they do not allow for more detailed comparisons between charter schools that serve different populations or utilize different models; nor do they provide more comprehensive knowledge about the condition of the charter school sector in general.

National activity funding could be leveraged to identify CSOs with little or no research capacity in order and provide them with technical assistance in developing more rigorous and formal performance frameworks that incorporate data unique to their state. In addition to improving the information available to CSOs, this effort would allow CSOs to work with school operators and authorizers to improve, turn around, or close low-performing or underperforming charter schools.

Additionally such an investment could also increase the overall research capacity in these states, help build up a pipeline of young analysts and researchers who are interested in a career in public education, and identify geographic areas of need in each state that would most benefit from the development of new high-quality charter schools.

2. Charter School Facilities Policy and Technical Assistance

Lack of access to adequate facilities is one of the primary preoccupations school leaders face, and one of the biggest barriers to healthy growth of the sector. While there are a number of programs that seek to support charter schools finance schools, we believe it's not enough to meet the demand and spur innovation. There is a national need to conduct research and collect data on charter school facility policies and needs.

3. New School Development in emerging sectors

National activities funds should be used to develop a sustainable pipeline of quality applicants and new schools in emerging sectors, such as states with new charter school

laws. A community of practice that draws on expertise from other states could assist state and local policymakers and the charter community to develop and operationalize a charter implementation plan in their states that will lead to a pipeline of quality applicants. The focus of this work in new states would be on the following key elements of a quality implantation plans:

- a. **Developing authorizer quality:** The overall success of the public charter school movement in any state will be determined by the quality of authorizing practices implemented by authorizers. It is far easier to get this expectation and implementation right at the outset than to try and clean it up well into implementation.
- b. **Recruit CMOs:** With the success of CMOs, they are highly sought-after by several regions, including those with highly-functioning charter sectors. Groups in new law states need to learn the basics of a CMO, as well as start to understand what it takes to convince a CMO to come to a new region.
- c. **Incubating new developers:** a city or state cannot depend on CMOs to build its charter sector. Instead, there needs to be a deliberate effort to recruit and develop talent to open and run single site schools.
- d. **Awarding pre-planning grants:** award small planning grants in order to the provide resources necessary to draft high quality charter applications during their planning phase

Elementary and Secondary Education Act: Charter Schools Program Credit Enhancement

The National Alliance supports the comments submitted by the Charter School Lenders Coalition (CSLC) to improve the administration of the Credit Enhancement program. We would like to highlight the following issue that needs to be addressed in the administration of the program:

Streamline Reporting Requirements: The Annual Performance Report currently requires the collection and reporting of 41 unique data points in separate fields for each school, with several fields requiring annual updates. We recommend that the Department conduct a comprehensive review to ensure the data collected is actually analyzed or used for a specific purpose or provides concrete value for compliance or program assessment. The letter submitted by CSLC contains specific recommendations as to what fields can be eliminated.

Individuals with Disabilities Education Act (IDEA)

Just as is the case with district-run 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 IDEA-mandated services and how that responsibility is overseen. The Department issued several helpful guidance documents in late 2016 to help states, authorizers, and charter schools understand and fulfill their responsibilities. We encourage the Department to retain the FAQs and guidance documents on IDEA and Section 504 issued in December 2016.

We will continue to develop our point of view on the more complicated and ongoing issues presented here, as well as those that will arise in the future, such as on the wholesale revision of the Charter Schools Program guidance. We welcome any opportunity to provide our perspective or share experiences of the charter school sector as you develop policy to advance school choice and increase access to high-quality schools for students across America.

Sincerely,

A handwritten signature in black ink, reading "Nina G. Rees". The signature is fluid and cursive, with the first name "Nina" and last name "Rees" clearly legible, and "G." as a middle initial.

Nina Rees
President and CEO