FELDESMAN

January 19, 2024

Administration for Children and Families
Office of Head Start
Department of Health and Human Services
1250 Maryland Avenue, SW
Washington, D.C. 20024
Attn: Director of Policy and Planning

RE: Notice of Proposed Rulemaking
Supporting the Head Start Workforce and Consistent Quality Programming (RIN 0970-AD01)

To Whom It May Concern:

Feldesman Leifer LLP, formerly Feldesman Tucker Leifer Fidell LLP, (Feldesman LLP) is pleased to respond to the Notice of Proposed Rulemaking (NPRM) referenced above which was published on November 20, 2023 (88 Fed. Reg. 80818).

Since its founding in 1970, Feldesman LLP has been the leader in developing the area of federal grants law. Feldesman LLP has, for almost as long, represented recipients of Head Start and later Early Head Start funding across the spectrum of grantees, including non-profit and for-profit entities, community action, city and county governments and school districts. The firm values the contributions that our clients make to their communities and is inspired by their ability to accomplish so much with such limited resources.

General Comments

We appreciate the hard work of the Administration for Children and Families (ACF), Office of Head Start (OHS) in developing the NPRM. It is refreshing to see a federal agency acknowledge that the status quo where individuals working in a federally assisted program for low-income families could receive pay so low that they too are eligible for services under that program. We commend OHS for recognizing that many Head Start staff are women and people of color who should be paid at a level commensurate with others providing similar services. The need for fair and equal compensation is particularly important as grantees now face unprecedented staff shortages and high rates of turnover.

With that said, we cannot support many of the proposed changes. The need for fair pay does not arise because Head Start program management refuses to increase wages; the need arises because there is insufficient funding. Mandating payment levels without the requisite funding from Congress makes little sense and will only lead to non-compliances, deficiencies and greater staff shortages as program personnel look for job opportunities that provide opportunities not sanctions. Much worse, in our view, is the doubling-down on hyper-punitive and unrealistic requirements that set a standard of strict liability combined with a very fast, very vague reporting requirement that serves no purpose but will,

again, have the effect of pushing qualified staff out of Head Start. These proposed rules and others currently on the books assume that Head Start programs do not have the commonsense to design classrooms that work for staff by, for example, including a place for adults to sit or that programs would, without being told, expel children from the program on a whim. The implicit assumption underlying the NPRM seems to be that grantees have not yet made many of the proposed changes merely because they were not required to do so. Yet, the real reason Head Start leaders have not been able to make many of the proposed changes is due to a lack of funding, not a lack of motivation. In our experience, Head Start agencies absolutely want to support their staff and provide high-quality, safe services. They work on these goals every day. The implicit failure of the NPRM to recognize the compassion, creativity, expertise, professionalism, and integrity of Head Start agencies and their staff is unhelpful and counterproductive.

We are hopeful that our comments will help OHS take this opportunity to entrust Head Start grantees with sufficient deference and flexibility to carry out the mission of the program and support them to maximize the limited resources available to them at any given time. Being supportive rather than punitive this will be the most effective way to achieve the goals set forth in the NPRM.

Specific Comments

The comments below are not intended to be a comprehensive review of the NPRM but instead provide suggestions on how to further improve the clarity, effectiveness, and fairness of certain aspects of the Performance Standards addressed in the NPRM. We also provide comments on related provisions not specifically covered in the NPRM that will further the objectives of the proposed changes and create consistency with existing provisions.

1. **The proposed provisions to support Head Start staff such as improvements to staff wages and benefits, staff health and wellness, etc. are unfunded mandates that should be removed or at the very least be contingent on adequate additional appropriations. [§§1302.90(e), (f), 1302.93]**

The NPRM provides for a number of improvements to address the staff shortages and support Head Start grantees in their efforts to recruit and retain qualified staff. The proposals range from increasing pay parity with public school teachers as well as minimum pay to meet the basic cost of living in the area, increase paid leave, including imposing requirements of Family and Medical Leave Act (FMLA) on grantees that are otherwise not subject to that law, providing support for child care subsidies, and student loan forgiveness. It is clear that most if not all of these initiatives will increase the cost of services. It is not clear that OHS appreciates the magnitude of inevitable increase in associated administrative costs. For example, the internal human resources monitoring expenses alone will increase dramatically.

If Congress fails to adequately increase the appropriation to implement the proposed staff supports, OHS acknowledges that there will be a predictable need to radically shrink the size of the program through slot reductions. This will result in increased costs for OHS to administer the program to process the flood of slot reduction requests. Even today, there are lengthy backlogs for these requests.

Recommendation: OHS should remove the proposed requirements and instead offer support to make the suggested changes in support of staff. Support for issues like health care could include partnering with Federally-qualified health centers in the community or other community partners to assist with meeting staff needs.

If OHS insists on going forward with the proposed mandates, it should include language that delays implementation contingent on sufficient additional appropriations, in a manner similar to the duration requirements set forth in the 2016 final rule.

2. **The proposed provision on Migrant and Seasonal eligibility is helpful and can be improved with a few minor modifications. [§1302.12(f)]**

The NPRM proposes to remove the requirement that a family's income come primarily from agricultural work to instead require that one family member is primarily engaged in agricultural work. This is overall a good change because in many cases the income from agricultural work is not sufficient to sustain a family and may not be the primary source of income even if family members spend the majority of their time working in agriculture. The Head Start Act does not have a threshold requirement regarding the extent of the of engagement in agricultural work or the amount of income earned and merely requires that the Migrant and Seasonal programs serve "families who are engaged in agricultural labor" *See* Head Start Act Section 637(17).

Recommendation: The provision should go further to clarify a flexible definition of "primarily engaged in agricultural work" consistent with the Head Start Act. For example, the provision could specify that agricultural work make up at least thirty percent of the total time the individual worked in the last year. In addition, OHS should clarify the definition of "family" and clearly define "legally responsible party" and "authorized caregiver."

3. **The proposed provision to adjust income to exclude excessive housing expenses is overly burdensome and based on questionable statutory authority. [§1302.12(i)]**

The proposed provision allows for Head Start grantees to consider excessive housing costs the during the income eligibility verification process. Specifically, staff would adjust the family income by subtracting certain housing expenses upon revieing bills, bank statements, and other documents. This proposal is responsive to the fact that the federal poverty guidelines do not account for the varying costs of living around the country and that many families spend well more than a third of their income on housing costs. It has been clear to the Head Start community that many of those families would benefit greatly from the program.

Although very well intentioned, this proposed change is problematic for at least two reasons. First, the statutory authority to implement such a change is questionable. The statutory definition of "income" requires grantees to evaluate "gross income" and it is not clear which provision of the Head Start Act would allow grantees to deduct housing expenses from a family's income. Second, the proposal substantially increases the administrative burden on Head Start staff and families. Staff would be required to review, analyze, and maintain significantly more documents related to expenses, in addition to all of the information regarding income. Correspondingly, internal monitoring and oversight responsibilities would increase, and programs would then be subject to even more scrutiny related to

housing expense documents from reviewers, auditors and the Office of Inspector General. Head Start applicant families often have informal housing arrangements and would be tasked with obtaining even more documentation from third parties that may not readily be willing to provide such information.

Recommendation: Rather than imposing unnecessary administrative burdens on Head Start staff and families rooted in uncertain statutory authority, OHS could implement other changes that achieves the same goal: reaching families that should be considered low-income based on a relatively higher cost of living.

First, OHS could interpret the longstanding language in the statute: "The family is eligible for or, *in the absence of child care*, would be potentially eligible for public assistance…" To date, there has been no meaningful interpretation of this language. An obvious benefit of this approach is that there is clear statutory authority for this proposal. One way to interpret this language is for staff to adjust a family's income by subtracting the average cost of child care in the service area, rather than individualized information on each family's excess housing expenses. The staff member could then compare that amount to the federal poverty level.

To avoid uncertainty inherent in determining what is the average cost of child care in a particular area, OHS could, annually, publish such data thereby removing the guesswork on a local level. Using and publishing a geographic adjustment factor is common in other HHS programs like Medicare and would be very beneficial in Head Start.

Second, OHS could give a broader interpretation of "eligible for public assistance" in two ways (a) expand the types of public assistance" and (b)) allow for Head Start eligibility even if the family is not currently receiving that assistance.

(a) Types of Assistance:

Historically this language has been narrowly interpreted to only include Temporary Assistance for Needy Families (TANF), Supplemental Security Income (SSI), and more recently, Supplemental Nutrition Assistance Program (SNAP). Similar to the recent update allowing for SNAP eligibility, OHS is well within its authority to expand to other forms of federal, state, and local public assistance such as the most obvious and largest form of federal assistance -- Medicaid. Tying Head Start eligibility to Medicaid eligibility as implemented in a particular state *via* its Medicaid State Plan is an obvious way to expand eligibility and achieve parity in many high cost areas of the country such as California and New York.

(b) Eligible for Public Assistance:

In addition to limiting the forms of public assistance, OHS has narrowly construed the statutory language to only allow for Head Start eligibility if the family is *receiving* the benefit at the time of the application for Head Start, rather than whether they are *eligible* for that public assistance. An example of a broader interpretation of this language would be to allow for eligibility for families that are on waiting lists for public housing or a Section 8 voucher. Under those circumstances, another entity has already verified the income and need, but the family may not actually receive the benefit until the child ages out of the Head Start program.

4. **The proposed provisions regarding suspension and expulsion impose impractical obligations on Head Start grantees. [§ 1302.17]**

The proposed language helpfully outlines steps to consider prior to suspending a child in extreme circumstances by including resources such as seeking interventions and support from the mental health consultant. However, the NPRM also proposes more stringent limitations on suspension and expulsion of children through this provision as well as through proposed new definitions for "suspension" and "expulsion" in section 1305.2. Section 1302.17 adds a requirement to place child with an alternate provider "that can immediately enroll and provide services to the child" upon expulsion. The proposed definition of "suspension" broadly includes moving a child from the center-based program to home based as well as requesting that a parent or parent's designee to pick up a child early "for reasons other than illness or injury." The proposed definition of expulsion also includes simply moving the child from center-based learning setting to a home-based learning setting.

These provisions impose an extremely onerous burden on programs and staff that are, in many cases, impossible to comply with depending on what resources are available in the community and fail to recognize the potential impact that a highly disruptive and physically aggressive child may have on the health and safety other Head Start children and staff. For example, before a program may send a child home early for a reason other than illness or injury or even remove the child from the learning setting away from other children, it

> "must engage with a mental health consultant, the multidisciplinary team responsible for mental health, collaborate with the parents, and utilize appropriate community resources – such as behavior coaches, psychologists, other appropriate specialists, or other resources – as needed, to determine no other reasonable option is appropriate."

The proposed new definition of "suspension" renders the existing provision in 1302.17(a)(3) effectively impossible to meet under certain circumstances. In order to protect the safety of other children, staff may need to remove a child from the learning setting before taking all of these actions. Another proposed mandate would be for the program to place a child in a program "that can immediately enroll and provide services to the child." The NPRM does not address what happens if there are no such services available and again completely ignores the risk to others. Putting a Head Start agency in the position of what is the job of state or local social service agencies is neither constructive nor workable.

As currently drafted, the proposed provision can expose the Head Start program to liability from staff employment claims, claims from other parents and compliance with state and local law. The implication is a one-size-fits-all directive instead of allowing Head Start programs to use appropriate discretion on a case-by case-basis taking into account local community situations and factors. We believe the suspension and expulsion regulations should be made more, not less, flexible to recognize local expertise as discussed next.

Recommendation: OHS should amend the proposed definitions of suspension to allow more flexibility for staff to take necessary actions to protect all children in the program. The definition should correspond with the language in 1302.17(a) to allow for a more practical timeline of efforts to work with the child and avoid removing the child from the learning setting for a longer period of time.

The language regarding expulsion should state that programs "must use best efforts" when attempting to place a child outside of the initial learning setting.

5. **The proposed provisions regarding health and safety reporting obligations are overburdensome without increasing safety**. **[§1302.102(d)(ii)]**

The NPRM proposes to align the program performance standards with informal reporting guidance with a few alterations. The proposed provision requires reports be made in three business days (rather than five calendar days). The proposed language also clarifies that Head Start programs must report incidents that involve non-Head Start children, when the classroom is partially funded by Head Start, or if the salary of the staff member involved is partially funded with Head Start dollars. In addition, the proposed language goes beyond the guidance to require reports of "any suspected or known violations of the Standards of Conduct." The proposed guidance is overly broad and burdensome without improving safety of children. There will likely be continued confusion on what should be reported. In particular, the language is problematic with respect to (a) non-Head Start children and (b) reports of suspected violations of the standards of conduct.

Non- Head Start children

Although it is understandable that OHS may require grantees to report health and safety incidents of staff partially funded by Head Start grant dollars, OHS does not have authority to request personally identifiable information (PII) or protected health information (PHI) of families that have not consented to be part of the federal program. Under the informal guidance similar to the proposed language in 1302.102(d) (ii)(A)(2), program specialists have requested that Head Start grantees provide information regarding the non-Head Start child's medical treatment as a result of alleged health and safety incidents.

Suspected violations of Standards of Conduct

Section 1302.102(d)(ii)(E) adds a new requirement that grantees must report "Any *suspected* or known violations of Standards of Conduct under §1302.90(c)(1)(ii)." It is clear that no staff, consultant, or volunteer should ever engage in the behavior outlined in the Standards of Conduct. Furthermore, it makes sense that grantees report even suspected violations of the Standards of Conduct as they primarily pertain to serious infractions such as corporal punishment, sexual abuse, and emotional abuse such as threatening and intimidating a child. However, requiring reports of suspected violations presents problems because the provisions in 1302.90 (c)(ii) include a non-exhaustive list that requires reports of behavior that "negatively impact the health, mental health" of a child. Among the listed infractions is the vague requirement to "respect and promote the unique identity of each individual child and family and…not stereotype on any basis, including gender, race, ethnicity, culture, religion, disability, sexual orientation, or family composition." Consequently, as currently drafted, grantees must report if any staff, consultant, or volunteer merely assumes someone else may have negatively impacted the mental health of a child, or engaged in behavior that they construe to be a lack of respect.

Recommendation: The provision should be amended to make clear that OHS may not request, and grantees are not obligated to provide PII or PHI of non-Head Start children and families. The provision

should also limit the reporting obligations to abuse and neglect as defined by Child Abuse Prevention and Treatment Act (CAPTA) (42 U.S.C. 5101 note), which defined as "Any recent act or failure to act on the part of a parent or caretaker which results in death, serious physical or emotional harm, sexual abuse or exploitation" or "An act or failure to act which presents an imminent risk of serious harm." This definition encompasses all of the significant explicit prohibitions enumerated in the Standards of Conduct.

6. **The definition of "federal interest" definition exceeds statutory authority and is inconsistent with the Uniform Guidance. [§1302.5]**

As stated in the NPRM, OHS proposes "technical fixes" to the existing definition of "federal interest with no substantive changes. As such the definition continues to be problematic because it lacks statutory authority or approval from OMB to deviate from 2 C.F.R. Part 200. The definition also could potentially result in improper augmentation of ACF's appropriation.

The Uniform Guidance provides mandatory definitions of "federal share" and "federal interest" with which the existing Head Start definition as well as the proposed changes are inconsistent. *See* 45 C.F.R. § 75.2. Most notably, 75 C.F.R. § 75.2 defines "federal share" as only "the portion of total project costs that are *paid by Federal funds*." (emphasis added). This is not a mere administrative definition, but a fundamental financial assistance principle that OHS seeks, through the NPRM, to alter. As explained at 45 C.F.R. § 75.318(c), the federal share of real property is limited to the proportion of the original purchase price (plus cost of improvements) paid with federal funds.

In addition to the problems with statutory and OMB authority, there are significant practical implications. Community partners may be discouraged from collaborating with Head Start grantees on mutually beneficial facility projects because rather than making a joint investment for the duration of the need, they would be effectively permanently bestowing their contribution of local resources to the federal government.

Recommendation: deleting the definition of "federal interest" in Head Start Program performance standards and defer to the long-standing definition in the Uniform Guidance (which defines federal interest to include *only* "[t]he *percentage of Federal participation* in the total cost of the real property, equipment, or supplies." We also strongly believe that all Head Start regulations that deviate from the Uniform Guidance should be removed as such provision undermine the very concept of uniform application of federal grant requirements across programs and federal agencies.

7. **The proposed changes to the definition of "income" are helpful and can be improved with a few minor modifications. [§1302.5]**

Updates outdated definition of income and makes clear that public assistance should not be included as income

Recommendation: This is a welcome change. OHS could further clarify the definition of "income" by addressing the proper treatment of education grants and stipends.

8. **The proposed changes to the definition of "major renovations" are helpful [§1302.5] and should be applied to Head Start Davis-Bacon requirements.**

The NPRM helpfully proposes to clarify the definition of "major renovation" to distinguish from "repairs," and "minor renovations." The preamble to the NPRM provides useful examples to further clarify the definition. OHS could use this opportunity to apply the new definition of "major renovation" to the Head Start Davis Bacon requirements. Historically, OHS guidance has ignored the clear language in the Head Start Act that only incorporates Davis Bacon requirements to "renovations." Instead, OHS has required grantees to significantly increase the cost of even small painting projects by ignoring this language. This misdirected guidance also prevents small businesses to be able to compete for work with Head Start grantees because they lack the capacity to comply with stringent Davis Bacon requirements

Recommendation: OHS should align application of the Davis Bacon requirements with the language in the Head Start Act which only requires application for "renovation." This would allow grantees large cost savings which would allow them to use those funds to support their staff.

9. **OHS should request approval to use fixed price awards to help Head Start grantees maximize their limited resources.**

The Uniform Guidance grants authority for agencies and pass-through entities to issue fixed amount awards that provide a specific amount of financial support without regard to the actual costs, and consequently reducing the administrative and recordkeeping burdens for all parties involved. *See* 45 C.F.R. § 75.2. Accountability is instead based on performance and results. However, under the Uniform Guidance grant programs that have a mandatory cost share or match like Head Start may not use fixed amount awards. 45 C.F.R. § 75.201(b)(2). At least one other program with matching requirements has obtained an exemption from OMB and is permitted to use fixed amount awards. *See* 2 C.F.R. §§ 2205.201(b) and 2205.306.

Fixed amount awards would greatly benefit Head Start programs that often expend exorbitant amounts of their precious few resources on compliance and at times experience disallowances based, not on the quality of the services they provide to the community, but instead on failure to maintain adequate cost accounting documentation. Permitting fixed amount awards would allow Head Start grantees and subgrantees the ability to focus on programmatic activities rather than compliance. Performance measures could be based on the number of children and families served and/or meeting the requirements of the programmatic Performance Standards such as timely screenings.

Recommendation: OHS should seek an exemption to 45 C.F.R. § 75.201(b)(2) and allow fixed amount awards.

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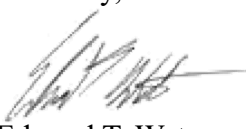
The suggested changes to the NPRM will reinforce OHS and Head Start grantees' efforts of fulfilling the mission of serving the children and families in communities throughout the nation and supporting the valuable staff that make that mission real.

Thank you for the opportunity to comment on the provisions of the NPRM regarding the Head Start Performance Standards. Feldesman LLP appreciates your consideration and favorable action on these comments.

Sincerely,



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