

Office of Head Start
Director of Policy and Planning
330 C Street SW, 4th Floor
Washington, D.C. 20201
RIN 0970-AD01

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To Whom It May Concern:

On behalf of the National Indian Head Start Directors Association—the voice of American Indian and Alaska Native Head Start (Indian Head Start) programs for over 40 years—we submit the comments below on *Supporting the Head Start Workforce and Consistent Quality Programming*, Proposed Rule, RIN 0970-AD01.

I. INTRODUCTION

We start by stating that we are broadly supportive of the aims of this Proposed Rule. We want our Indian Head Start program teachers, administrators, and staff to be paid good living wages with robust benefits. Working for a Head Start program is a hard job and our teachers, administrators, and staff do not get nearly as much credit or compensation as they truly deserve. We want our children, families, and staff to have access to readily available quality mental health services and supports. We want clean and safe program environments.

Our programs would love to implement many of these proposals, but lack the resources and flexibility to do so. As much as we support the goals ACF would advance in this Proposed Rule, we cannot agree with ACF's approach. This Proposed Rule would impose staggering costs for Head Start programs nationwide even though ACF knows no funding is forthcoming to support these activities. As such, many of ACF's proposals are better suited for best practices than codified, unfunded, and inflexible regulations.

The Proposed Rule is sweeping and, by our estimation, would impose 67 new requirements and implement updates to another 60 existing requirements. On the whole, ACF appears to expect more and more of our classroom staff while expecting them to do it with funding levels that have never fully aligned with cost and which have not changed with the demands of the economy—particularly with respect to labor force demands. Our Indian Head Start program staff are already burnt out and trying their best to keep their programs—and themselves—afloat while navigating student behavior concerns as well as family complexities that require time, attention, and compassion to address. They are already wearing multiple hats—cooking for students, driving buses, submitting compliance reports. But the Proposed Rule piles the workload on even more.

We will return to the compliance costs of this Proposed Rule, but before we can even get there we must first discuss the fact that the Proposed Rule was drafted and published without proper Tribal Consultation and that ACF has otherwise failed to consider the unique needs of Tribal Governments in a manner that directly undermines Tribal sovereignty.

II. CONCERNS ABOUT ACF'S INSUFFICIENT ATTENTION TO TRIBAL COMMUNITIES & TRIBAL CONSULTATION IN FORMULATING THIS PROPOSED RULE

A. Lack of Tribal Consultation

Just a few weeks ago, President Biden affirmed this Administration's commitment to respecting, fulfilling, and honoring the Federal Government's treaty and trust obligations to Tribes: Now is the time to build upon this foundation by ushering in the next era of self-determination policies and our unique Nation-to-Nation relationships, during which *we will better acknowledge and engage with Tribal Nations as respected and vital self-governing sovereigns...* This order solidifies my Administration's commitment to this next era of Tribal self-determination policies that are rooted in *prioritizing partnerships with Tribal leaders, respect for Tribal sovereignty, trust in Tribal priorities, and dignity for Tribal Nations.*

Executive Order 14112 of December 6, 2023, *Reforming Federal Funding and Support for Tribal Nations to Better Embrace Our Trust Responsibilities and Promote the Next Era of Tribal Self-Determination* (hereafter E.O. 14112), 88 Fed. Reg. 86022-23.¹

Regular and meaningful Tribal Consultation is necessary for the Federal Government to respect, honor, and fulfil its treaty and trust obligations to Tribes and is required by Federal law and policy. As the HHS Tribal Consultation Policy states, “[t]he importance of consultation with Indian Tribes was affirmed through Presidential Memoranda in 1994, 2004 and 2009, and an Executive Order (EO) in 2000.”² The importance of Federal agencies undertaking Tribal Consultation was also affirmed by Presidential Memorandums in January 2021 and November 2022. Moreover, the President's November 2023 Executive Order explicitly affirmed Federal agencies' responsibility to “continually improv[e] agencies' understanding of Tribal Nations' unique needs *through Tribal consultation and meaningful partnerships.*” E.O. 14112 §5(a)(ix). Tribal Consultation is also explicitly required by the Head Start Act for review and promulgation

¹ We acknowledge that this Executive Order was not signed until a few weeks after the Proposed Rule was published. However, the Administration's movements in the months leading up to the annual White House Tribal Nations Summit in November offered ample support for the widespread expectations that the Administration would make some type of policy announcement—likely *at least* a renewal of outstanding commitments to American Indians and Alaska Natives. Accordingly, we think it fair to hold ACF to all current Tribal Consultation standards.

² HHS Tribal Consultation Policy, available here <https://www.hhs.gov/sites/default/files/iea/tribal/tribalconsultation/hhs-consultation-policy.pdf>

of Head Start standards. 42 U.S.C. § 9836a(a)(2)(D). Consultation with the National Indian Head Start Directors Association prior to rulemaking is also specifically required by the Act. *Id.*

The HHS Tribal Consultation Policy plainly states that every operating division within HHS must engage in Tribal Consultation *before* drafting and proposing rules:

B. To the extent practicable and permitted by law, *no Division shall promulgate any regulation that has Tribal implications, or that imposes substantial direct compliance costs on Indian Tribes, or that is not required by statute, unless:*

1. *Funds necessary to pay the direct costs incurred by the Indian Tribe in complying with the regulation are provided by the Federal Government; or*

2. The Division, *prior to the formal promulgation of the regulation,*

a) *Consulted with Indian Tribes throughout all stages of the process of developing the proposed regulation;*

b) Provided a Tribal summary impact statement in a separately identified portion of the preamble to the regulation as it is to be issued in the Federal Register (FR), which consists of a description of the extent of the Division's prior consultation with Indian Tribes, a summary of the nature of their concerns and the Division's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of Tribal officials have been met; and

c) Made available to the Secretary and the Director of OMB any written communications submitted to the Division by Tribal officials.

C. To the extent practicable and permitted by law, *no Division shall promulgate any regulation that has Tribal implications and that preempts Tribal law unless the Division, prior to the formal promulgation of the regulation,*

1. *Consulted with Tribal officials throughout all stages of the process of developing the proposed regulation;*

2. Provided a Tribal summary impact statement in a separately identified portion of the preamble to the regulation as it is to be issued in the FR, which consists of a description of the extent of the Division's prior consultation with Tribal officials, a summary of the nature of their concerns and the Division's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of Tribal officials have been met; and

3. Made available to the Secretary any written communications submitted to the Division by Tribal officials.

HHS Tribal Consultation Policy, 3-4. Nearly identical language appears in ACF's Tribal Consultation Policy, 12-13.

ACF's Tribal Consultation Policy independently affirms its commitment to conduct Tribal Consultation "before taking action that will significantly affect Indian tribes."³ ACF Tribal

³ ACF Tribal Consultation Policy, Available here https://www.acf.hhs.gov/sites/default/files/documents/ana/final_acf_tcp_8_18_11.pdf

Consultation Policy, 9. Among others, ACF actions that are considered to significantly affect Tribes—those that immediately trigger the need for Tribal Consultation—include actions that may have substantial direct effects “on the amount or duration of ACF program funding” or “on the delivery of ACF program services to one or more tribes.” *Id.* at 10.

Below, we will return to some of the themes articulated by these Tribal Consultation Policies—for example, that the Proposed Rule would impose numerous unfunded mandates on Tribes and Tribal programs, would interfere with Tribal governance, would force a reduction of services to Tribal children, and would alter the purchasing power of ACF program funding—but for now we emphasize that ACF conducted little or no Tribal Consultation (and certainly not meaningful consultation) while developing and finalizing this Proposed Rule.

Even ACF’s most intrepid attempts to dress its actions up as proper rulemaking with Tribal Consultation cannot hide ACF’s lack of outreach beyond HHS:

We sought extensive input to develop this [Proposed Rule]. We collaborated and consulted with many policy and programmatic expert staff in [HHS]. ... We also consulted extensively with [HHS] regional staff who directly oversee and support Head Start grants and program operations as their primary job responsibility. We held multiple listening and input sessions with [HHS staff] ... We intentionally consulted with [HHS] staff that oversee Migrant and Seasonal Head Start and Tribal Head Start programs.... Similarly, we met with members of [an HHS entity]. We consulted with experts in early childhood development including staff [in HHS]. Additionally, we reviewed many research reports on a variety of topics, including NAS reports on the workforce.... In addition, in consultation with our [HHS staff], we considered the types of technical assistance requested by and provided to Head Start agencies and programs. We also reviewed findings from [HHS] monitoring reports to glean more insights into where grant recipients struggle the most with implementing requirements. 88 Fed. Reg. 80870

To its credit, ACF did conduct a survey of grant recipients, though it is not clear those grant recipients actually knew *how* their responses would be used:

We also recently fielded a survey of grant recipients (November 2022) which provided real time information on workforce challenges programs are experiencing. *Id.*

Troublingly, ACF tries to highlight years’ worth of frustratingly asymmetrical events like webinars and presentations—events that *do not and cannot* replace Tribal Consultation:

Furthermore, over the past several years since the last revision of the HSPPS (finalized in 2016), OHS has held many webinars for grant recipients OHS has also given multiple presentations During these webinars and conference presentations, grant recipient participants often ask questions and provide input regarding challenges with implementing various aspects of program requirements.... *Id.*

In our experience, ACF’s webinars and presentations follow an all-too familiar Federal pattern: ACF staff spend the first half of the meeting telling us about an action that the agency has already decided to take *and then* Tribal leaders may ask questions and provide feedback in whatever time is remaining. Rarely do our programs and Tribal leaders receive advanced notice of the agenda for

these webinars and conference presentations. This makes it extremely difficult for our programs to provide informed feedback to ACF because our programs have had no time to gather the necessary data from their program staff. More than anything else, our program staff and Tribal leaders come away from these events demoralized. It is as if ACF is only going through the motions of providing opportunity to collect Tribal concerns so that ACF can ‘check the box’ and say that it did so.

Unfortunately, our cynicism about the nature of the Federal-Tribal relationship is only further fed by ACF’s citation of its annual Tribal Consultations as support for its claim that it appropriately gathered stakeholder input while drafting this Proposed Rule:

We regularly hear from Tribal leaders at OHS’s annual Tribal consultations. *Id.* Technically true. But it’s hard to see why such a statement is relevant to *this* Proposed Rule. In *none* of those consultations did ACF make Tribes aware that it was about to overhaul program standards, or reveal anything about any aspects of its plans to do so. For Tribal Consultation to work, Federal agencies need to candidly communicate what their plans are, how they see their plans impacting Tribal communities, and how they intend to use Tribal input to shape those plans. ACF’s actions fail on all fronts.

It is no surprise then, that from this intellectual salon of agency-only internal deliberations and cherry-picked, out-of-context feedback from grant recipients and Tribes, ACF concludes with one of its most inconsistent statements in the Proposed Rule:

Lastly, ACF asserts that the revisions to the HSPPS proposed in this [Proposed Rule] will not result in the elimination of or any reduction in quality, scope, or types of health, educational, parental involvement, nutritional, social, or other services required to be provided under the standards that were in effect when the Head Start Act was last reauthorized in 2007. 88 Fed. Reg. 80870-71.

This, despite its acknowledgements elsewhere—in *the same document*, that its proposals *will* force a reduction of slots and scaling back of services. *See* below at IV.B; 88 Fed. Reg. 80825, 73.

ACF’s failure to conduct meaningful Tribal Consultation on this Proposed Rule is contrary to HHS policy, ACF policy, Presidential directives, and Federal law. Sadly, this is but the latest episode in the Office of Head Start’s declining relationship with Tribes. In the last few years, we have heard that an increasing number of our program directors have been advised that Tribal leadership will not attend Tribal Consultation with the Office of Head Start because OHS has repeatedly failed to listen to and heed what Tribal leaders are saying. We were also recently reminded of the inadequacy of ACF Tribal Consultation in the months leading up to the promulgation of the 2016 Performance Standards. But, rather than working to rebuild the relationships with Tribal leaders it has damaged, ACF once again sprints toward the Final Rule, knocking over Tribal communities as it goes. The carelessness and expedited timeline of these proposals also place serious limitations on the quality of the comments we are able to provide on the Proposed Rule.

As we briefly noted above (and will discuss in more depth below), the Proposed Rule would cost billions of dollars nationwide and constitutes a major regulatory overhaul of Head Start the likes of which we have not seen in decades. It takes a substantial amount of time and resources to gather the data and feedback necessary to provide informed comments on the impacts of this Proposed Rule on our programs. The Proposed Rule calls on our programs to estimate the funding necessary for them to come into full compliance. This would include—but is not limited to—gathering information about local salary and benefits for comparable teaching and staff positions (information which may not be readily available); pulling together hypothetical salary and benefits packages for professionals not currently employed by our programs; seeking contractor estimates for the costs of monitoring lead water levels and, if need be, replacing infrastructure; estimating the labor, equipment, fuel, and insurance costs of providing transportation to every child to and from our programs; and attempting to estimate the cumulative administrative burden of complying with paperwork requirements contemplated by the Proposed Rule, without any inkling of how long or how extensive ACF’s future information requests might be. Then, our programs would need to calculate baseline costs for their programs for the next seven years and compare the cost of compliance with the Proposed Rule against their baseline costs. Then they’d need to calculate how many program slots to eliminate to cover that difference.⁴

This lift is part of the reason why Tribal Consultation throughout the rule-conception process is so important—it provides Tribes with notice, a forum to be heard, and time to pull together reports, anecdotes, testimony, and the legal review needed to provide informed responses.

Under ordinary circumstances, aggregating, analyzing, and summarizing this information would be challenging to accomplish within the 60-day deadline set for submitting comments, but the timing of the release of this Proposed Rule could not be worse for the leaders of our programs. As ACF is aware, the end of the calendar year—November and December—is election season for many Tribes. As a result, many new Tribal Administrations do not take office until January or February. The release of this Proposed Rule unfortunately straddles this transition period and has the potential to (1) cause tension between incoming and outgoing leadership and (2) get lost in the transition. The November—January season is also the time for ceremony for many Tribes across the country. In addition, the late-November release of this Proposed Rule coincides with the Judeo-Christian holiday season celebrated and observed by many of our Tribal Administrations, programs, and families. This places limitations on the quality and quantity of feedback we can gather from our Head Start families. Not surprisingly, one of our program directors responded to this Proposed Rule with the following remark:

“The thought of all these rules is very overwhelming to the point that I can’t even begin to put comments together.”

All of these factors make it especially difficult for our programs to pull together comments on this Proposed Rule in time for the comment deadline and makes ACF’s decision to forego Tribal

⁴ We will return to the math of this program slots to compensation trade-off later to illustrate why this offset might not work out for some of our programs.

Consultation that much more egregious. Even though we promptly made these concerns known, ACF nevertheless rejected our request to extend the deadline for comments on this Proposed Rule. By foregoing Tribal Consultation and hot-lining this Proposed Rule at this time of year, ACF effectively has not afforded us the time we need to survey our programs and fully, properly, and competently respond to the Proposed Rule. Thus we are silenced.

B. Tribal Sovereignty & Self-Determination

Parts of this Proposed Rule would interfere with Tribal governance; we express our concerns about those provisions immediately below. In addition, we have identified a couple of decisions that, if made, could actually improve this Proposed Rule's impact on Tribal sovereignty and self-determination and we encourage ACF to consider implementing them. Respect for Tribal sovereignty and self-determination is a core value to which President Biden recently affirmed the Federal Government's commitment:

As we continue to support Tribal Nations, we must respect their sovereignty by better ensuring that they are able to make their own decisions about where and how to meet the needs of their communities.

E.O. 14112, 88 Fed. Reg. 86022.

The Proposed Rule would require programs to provide certain Indian Head Start employees with certain wages and benefits. *See* Proposed 42 C.F.R. § 1302.90(e)-(f). However, this fails to consider that many Indian Head Start programs operate within Tribal Governments and these changes would have ripple effects that greatly exceed ACF's regulatory jurisdiction. As one Indian Head Start program reported, their program functions within a Tribal Education Division with five other programs. Raising wages and benefits in the Head Start program (or any one of the programs) affects wages and benefits set across the entire Tribal Education Division. As such, the Proposed Rule would effectively set a minimum wage for the Tribal Education Division. This would directly usurp the Tribe's sovereign right to set its own conditions of employment. Moreover, it seems more likely than not that the imposition of a minimum compensation package for the Tribal Education Division would spill out across other Tribal departments, thus compounding costs for the Tribe. This would likely extend beyond just teacher compensation because, as one of our program leaders put it, "you can't raise teaching wages without raising administrative wages."

ACF's proposal to set 30 hours as the definition of "full-time" employment threatens similar interference. Proposed 42 C.F.R. § 1302.90(f). Just as it is the prerogative of a Tribal Government to itself set compensation packages for its employees, so too it is the prerogative of a Tribal Government to establish for itself what full-time Tribal employment looks like. Some of our Indian Head Start programs have reported that their Tribes set full-time employment at 38 or 40 hours, for example. ACF's proposal thus directly conflicts with established Tribal law and policy. In a practical sense, the forced reclassification of 30-37 hour and 30-39 hour Head Start employees as full-time employees triggers immediate economic consequences for the Tribe, stemming from the amount and type of benefits owed to different types of employees. As just discussed, while these consequences may begin with the Head Start program, they are unlikely to

be contained there and we would expect cascading economic impacts throughout Tribal Governments. And, in a fundamental sense, ACF's full-time policy would appear to threaten to pre-empt Tribal law. Such an extreme action is only ever within the purview of Congress—not unelected Executive Department officials, and is something that HHS and ACF committed to *not doing* without prior Tribal Consultation: "... no Division shall promulgate any regulation that has Tribal implications and that preempts Tribal law unless the Division, prior to the formal promulgation of the regulation...[c]onsulted with Tribal officials throughout all stages of the process of developing the proposed regulation." HHS Tribal Consultation Policy, 3-4.

In addition, we are concerned that some of ACF's data collection activities are unnecessary and do not honor the spirit of Tribal data sovereignty—the right of Tribal communities to be masters of their own data. The Proposed Rule would implement numerous new reporting requirements. Proposed 42 C.F.R. § 1302.102(d). Below, we will discuss our concerns about the administrative burden that would place on our programs. Here, we question ACF's intended use of the data we would be obligated to report. Our programs already contend that the Office of Head Start does not meaningfully or timely respond to incidents; it is hard to see how papering our programs with additional reporting requirements will improve matters. Others have expressed concerns that information and incidents that do get reported get escalated at the Department level but never corroborated at the local level. Further, we would like to know how ACF plans to use data about our programs in its communications with internal and external stakeholders, including, but not limited to, the White House, Congress, public health researchers, etc. For far too long our communities have been excluded from discussions about statistics affecting our own people.

Though we find many parts of this Proposed Rule concerning, we see opportunity in others. Specifically, we see opportunities for ACF to improve its commitment to honoring Tribal sovereignty. We note that the Proposed Rule seeks to set up an income calculation adjustment for those whose housing costs are considered excessive in proportion to their income. Proposed 42 C.F.R. § 1302.12(i)(ii). While this adjustment may be helpful for some in our Indian Head Start programs, many in our Tribal communities have access to affordable Tribal housing as a result of the Federal Government's treaty and trust obligations to Tribes and Tribal Governments' decisions about how to care for their people. *See generally* Native American Housing Assistance and Self Determination Act of 1996, 25 U.S.C. §§ 4101-4243. As such, the housing adjustment may be of limited use to certain Tribal communities. In addition, as a result of the unique relationship between American Indian and Alaska Native communities and the Federal Government, other conceivable adjustment factors—perhaps an adjustment when a high percentage of income is spent on food, transportation, or student loan debt—may likewise be of limited use for Indian Head Start program families. **Accordingly, rather than codify specific types of adjustments that programs can make to income calculations, we urge ACF to consider codifying in its regulations an instruction that Tribes and Indian Head Start programs can determine *for themselves* what kinds of income adjustments are appropriate to make.** This would be much more responsive to local needs and honors principles of Tribal sovereignty and self-determination by unequivocally empowering Tribes to make decisions for their own people.

For similar reasons, we urge ACF to not adopt its proposal to require that the 1,380 hours of Early Head Start operations be conducted within 46 weeks. Proposed 42 C.F.R. § 1302.21(c)(1)(i). For some of our Indian Head Start programs, the ability to be flexible about how and when to work toward the 1,380 hours requirement throughout the program year has supported traditional Tribal practices and important local and cultural events. For example, some of our communities engage in traditional gathering and subsistence hunting and fishing. These activities have their own time of year. One of our programs in Alaska reported that sometimes there are only one or two children in its classroom during the summer months because its Head Start families are engaging in these activities. Not surprisingly, one school district in Alaska has already adopted a subsistence calendar to respond to the same local needs.⁵ Further, there are other circumstances that counsel scheduling flexibility, such as Tribal holidays and ceremonies, or the funeral of a Tribal elder. Sometimes there are weather events in Indian Country that make roads and waterways impassable for weeks. Preserving program flexibility to schedule hours across the program year ensures that programs can be responsive to the needs of their local communities and the rhythms of traditional cultural practices. **We urge ACF to rethink the application of its 46-week proposal to Indian Head Start programs and to consider codifying deference to Indian Head Start programs to set their own program year schedules.** In evaluating such a proposal, we urge ACF to consider that the Head Start Act specifically directs the Secretary to consider “the unique challenges faced by individual programs, including those programs that are seasonal or short term and those programs that serve rural populations.” 42 U.S.C. § 9836a(a)(2)(B)(x). We already hear concerns from our programs that the Head Start regulations do not provide sufficient time for cultural days and professional development activities. ACF has an opportunity to improve these tensions and convey greater respect and deference to Tribal decisions about local conditions.

C. Unrealistic Proposals for Indian Head Start Programs

Parts of ACF’s reasoning behind the Proposed Rule are unrealistic. Most significantly, ACF suggests that our programs should cut slots and repurpose the funds to comply with the Proposed Rule. 88 Fed. Reg. 80873 (“...[w]e estimate that Head Start programs would need to reduce the total number of funded slots available by about 15% ...to fully implement this proposed rule.”). This suggestion suffers from numerous flaws.

First, in certain rural and remote communities (like some Tribal communities), programs are so small that there are no more slots to cut—those programs are only operating one or two classrooms as it is.⁶ Furthermore, contrary to what appears to be ACF’s understanding, they are operating at close to cost—there is no margin to cut.

⁵ See Will McCarthy, *Southwest Alaska school district adopts subsistence calendar in effort to center Yup’ik culture*, Anchorage Daily News (Sep. 15, 2022) <https://www.adn.com/alaska-news/rural-alaska/2022/09/15/southwest-alaska-school-district-adopts-subsistence-calendar-in-effort-to-center-yupik-culture/>.

⁶ We estimate that about 33% of Indian Head Start programs operate between one and three classrooms. Of those, half were at 90% enrollment.

Second, there is little evidence to suggest that cutting slots to reprogram funds for salaries and benefits will stop the bleeding; we have Indian Head Start programs that have cut slots before and are now confronting *additional* rounds of cuts to try to stave off the recoupment of millions of dollars those programs can't use because they can't find the teachers to cover the chopping-block slots.

Third, it is not clear that ACF considered any alternative trade-off to cover the costs of the Proposed Rule. Some of our programs are exploring the feasibility of providing hybrid in-person/remote at home services in a last-ditch effort to reduce costs without cutting program slots. By contrast, ACF proposes no alternative to its preferred triage strategy.

Fourth, this approach does precisely what the ACF Tribal Consultation Policy protects against: it interferes with “the amount or duration of ACF program funding” and “on the delivery of ACF program services to one or more tribes” by modifying the purchasing power of ACF funds to serve fewer Tribal children. ACF Tribal Consultation Policy, 10.

We are curious to know exactly how ACF expects our smaller programs to cut enough slots to make a meaningful impact to their budgets, and for larger programs, how to decide which community's classroom to cut. We are at a loss as to how to advise our programs to go about this.

Some of our programs have attempted to estimate how many program slots they would have to eliminate to comply with the Proposed Rule. These preliminary assessments are bleak. These respondents estimate they will need to cut between 7.5%–33.3% of their program slots.⁷ Across only nine responding programs, an estimated 431 children will lose Head Start services. But we think the actual slot loss would likely be even higher than this estimated range because some of these projections made cuts at the sub-classroom level—cuts which we think most programs will have difficulty making (even if the dollar amount trade-off appears to line up).

For similar reasons, some of ACF's labor force proposals are simply unworkable for certain areas for certain professions. Proposed 42 C.F.R. §§ 1302.91 (staff qualifications); 1302.45 (multidisciplinary mental health team). Our Indian Head Start programs report that there is such a dire worker shortage in the State of Alaska that the Governor recently ordered the removal of four-year degree requirements for most state jobs.⁸ From our programs that voluntarily provide transportation services, we hear about chronic driver shortages compounded by challenges to recruitment and certification. One Indian Head Start program reported that one of their centers has been without a driver for three years and that competing for drivers with the local school district was particularly challenging because the district was offering a \$10,000 sign-on bonus the Head

⁷ 4 of 39 total slots (10.3%); 10 of 100 total slots (10%); 10 of 134 total slots (7.5%); 20 of 93 total slots (21.5%); 30 of 178 total slots (16.9%); 56 of 191 total slots (29.3%); 60 of 180 total slots (33.3%); 91 of 403 total slots (22.6%); and 150 of 1,029 total slots (14.6%).

⁸ Office of Governor Mike Dunleavy, Governor Dunleavy Champions Economic Opportunities for Alaska Workers, Orders Removal of Four-Year Degree Requirements for Most State Jobs (Feb. 14, 2023) <https://gov.alaska.gov/governor-dunleavy-champions-economic-opportunities-for-alaska-workers-orders-removal-of-four-year-degree-requirements-for-most-state-jobs/>

Start program just could not match. Grimmer still, the same program reported that their current transportation workforce is approaching retirement age and program leaders know they will soon lose the few drivers they do have. From our Indian Head Start programs in the West and Southwest, we have heard about severe existing shortages of mental health professionals in the California and New Mexico areas. Some have reported wait times exceeding five months to merely get an appointment. Other program areas are experiencing less severe shortages, but nevertheless report that having a mental health consultant available for once a month visits is an unattainable standard.

In light of these shortages, we do appreciate that ACF proposes to permit our programs to solicit mental health consultation from professionals still in the process of obtaining licensure. Proposed 42 C.F.R. § 1302.91(e)(8)(ii). This has the potential to keep costs down, support early-career professionals, build the Indian Country mental health provider pipeline, and alleviate the shortage of mental health providers with Early Childhood Education experience. But, this is nothing but a pipe *dream* if there is no funding available to support the hiring of these professionals.

ACF's proposed solution to this workforce crisis is to mandate local salary and benefits matching. Proposed 42 C.F.R. § 1302.90(e)(2),(f). But, as is the case for ACF's funds reprogramming proposition, it is not clear that its proposal will actually have any effect on the root problem. One of our programs is proud to have not only voluntarily matched—but exceeded—local teacher pay. Nevertheless, the program is still struggling to fill open positions because there is such a dearth of teachers in the local area—rural South Dakota. Moreover, despite providing better-than-local pay, the program reports that it has not been able to fill funded enrollment since January 2021, thus demonstrating that increased pay is no guaranteed fix for a nationwide (or even regional) workforce shortage. In addition, for programs facing workforce shortage conditions like those in Alaska and other States, Head Start programs are being undercut by local school districts that are offering similar pay for fewer programmatic requirements and fewer teacher qualifications. Since the Proposed Rule sets out to link Head Start pay to local pay and take credentialing into account, the Proposed Rule exacerbates the cost problem by inflating the baseline value of the lesser-degree positions which in turn inflates the value of the greater-degree positions, which necessarily must exceed the value of the less qualified positions. *See* Proposed 42 C.F.R. § 1302.90(e).

Other ACF proposals suffer from similar goodness-of-fit problems as well—problems that are the natural result of trying to fit programs serving a nation of diverse communities into a single, uniform box. Some of the proposed requirements for employee wellness and breaks do not make sense, for example, for an Alaska Native Head Start program with only two staff alone on an island. There is no way for a program administrator to remotely provide those employees with the regular shift and anytime 5-minute mental health breaks contemplated by the Proposed Rule. Proposed 42 C.F.R. § 1302.93(c)(1),(c)(4). We have also heard about local challenges to getting professionals certified—challenges that vary based on location and profession. Moreover, ACF's proposal to require programs to immediately place a child with a readily available substitute facility in the

event of the need for suspension or expulsion is, as one program leader put it, “unreasonable for anywhere.” Proposed 42 C.F.R. § 1302.17(b)(3).

Finally, ACF should not mandate child transportation to and from our programs. Proposed 42 C.F.R. § 1302.16(a)(2)(v). Some of our programs do provide transportation, but such services are unfortunately out of reach for some of our communities—communities in which Indian Country infrastructure is not funded well enough to have roads to drive on, buses to use, or drivers to rely on. Some of our programs, like those in the Great Plains and Southwest, cover massive geographic service areas for which obligatory transportation is unrealistic. In some places, the local cost to provide transportation to Head Start children may be excessive. *See* 42 U.S.C. § 9835(a)(5)(vii)(stating that *not more than* 10 percent of funds allocated under that provision may be used for program transportation).

ACF should have carefully considered all of these issues in preparation for and participation in proper Tribal Consultation. Yet it did not and the Proposed Rule suffers as a result.

III. CONCERNS WITH THE COST OF THE PROPOSED RULE

A. Unfunded Mandates

As we noted at the outset of these comments, we are broadly supportive of ACF’s aims in promulgating this Proposed Rule. But some of our major concerns are that ACF’s proposals are extremely costly and ACF proposes these requirements knowing that there is no funding available for our programs to meet these requirements *while preserving the quality and scope of services they currently provide*.⁹ To be clear, ACF’s Proposed Rule will cost billions of dollars, but its requirements would not be supported by any new funding, new staff, new resources, new equipment—nothing. Unfortunately, pay parity, compensation increases, increased transportation services, and development of mental health resources can only be achieved if additional funding becomes available to tackle them. The Proposed Rule might also require purchase and implementation of modern technologies that may be unavailable or prohibitively expensive for Tribal communities. Proposed 42 C.F.R. § 1302.13. As such, ACF appears unaware that some Tribal communities face a lack of access to the reliable, accessible, and affordable technologies the rest of the country may take for granted. While some of our families do have smart phones, some of our programs report using free messaging services with their Head Start families because those families are concerned about using up plan minutes. Yet ACF offers no funding to support Tribes or our programs while asking them to scramble to get connected.

⁹ We emphasize that although Head Start programs will still be funded in the normal course of things, and thus the Proposed Rule may not be an unfunded mandate within the traditional and technical sense of the phrase, the fact that the Proposed Rule is not accompanied by the corresponding funding necessary to achieve compliance while protecting our baseline degree of services and operations makes these requirements, *in reality*, unfunded mandates.

By its own admission, ACF has “initially determined that the proposed rule will have a significant economic impact on a substantial number of small entities.” 88 Fed. Reg. 80871. We agree. But we think ACF has had some trouble with the specific math of it and ultimately greatly underestimates the full cost of this Proposed Rule.

In one place, ACF states that the Proposed Rule *would not* have a cumulative impact on State, local, and Tribal governments that exceeds \$177 million (the adjusted threshold for the Unfunded Mandates Reform Act). 88 Fed. Reg. 80872 (“This proposed rule would not likely result in unfunded expenditures that meet or exceed this amount.”). Elsewhere, ACF states the opposite—that the Proposed Rule *would* mandate the aggregate expenditure of more than \$177 million by State, local, and Tribal governments. 88 Fed. Reg. 80871 (“This proposed rule would likely result in expenditures that meet or exceed this amount.”). Since our Indian Head Start programs operate within Tribal Governments, we are particularly interested in the resolution of this question.

We also question some of the assumptions undergirding ACF’s cost estimates. ACF’s “baseline” estimate for the cost of status quo administration of Head Start programs over the next seven years assumes a 2.3% annual increase to Head Start appropriations. 88 Fed. Reg. 80874. In the first place, we are and have been for years now, sporadically beholden to Congressional shutdown brinkmanship that makes flat-funded continuing resolutions increasingly more likely than program funding increases through annual appropriations bills. Second, it has been more than a decade since the Head Start Act was last reauthorized. Third, while a 2.3% annual increase for inflation may have made sense for years like 2018 and 2019, nationwide inflation was 6.1-6.2% in 2022 and 5.4% for the first half of 2023.¹⁰ So even assuming Head Start programs did receive annual 2.3% increases from Congress, it is likely that—particularly for the next few years—a 2.3% increase would not cover the rising cost of programs. As such, ACF overestimates its baseline figure by assuming a purchasing power that is not presently realistic. This swollen baseline in turn deflates the ultimate cost estimate for full compliance with this Proposed Rule.

ACF’s estimate of the cost of this Proposed Rule assumes 755,074 program slots for children. 88 Fed. Reg. 80877. This is the number of program slots ACF projects to be served in 2023. As ACF notes, however, Head Start programs are funded for 2022 for 833,075 program slots. ACF’s Proposed Rule cost projection thus begins with ACF’s 9% reduction of program slots to be served as well as a corresponding 9% reduction in number (and cost) of educational staff to be employed. ACF makes such adjustments because it expects funded enrollment to continue to decline, 88 Fed. Reg. 80877, though some of this decline is a result of workforce shortages, not lack of demand.¹¹ ACF also makes this adjustment despite lengthy Head Start and Early Head Start waitlists across the country. So, rather than estimate the cost of compliance to serve the peak

¹⁰ U.S. Bureau of Labor Statistics, Consumer Price Index for all Urban Consumers https://data.bls.gov/timeseries/CUUR0000SA0L1E?output_view=pct_12mths

¹¹ “[I]n recent years, Head Start programs have experienced significant and persistent under-enrollment where the number of children actually served is far less than the number of funded slots, *due in large part to widespread staffing shortages.*” 88 Fed. Reg. 80873

number of program slots—which is currently not even enough to cover demand for Head Start services—ACF shrinks the size of the problem, and its cost. ACF’s cost estimate also does not account for any population growth adjustment to the number of program slots—and professionals—needed to maintain the relative status quo. ACF’s “baseline” estimate assumes the number of funded slots will remain the same through 2030. Thus, ACF again suppresses the full cost of this Proposed Rule.

By ACF’s math, the Proposed Rule is projected to cost an increase in expenditures of about \$2.4 billion, “with further increases that are consistent with impacts tied to wage growth.” 88 Fed. Reg. 80873. Here, ACF acknowledges that it has failed to completely price-in the cost of the wage growth it is mandating in arriving at its \$2.4 billion figure. “Under this scenario, we estimate that Head Start programs would need to reduce the total number of funded slots available by about 15% compared to projected FY 2023 funded enrollment...” 88 Fed. Reg. 80873. We imagine programs will need to cut *at least* that much, but we are presently unable to put a figure on how much more.

We are sympathetic to the challenges of calculating the cost of this Proposed Rule and we recognize that ACF has a tough job ahead to account for dozens of variables and unknowns affecting hundreds of programs in different ways. For similar reasons, we have declined to provide specific dollar figures in these comments because, frankly, we have neither the time, data, nor resources to pull those calculations together within the course of this window of the notice-and-comment rulemaking process. But we aren’t an agency that’s been keeping this Proposed Rule under wraps for months and could have taken all the time it needed to formulate a sound cost estimate methodology.

In the end, not only does ACF have an incomplete understanding of the staggering costs of its proposal, but ACF also proposes no parachute for the Proposed Rule’s compliance cliff. Although the Proposed Rule sets a compliance date seven years from now, by which time some—maybe even many—Head Start programs will have been brought to par, the fact remains that many other worthy and well-meaning Head Start programs will not have the resources to come into compliance by the deadline. Is ACF’s plan really to close every non-compliant Head Start program in the country at that time?

B. Administrative Burden

The requirements of this Proposed Rule, well-intentioned as they may be, would impose not just personnel and services costs on our programs, but also administrative burdens on our teachers and staff. The increased reporting, management, and paperwork required by this Proposed Rule would come at the cost of our teachers’ and employees’ time with children in the classroom and at home with their families and communities.

We already have teachers, staff, and families complaining that Head Start requires a significant amount of paperwork and we regularly hear that working for a local school district

entails much less of a paperwork burden. It is inappropriate for ACF to try to micromanage Tribal Governments in this way. Furthermore, some of our programs report that their families are already uncomfortable with the degree of personal information our Head Start programs are obligated to request. Some of our program staff question whether some of these requests and assessments are culturally appropriate at all. And it is a recurring theme for our programs that employees and families alike feel like they are endlessly jumping through hoops to comply with ACF's voluminous and intrusive requests. This fatigue and unease has only been exacerbated by the workforce shortage that has ensured our teachers and staff remain spread too thin. It is no wonder why so many of our programs report teacher and staff burnout.

Yet the administrative burdens proposed by ACF still come at a time when the President has only recently reminded his agency heads to look inward and develop ways to minimize administrative burdens on Tribal communities:

We must improve our Nation to-Nation relationships by *reducing administrative burdens* and by administering funding in a manner that provides Tribal Nations with the greatest possible autonomy to address the specific needs of their people.

EO 14112, 88 Fed. Reg. 86022.

Even ACF's proposal to open up eligibility for Public Service Loan Forgiveness in our Indian Head Start programs—which we wholeheartedly support as a valuable teacher and staff recruitment and retention tool, as a means of home-growing Indian Country educators to serve in their own communities, and as the rare proposition in this Proposed Rule that does not carry its own price tag—comes with the additional administrative burden required to certify such public service for the Federal Government. Proposed 42 C.F.R. § 1302.90(f)(4). This costs time and attention and diverts energy from other activities and reports. This makes compliance even more challenging.

We also confess that we are wary of the comprehensive incident reporting procedures that ACF proposes to establish. First, ACF's vague guidelines have immediately left our program staff wondering about the definition of "serious safety threat" and scope of "reportable incidents." Proposed 42 C.F.R. §§ 1302.17(a)(2); 1302.102(d)(1)(iii). Especially as we shed more light on the importance of providing mental health supports, is every crying child a reportable incident? Furthermore, many State, local, and Tribal departments and jurisdictions already have incident reporting systems in place. So why is ACF reinventing the wheel? Proposed 42 C.F.R. § 1302.102. Likewise, does ACF really need to receive a report every time an Indian Head Start program closes because a Tribal Government shuts down for a few hours or a day for weather or ceremony or similar community needs? Proposed 42 C.F.R. § 1302.102(d)(1)(iii)(B).

We recommend that ACF stay its incident reporting requirements for Indian Head Start programs until *after* the incidents have been reported and addressed through Tribal reporting systems. **ACF should defer to Tribes to investigate and address incidents affecting their own community members and Tribes should have the discretion as to whether they deem incidents reportable to ACF.**

We recognize that the Head Start Act authorizes the Secretary to promulgate “standards relating to the condition and location of facilities (including indoor air quality assessment standards, where appropriate) for such agencies, and programs...” 42 U.S.C. § 9836a(a)(1)(D). Likewise, we note that the same provision requires such standards to “meet or exceed State and local requirements concerning licensing for such facilities.” 42 U.S.C. § 9836a(a)(1)(D)(i). As such, we do not dispute here the Secretary’s authority to set lead water monitoring standards in this Proposed Rule and to require lead-related water quality levels to meet or exceed State and local requirements. Nor do we take issue with the goals of lead monitoring and remediation; our children and program staff deserve healthy drinking water. However, we emphasize once again that the Proposed Rule’s requirements constitute an unfunded mandate for our programs as well as a recurring administrative burden—under the Proposed Rule our programs presumably must periodically monitor and report until the end of time. Proposed 42 C.F.R. § 1302.48.

Finally, and not surprisingly, the Proposed Rule’s wage and compensation requirements come with their own set of administrative burdens—some obvious, some not. ACF’s proposal would clearly make the job of managing human resources more challenging—programs would immediately need to wrangle new, large, and complex benefits packages. Yet it would also require our program administrators to be constantly vigilant to changes in local compensation and benefits packages. *See* Proposed 42 C.F.R. § 1302.90(e)-(f). While some of this information might be available online through resources like Glassdoor and Indeed, even those resources can be woefully inaccurate and badly out of date. While some of our Head Start Programs might have Memorandums of Understanding with their local school districts, in our experience those documents do not share compensation information. Thus, ACF calls on our Head Start administrators to adopt a permanent research role to monitor an obtuse and ever-changing subject.

IV. CONCERNS WITH THE LEGAL PROPRIETY OF THIS PROPOSED RULE

A. Some of ACF’s Proposals Appear to Exceed Its Statutory Authority Under the Head Start Act

ACF purports to promulgate this Proposed Rule under the authority of the Head Start Act, *see* 88 Fed. Reg. 80821, yet the Act itself speaks clearly on how the Act supports improving teacher and staff compensation. Therefore, *Congress* spoke clearly on how the Act should be used to improve teacher and staff compensation. But what ACF proposes is...not that.

In broad strokes, the Act provides that the Secretary shall allocate appropriated funds first to base grants, to provide cost of living increases, and as amounts to increase enrollment. 42 U.S.C. § 9835(a)(1)-(3). After all of those amounts have been expended, the Secretary shall allocate some of the remainder for quality improvement activities, including activities to improve compensation and benefits and hire additional classroom staff and qualified family service workers:

(a) Distribution of appropriations; priorities, etc.

....

(5)(A) Not less than 50 percent of the amount reserved under subparagraph (A)(i) or subparagraph (B)(i)(I), as appropriate, of paragraph (4) to carry out quality improvement activities under paragraph (4)(C) and this paragraph shall be used to improve the compensation (including benefits) of educational personnel, family service workers, and child counselors, as described in sections 9839(a) and 9848 of this title, in the manner determined by the Head Start agencies (including Early Head Start agencies) involved, to—

(i) ensure that compensation is adequate to attract and retain qualified staff for the programs involved in order to enhance program quality;...

(B) Any remaining funds from the reserved amount described in subparagraph (A) shall be used to carry out any of the following activities:

...

(iii) Employing additional qualified classroom staff to reduce the child-to-teacher ratio in the classroom and additional qualified family service workers to reduce the family-to-staff ratio for those workers.

...

(viii) Improving the compensation and benefits of staff of Head Start agencies, in order to improve the quality of Head Start programs.

42 U.S.C. § 9835(a)(5); *see also* § 9835(a)(4).

Thus, through the plain language of the Head Start Act, Congress provided *the* mechanism for improving Head Start staffing and compensation. It is first, Congress', and second, the Secretary's, responsibility to specifically allocate *funding* to be used to improve staffing and compensation. It is notable that this vehicle for improvement comes separately and *after* funds are allocated to Head Start programs to improve enrollment. *Compare* 42 U.S.C. § 9835(a)(4)-(5) with 42 U.S.C. § 9835(a)(3). Thus, funding for enrollment—including to improve enrollment—is distinct from funding to improve staffing and compensation. Not surprisingly, grant recipients applying a plain-meaning reading of the statute “have historically prioritized serving more children over increasing wages for qualified education staff.” 88 Fed. Reg. 80825. As such, ACF's decision to couple these funding mechanisms together strays from the Act and longstanding practice.

In addition, we note that the Act contemplates that a fraction of the remainder of the funds—*after* base grants, costs of living increases, and enrollment improvement allocations have been made—can be used to improve staffing and compensation. ACF's Proposed Rule seeks to do something else altogether extraordinary and unsupported by the Act: it seeks to improve staffing and compensation by forcing Head Start programs *to alter the compensation of their base grants*. We cannot fathom from what legal authority ACF derives this proposal. That ACF intends to tinker with the compensation of base grants is exemplified by, for example, its stated intention to lift the percentage of overall compensation dedicated to fringe benefits from the current 24% to 27.8% or 32.5%. 88 Fed. Reg. 80880.

Furthermore, we note that the Act explicitly vests authority for setting salaries and compensation in the Head Start programs, not ACF:

(3) Each such agency shall *adopt for itself* and other agencies using funds or exercising authority for which it is responsible, rules designed to—

(A) establish specific *standards governing salaries, salary increases, travel and per diem allowances, and other employee benefits...*

42 U.S.C. § 9839(a).

ACF's Proposed Rule nevertheless seeks to effectively set a locally based minimum wage and mandate specific benefits—like health and retirement—be included in compensation packages it intends to mandate. In so doing, ACF usurps the local control Congress was careful to preserve. In so doing, ACF also appears to have lost sight of the purpose of the Head Start Act—improving learning outcomes of *children*—as it proposes, in apparent seriousness, that Head Start programs reduce the number of children they serve to guarantee retirement savings for staff. Proposed 42 C.F.R. § 1302.90(f)(5).

Thus, ACF exceeds its statutory authority in the Proposed Rule by endeavoring to allocate more of appropriations to compensation and benefits than the percentage of appropriations set out in the Act. In addition, by forcing this change at the Department level, ACF contradicts the express authority to make compensation improvement decisions which Congress specifically vested at the program level.

B. ACF Proposes Actions That Congress Has Specifically Declined to Take

This Proposed Rule effectively sets a new Federal Minimum Wage—not just for teachers, but for affiliated Head Start and education program staff as well. *See* discussion above at II.B. True, this Federal Minimum Wage does not take the form of a dollar amount per hour, but there is no doubt that requiring—*nationwide*—that salaries and benefits packages match local conditions constitutes a locally influenced Federal Minimum Wage. And while our teachers, parents, and program staff will be *the first* to tell you that the \$7.25 per hour rate for the current Federal Minimum Wage is *much too low*, raising the Federal Minimum Wage is Congress' responsibility, not ACF's.¹²

Making adjustments to the Federal Minimum Wage is the domain of the Political Branch of our Government because of the massive economic consequences of the workforce-industry compromises it requires.¹³ Moreover, the authority to implement the Federal Minimum Wage is vested in the Department of Labor—not ACF or the Department of Health & Human Services. *See*

¹² U.S. Department of Labor, *Minimum Wage*, <https://www.dol.gov/general/topic/wages/minimumwage>

¹³ For example, the Congressional Budget Office calculated that a proposal to incrementally raise the Federal Minimum Wage to \$15 per hour over ten years would result in a \$509 billion increase in pay for those employed, but be offset by *\$175 billion in reduced employment* because of the proposal. In addition, the resulting higher prices for goods and services would contribute to increases in federal spending and the changes in employment would increase spending for programs like Federal unemployment compensation, but reduce spending for others. Congressional Budget Office, *The Budgetary Effects of the Raise the Wage Act of 2021*, 1-2 (Feb. 2021) <https://www.cbo.gov/system/files/2021-02/56975-Minimum-Wage.pdf>.

generally Fair Labor Standards Act, 29 U.S.C. §§ 201-219. Despite this, ACF proposes, effectively, its own Federal Minimum Wage, mandatory health insurance, mandatory retirement plans, and mandatory paid vacation for full-time employees. Proposed 42 C.F.R. § 1302.90(e)-(f). ACF also proposes defining “full-time” employee as someone who works 30 hours per week, even though Congress in the Fair Labor Standards Act legislated to require a 40-hour work week before overtime pay and other benefits must be available. Proposed 42 C.F.R. § 1302.90(f); 29 U.S.C. § 207. Thus, ACF oversteps.

Likewise, ACF’s proposals require Head Start programs to provide *paid family leave* to extend the reach of the Family and Medical Leave Act (FMLA) which is, again, within the purview of the Department of Labor, not HHS. Proposed 42 C.F.R. § 1302.90(f)(1)(iii); *see generally* Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601-2654. As is the case with the Fair Labor Standards Act, from time to time Congress amends the FMLA. But Congress has not elected to make the amendments ACF proposes, and neither (as far as we know) has the agency with which Congress actually delegated authority to carry out the Acts. Most galling, however, is that ACF itself acknowledges that its proposals are beyond what is authorized by the FMLA:

We intend for [the requirement for protected periods of paid family leave] to apply to all programs, *even those who are not covered by FMLA* due to employer size (e.g., fewer than 50 employees). 88 Fed. Reg. 80834.

So, Congress may have written the law, but ACF knows better.

Furthermore, ACF’s wage and compensation proposals could interfere with the States’ (and District’s and Territories’ and, as discussed above, Tribes’) rights to set their own compensation rates. For example, under ACF’s Proposed Rule, a program on the border between two states would be required to look at “local” wages—but not necessarily *in-state* local wages. Proposed 42 C.F.R. § 1302.90(e)(2) (“local school district” or “neighboring school district”). A community in Utah along the Colorado border, for example, would see the Federal Minimum Wage of \$7.25 on the Utah side of the border and wages buttressed by a much higher state minimum wage of \$13.65 on the Colorado side.¹⁴ Even if the program merely split the difference between wages on either side of the border, the program’s wages would nevertheless be bolstered by Colorado’s minimum wage—a minimum wage Utah has not adopted. Over time, programs along borders throughout the country splitting the difference would, by operation of the same principle, raise (*or lower*) compensation for programs further away from the borders and those programs would in turn raise (*or lower*) compensation for programs even further from the borders, and so on. Thus, a program in Montana might be more affected by the actions of the Washington State Legislature than the Montana Legislature.

¹⁴ We use state minimum wage for this discussion because those numbers are readily available and have large legal and geographic impacts. Though State-employed teachers are likely compensated at rates above state minimum wage, the impacts discussed vis-à-vis state minimum wage are likely to be similar. State minimum wages, in dollars. Sept 30, 2023. https://en.wikipedia.org/wiki/Minimum_wage_in_the_United_States

The Proposed Rule's wage and compensation requirements would also have negative impacts on program eligibility and family integrity. For our communities, it is a point of pride to be an Indian Head Start alumnus. Many of our alumni go on and give back to their Tribal communities by teaching and working in Indian Head Start programs. As ACF knows, however, eligibility for Head Start is mostly limited to households earning a percentage of the Federal Poverty Level. *See* 42 U.S.C. § 9840. By taking these actions to raise wages nationwide, without raising the Federal Poverty Level, the Proposed Rule would all but guarantee that our Indian Head Start alumni will be unable to send their children to their own Indian Head Start programs because those Head Start alumni-employee families will be disqualified as over-income. This would force perverse incentives on our program employees: should they quit their employment with Head Start and forfeit the higher pay so their child can attend Indian Head Start programs, or should they stay in a position with higher pay but forfeit their child's access to a program that helps repatriate their long-suppressed language and culture?

We note that our Indian Head Start program families already face similar dilemmas with respect to income qualification for the program. As we have reported to ACF, we have heard anecdotal reports of households breaking up through divorce to preserve their children's access to Head Start programs. As a result, we have a hard time understanding how ACF came to its conclusion that the Proposed Rule "will not have any impact on the autonomy or integrity of the family as an institution." 88 Fed. Reg. 80871. Program actions that raise such questions—let alone result in such choices—necessarily impact the integrity of the family unit.

C. ACF Proposes Changes Nobody Can Afford Under Current Funding Levels

As discussed above, this Proposed Rule would effect a major overhaul of the Head Start program and is expected to cost—at the low end of estimates—well over \$2 billion. Though there is currently no funding available for those costs, ACF is promulgating a rule that is unrealistic unless Congress takes its obligations to low-income children more seriously. Hopefully, ACF's observation proves true:

Some of the past increase in appropriations *was in response to new initiatives in Head Start*, such as the creation of Early Head Start-Child Care Partnerships and other quality initiatives. It is possible that this trend continues and *Head Start appropriations will increase in response to the quality improvements under the proposed rule.* 88 Fed. Reg. 80872.

The proposed changes to workforce supports will provide clarity to Head Start grant recipients that, *in the absence of additional appropriations*, slot loss is an acceptable tradeoff in order to improve staff compensation and other supports." 88 Fed. Reg. 80825.

[T]he establishment of new or enhanced expectations in program quality through the proposed standards described in this [Proposed Rule] will provide a better foundation for more consistent implementation of high-quality services and *provide an opportunity for future Congressional investments in quality improvement.* 88 Fed. 80821.

ACF should labor under no delusion that Head Start programs will be able to comply with this Proposed Rule without further investment from Congress. ACF notes that “[w]ithout additional appropriations, programs *would have to serve fewer children* to achieve the necessary cost savings to fund increases in staff compensation.” 88 Fed. Reg. 80825. ACF acknowledges that Head Start programs would need to reduce the total number of funded slots available by about 15% from FY 2023 levels to accommodate the Proposed Rule’s required expenses by 2030. 88 Fed. Reg. 80873.

Thus, ACF knows that Head Start children, families, and staff will be the collateral damage if Congress declines to appropriate the billions of dollars programs nationwide that would be needed to comply with these mandates.¹⁵

D. The Timeline for Implementation of This Proposed Rule Ensures a Lack of Political Accountability and Subjects Putative Future Head Start Children to a Lottery for Services

As just discussed, ACF knows that its Proposed Rule will strip services from children. ACF justifies this approach, in part, by promising that currently enrolled students will not be affected. 88 Fed. Reg. 80827, 91. Thus, the currently enrolled students will win the lottery, but tough luck to those who follow.

V. REQUESTS & CONCLUSION

The application of this Proposed Rule to Indian Head Start programs would inappropriately burden Tribal communities, interfere with Tribal Governments, impose nationwide standards not appropriate for many of our Tribal communities, cost billions of dollars, and come at the expense of our neediest Head Start families. **We urge ACF to withdraw this Proposed Rule and start over.** ACF must first conduct proper Tribal Consultation and then, if absolutely necessary, build a new Proposed Rule.

Alternatively, we urge ACF to exempt Indian Head Start programs from the requirements of this Proposed Rule. This course of action is particularly supported by this Administration’s own guidance on waivers and accommodations for Tribal communities in Federal funding program:

Agencies shall design, revise, provide waivers for, and otherwise administer Federal funding and support programs for Tribal Nations to achieve the following objectives, to the maximum extent practicable and consistent with applicable law:...

(iii) design application and reporting criteria and processes in ways that *reduce administrative burdens*, including by consolidating and streamlining such criteria and processes within individual agencies;

¹⁵ In so doing, ACF also dares the courts to strike down its proposals.

(iv) take into account the unique needs, limited capacity, or significant barriers faced by Tribal Nations by providing reasonable and appropriate exceptions or accommodations where necessary;

(v) increase the flexibility of Federal funding for Tribal Nations by removing, where feasible, unnecessary limitations on Tribal spending, including by maximizing the portion of Federal funding that can be used for training, administrative costs, and additional personnel; ...

(vii) respect Tribal data sovereignty and recognize the importance of Indigenous Knowledge by, when appropriate and permitted by statute, allowing Tribal Nations to use self-certified data and avoiding the establishment of processes that require Tribal Nations to apply to, or obtain permission from, State or local governments to access Federal funding or to be part of a Federal program;...

(ix) provide ongoing outreach and technical assistance to Tribal Nations throughout the application and implementation process while *continually improving agencies' understanding of Tribal Nations' unique needs through Tribal consultation and meaningful partnerships*.

Executive Order 14112 of December 6, 2023, *Reforming Federal Funding and Support for Tribal Nations to Better Embrace Our Trust Responsibilities and Promote the Next Era of Tribal Self-Determination*, §5(a), 86023-24.

Thank you for your time and consideration of these comments.

Signed,

National Indian Head Start Directors Association

Central Council of Tlingit & Haida Indian Tribes of Alaska

Confederated Tribes of Siletz Indians

Metlakatla Indian Community

Mille Lacs Band of Ojibwe

Mississippi Band of Choctaw Indians

Pinoleville Pomo Nation

Port Gamble S'Klallam Tribe

Rosebud Sioux Tribe

Santo Domingo Pueblo

Sault Ste. Marie Tribe of Chippewa Indians

Sisseton-Wahpeton Oyate

Suquamish Tribe

Tulalip Tribes

Zuni Tribe - Pueblo of Zuni

Chehalis Tribal Early Learning Program

Santa Clara Pueblo Head Start

Chugachmiut Head Start/Early Head Start

Tanana Chiefs Conference Head Start/Early Head Start

Council of Athabascan Tribal Governments
Early Head Start

Eastern Band of Cherokee Indians Head
Start/Early Head Start

Fairbanks Native Association

Fond du Lac Head Start Programs

Inter-Tribal Council of Michigan, Inc.

ISWA Head Start/ Catawba Nation

Kenaitze Early Learning - Head Start/Early
Head Start

Kickapoo Kansas Head Start/ Early Head
Start Program

Metlakatla Early Learning Program

Pinoleville Native American Head Start

Pueblo of Isleta Head Start

Pueblo of Zuni Head Start Program

Ramah Navajo Head Start

Red Cliff Early Childhood Center

Rural America Initiatives Head Start
Program

San Carlos Early Childhood Program

San Felipe Pueblo Head Start