December 27, 2021

Ms. Colleen Rathgeb
Director of Policy and Planning, Office of Head Start
U.S. Department of Health & Human Services
330 C Street, S.W., 4th Floor
Washington, DC 20201

RE: **Comments on Vaccine and Mask Requirements to Mitigate the Spread of COVID-19 in Head Start Programs, Docket No. ACF-2021-0003**

Dear Director Rathgeb:

On behalf of the undersigned regional and state Head Start associations, the National Head Start Association (NHSA) submits the following comments regarding the Interim Final Rule with Comment period (the IFC, or the new rule) adding new provisions to the Head Start Program Performance Standards (HSPPS) to mitigate the spread of the coronavirus disease 2019 (COVID-19).

We acknowledge the critical role of face masks and vaccinations in reducing the spread of COVID-19 in early care and educational settings. We further acknowledge the elimination of COVID-19 is of paramount importance and would like to see all Head Start staff vaccinated. That said, we remain deeply concerned that, if the IFC is made final immediately, thousands of children will lose access to life-changing Head Start and Early Head Start (collectively referred to as "Head Start") services. Head Start programs need prompt clarification, detailed guidance, and clear flexibility to effectively implement and enforce the mask and vaccine mandates contained in the IFC. Our comments seek to balance the absolute imperative of widespread vaccination with the reality of local differences in which various Head Start programs are able to meet the IFC mandates.

A final rule must acknowledge the realities facing Head Start agencies and their partners by allowing either specific, finite waivers or locally designed solutions based on local data that balance safety with local circumstances and realities that enable children to retain access to transformative services. It must also empower programs to the maximum extent feasible to do everything they can to mitigate the spread of COVID-19 based on scientific guidance from federal, state, and local health officials, as Head Start has done since the pandemic began.

Recognizing the devastating impacts poverty can have on the future success of young children and their families, Head Start delivers on a longstanding national commitment to provide early learning opportunities for

vulnerable children and comprehensive services to support them and their families on pathways to long-term stability and success. NHSA and the undersigned believe every child, regardless of circumstances at birth, has the ability to succeed in life if given the opportunity that Head Start offers to children and their families.

Through Head Start's mission and culture of true partnership with families to achieve success for their children, each program develops a comprehensive understanding of the needs, goals, and concerns of the children and families in their respective communities.

Background

Throughout the challenging past two years, as our nation has navigated the COVID-19 pandemic, the Head Start community has remained deeply committed to the health and safety of children and families. With the support and leadership of HHS, ACF, and OHS, Head Start has been a highly effective leader in communities across the nation in continuing to provide and facilitate critical services such as teaching basic hygiene, performing medical and dental screenings, helping parents end chemical dependencies, and supporting children with disabilities. Head Start programs have supported and encouraged vaccination among staff, families, and partners, becoming a proven model of effective public health. The Centers for Disease Control and Prevention (CDC) found, according to a December 2020 Morbidity and Mortality Weekly Report,[1] that:

> *"Head Start and Early Head Start programs successfully implemented CDC-recommended mitigation strategies and applied other innovative approaches to limit SARS-CoV-2 transmission among children, teachers, and other staff members by allowing maximum program flexibility…"*

As COVID-19 numbers rise and fall and rise again in communities, Head Start has continued to operate and effectively implement protocols to ensure children and staff stay safe and healthy. This has only been possible with clear and extensive flexibilities that the administration had approved as well as with close communication between programs and regional office staff.

Our concerns about the IFC stand apart from the exceptional work programs have been doing in vaccinating staff and partners. While we detail specific comments and recommendations below, programs are already wrestling with how to comply with contradictory state, local, and federal laws. Since the release of the IFC, programs have been forced to wade through an impossible set of legal challenges, trying to decide which laws and regulations they should prioritize over others. Head Start programs are also losing valuable collaboration agreements with school districts and other partners, losing high-quality staff, and, most concerning, because of not being able to open all necessary classrooms, losing trust with the families they serve. In situations like these,

[1] Coronado F, Blough S, Bergeron D, et al. Implementing Mitigation Strategies in Early Care and Education Settings for Prevention of SARS-CoV-2 Transmission — Eight States, September–October 2020. MMWR Morb Mortal Wkly Rep 2020;69:1868-1872. DOI: http://dx.doi.org/10.15585/mmwr.mm6949e3

it is the children who suffer, especially the most vulnerable children—those who receive services for disabilities, require transportation, and depend on additional collaboration with service providers.

Feedback Informing NHSA Comments

NHSA received its first true indication of the potential impact of the IFC on the day it was released. The agenda for a regularly scheduled meeting with a group of Head Start directors was derailed entirely by discussion of the IFC. One director from a rural area was literally in tears while sharing with certainty that, in her small program, probably a third of her workforce would be likely to resign. Upon hearing this, NHSA began compiling comments through extensive engagement with Head Start administrators, program leaders, parents, and staff nationwide through surveys and discussions. The comments from our community regarding the IFC revolved around three themes:

1. the health and safety of children, families, staff, and communities has always been and is still our shared top priority, regardless of where they live in our country;
2. over the decades, Head Start's strength has come from the local design, maximum feasible community participation, and responsiveness to community needs that enable programs to best meet the needs of their children and families; and
3. a one-size-fits-all approach, such as what is proposed in the IFC, does not accurately reflect the diversity of situations facing Head Start programs across the country and could prove to be detrimental to the healthy and safe development of children and their families.

Results of our field survey (attached) and ongoing engagement with the Head Start community indicate the potential devastating effects the new rule on vaccines and masks will have on the children and families we serve. Per the survey, NHSA estimates the new rule could lead to Head Start programs losing between 46,614 and 72,422 employees, or 18% to 26% of all staff. This could result in the closing of over 1,300 Head Start classrooms impacting 19,000 children or more, children who could lose access to services virtually overnight.

NHSA hosted a webinar for programs after reviewing the data accumulated from our survey. The comments shared by the more than 520 participants were both heartbreaking and difficult to address. Participants agreed that vital elements of the Head Start model—developmentally appropriate educational experiences, qualified and dedicated staff who have the children's best interest at heart, and the opportunity for parents to be involved in their child's education and community collaboration/partnership —will not be available for many children if classrooms are unable to operate because of the new rule.

In the five sections below, we have highlighted some of the main points of confusion and open questions regarding the IFC. We strongly encourage the Office of Head Start (OHS) to consider the minor changes we have proposed and issue additional guidance explaining its expectations for compliance with the IFC.

1. **<u>The IFC should account for the diverse Head Start program structures and circumstances that impact the practicality of the mask and vaccine mandates.</u>**

NHSA acknowledges the critical role of face masks and vaccinations in reducing the spread of COVID-19 in early childhood educational settings. We share OHS's commitment to prioritizing the health and safety of Head Start children, families, and staff, particularly considering the data showing the disproportionate effect of COVID-19 on low-income communities served by Head Start programs.

We are concerned, however, that the IFC does not account for the diverse ways Head Start services are delivered and, as a result, how the vaccination and mask mandates would apply across different program settings and structures. Head Start services are provided to income-eligible children and families in a variety of different settings around the country. *In particular, programs need more clarity on how the vaccination and mask mandates will apply in locations where Head Start services are provided alongside non-Head Start programs and activities in a manner which does not isolate or negatively impact children*.

Examples of these settings include:

- A public school where a Head Start program partners with the school to deliver Head Start services in certain classrooms, with the school district providing some classroom staff and support;
- A Community Action Agency (CAA) where Head Start classrooms are co-located in the same building where the CAA provides other types of services, such as energy assistance and housing counseling, to families who receive Head Start as well as those who do not receive Head Start services;
- A Head Start program operating in space leased from an unrelated party, with some semi-public spaces such as hallways, bathrooms, and eating areas the Head Start program shares with the unrelated party or other tenants in the building; and
- A family's house or apartment where they receive home-based services.

Other parties, outside the control and direct oversight of Head Start agencies, in all these settings may be unable, unwilling, or prohibited from meeting this mandate. As outlined below, we urge OHS to release specific guidance on how to implement mask and vaccination mandates in different settings so Head Start children—especially in mixed delivery programs—are not negatively impacted socially or emotionally.

a. Clarifications on the Mask Mandate *(Safety Practices, 45 CFR § 1302.47(b)(5)(vi))*

We request written guidance clarifying the applicability of the IFC's mask mandate to individuals who do not directly provide Head Start services, but with whom Head Start program staff, children, and families may have contact. This is critical for programs to be able to administer their programs in a compliant manner while respecting the requirements which may apply to others sharing space with Head

Start activities.

We also request additional guidance in the following areas: the definition of setting; when Head Start services are provided; and outdoor masking. In addition, we have concerns about the impact of visually demarcating children by vaccination status or Head Start participation.

Defining "setting"

The mask mandate requires masks be worn "indoors in a setting when Head Start services are provided." For Head Start programs that share space with non-Head Start programs as well as those that operate home-based program options, mandating universal masking for non-Head Start individuals in semi-public spaces is particularly challenging. These semi-public spaces include Head Start children who may temporarily access the shared facility, such as hallways, bathrooms, cafeterias, and auditoriums, where they may encounter non-Head Start individuals in-passing. We propose OHS limit the definition of "setting" to the enclosed room in which a specific Head Start service is provided and exclude semi-public spaces Head Start children may access temporarily, such as hallways, bathrooms, cafeterias, and auditoriums, from the definition of "setting."

For the Head Start home-based option, we recommend the masking requirement only apply to the Head Start home visitor or program staff and individuals two and older with whom the home visitor has direct, in-person contact. This would enable the exclusion of children and adults in other parts of the home who do not have direct, in-person contact with the Head Start home visitor.

Identifying "when Head Start services are provided"

We request OHS clarify the phrase, "when Head Start services are provided." In the preamble to the IFC, the mask mandate is described as applying "***where*** Head Start services are provided" (emphasis added), whereas in the text of the amended HSPPS, the phrase "***when*** Head Start services are provided" (emphasis added) is used. In addition, the FAQs OHS issued on December 10, 2021, also state that families and children receiving home-based services must wear masks in their homes "***where*** Head Start services are provided." Please clarify which language OHS intends for programs to apply.

Some Head Start personnel, like janitorial staff and teachers, perform duties when there are few others in the building or when no Head Start children are present. For example, a teacher may prepare for the program day alone in a classroom in the morning, or janitorial staff may clean spaces when no children are present. We request clarification on whether individuals must mask during those times. Specifically, would an individual be required to mask if (1) there are no children in a room, or (2) if they are alone in a room, even if the individual is doing work related to providing Head Start services? We propose that

OHS follows the Occupational Safety and Health Administration's (OSHA) Emergency Temporary Standard (ETS) and adopt an exception to the mask mandate for vaccinated and unvaccinated individuals who are alone in a room with floor to ceiling walls and a closed door. We also propose that OHS limit the mask mandate to in-person Head Start services, such that masks are not required to be worn: (1) by a child or adult when receiving services remotely from home; nor (2) by staff when delivering services remotely to children (e.g., conducting a virtual home visit).

Masking outdoors

For those not fully vaccinated, the mask mandate requires masking "outdoors in crowded settings or during activities that involve close contact with other people." We request additional guidance on how to define "crowded settings" and "close contact," particularly for unvaccinated children while playing outside on a playground, and urge an evidence-based approach when considering the risks of COVID-19 spread through playground activity, as balanced with the benefits of outdoor mask breaks. We ask you to consider CDC child care guidance that explicitly states outdoor play is not close contact in most instances and children and adults do not need to be masked during outdoor play.

Further, for Head Start programs that share outdoor play space with non-Head Start programs (such as a public school playground), we request clarification on how to enforce the mask mandate for children and adults who are not part of the Head Start program but may be using the playground at the same time. Requiring Head Start programs to impose a mask mandate on unvaccinated individuals in these settings would be administratively challenging and could jeopardize the relationship between the Head Start program and the community partner.

Distinguishing children by vaccination or Head Start status

Since COVID-19 vaccinations have not been approved for children under age five, most Head Start children are currently unable to be vaccinated. We are concerned about distinctions between vaccinated children (who do not have to mask outdoors) and unvaccinated children (who may be masked) impacting socialization and friendships.

Similarly, requiring Head Start children and staff to mask in mixed delivery settings without a comparable mask requirement, such as many public schools, can create the impression of a two-tiered system. Our children and families already experience stigma and isolation due to a host of socioeconomic factors. Adding a further distinction will compound the social and cultural pressures of receiving services in a blended environment.

b. Clarifications on "Head Start staff" ***(Staff health and wellness, the "Vaccine Mandate") (45 CFR § 1302.93(a))***

We seek additional clarity on how to determine if an individual constitutes Head Start staff with "responsibilities related to the Head Start program" at multi-service agencies, such as community action agencies and school districts, for purposes of determining the applicability of the vaccine mandate. These types of employees include:

- Multi-service agency employees who provide comprehensive services to Head Start families, such as weatherization crews who conduct weatherization work on Head Start families' houses;
- Multi-service agency employees whose salaries are paid out of the agency's indirect cost rate, which is applied to all the agency's funding sources, including Head Start, but who do not have direct responsibilities related to the Head Start program (e.g., a payroll manager who does not handle payroll for Head Start staff; a grant writer who does not work on Head Start grants).

c. Conflicting laws and policies ***(Safety practices and , Staff health and wellness, 45 CFR § 1302.47(b)(5)(vi) and 45 CFR § 1302.93(a))***

Vaccination and mask mandates are deeply divisive issues, which has resulted in a patchwork of laws and regulations across the country. Head Start programs are currently operating in states and localities that have banned vaccine and/or mask mandates for employees of public schools and private employers. In some cases, Head Start partners may not be permitted to impose a vaccination or mask mandate for their employees. Some local schools may be prohibited—by local law or collective bargaining agreements—from asking about vaccination status. Partnerships with these organizations are currently in limbo. These relationships have taken time to develop and will not be easily recovered once destroyed.

Conflicting laws and policies are putting Head Start programs in an untenable position and will make some unable to enforce the IFC without breaking state laws. Flexibility to adapt operations accordingly is critical to managing these conflicting laws and policies.

In addition to the challenge of identifying which personnel the mask and vaccine mandates will apply to, enforcing the vaccine mandate in settings where services are provided by employees of local school districts or other contractors may jeopardize Head Start's partnerships with these valuable partners. Many programs partner directly with social service providers and public schools, offering blended classrooms where teachers work with Head Start and non-Head Start children. These partnerships make Head Start stronger and have been encouraged by multiple administrations, but in many communities, they will become untenable under the IFC.

Many Head Start programs are co-located in districts that refuse to comply with the mandate or that use LEAs for IDEA or other services. With that in mind, Head Start programs will need the flexibility to adjust their operations when partners refuse to require that their employees providing Head Start services be vaccinated and masked (e.g., covering the costs of withdrawing from a partnership agreement). In some communities, particularly rural ones, Head Start programs may have no other partner option. In such a case, we ask that the Head Start program be allowed to request a waiver of the contractor vaccination requirement with respect to employees of the partner.

d. Full participation for children with disabilities in program services and activities *(45 CFR § 1302.60)*

Mask and vaccine mandates may have the unintended consequence of preventing children with disabilities from receiving critical services provided by partners such as local school districts. As noted above, many other providers are limited by laws and policies outside the Head Start Act that are inconsistent with the IFC. As a result, the IFC will force programs to pit one performance standard against other laws or requirements - complying with the vaccine mandate rather than their IDEA requirements to partner with LEAs.

Head Start has been a unique setting for children with a full range of disabilities and Head Start programs are required to provide accommodations and supports as necessary to support their full participation. Implementation of the IFC may jeopardize their ability to meet this requirement, since many grantees rely on school district-funded providers to provide specialized services such as speech therapy. The mask mandate may impede the provision of services by such specialists who support hearing-impaired children, for example. In areas where local schools are prohibited from asking teachers and staff about their vaccination status, a Head Start child may be unable to meet with a specialist who does not meet the vaccine mandate. Losing access to a specialist can be devastating to a child with a disability and their family, with long term consequences for their skill development. Those in rural areas are particularly at risk because it may take months to find an alternative provider who is vaccinated.

2. <u>The IFC should account for the potential for significant adverse impact on the long-term, trusting relationships of Head Start programs with community partners.</u>

We applaud the efforts of OHS to protect the health and safety of its children and families by incorporating a multi-layered strategy for contagion risk as part of the HSPPS. We believe that Head Start programs should continue to implement health and wellness policies based on data and the most current scientific understanding of the COVID-19 pandemic. However, we cannot ignore the reality that masks and vaccinations have become deeply divisive political issues, particularly in rural areas. The IFC imposes transformative requirements on Head Start program operations, but it doesn't account for the ways that this

will transform how Head Start programs interact with their communities. We need additional guidance on how to approach program partnerships and handle the fallout from lawsuits and fines and enforcement in jurisdictions that have passed laws that directly conflict with the IFC.

The IFC may deter community partners from working with Head Start programs in the future. While we understand and agree that Head Start programs should be held to high standards of safety, we urge OHS to consider that one of the reasons this program has been able to succeed and grow for so long is that it has steered away from taking a side on hot-button political issues. This has allowed Head Start to remain above partisan politics and unite those with very different political opinions around serving vulnerable children and families. We urge OHS to recognize that implementing these mandates requires thoughtful and engaged communications with community members.

3. **Programs need additional support from OHS to address the impact of the IFC's requirements on the relationships between programs and Head Start families.**

Building partnerships with families has been a central ideal of Head Start since 1965, and the whole family approach has come to define how our programs provide services. This whole child, whole family approach is precisely why Head Start has been proven to disrupt intergenerational poverty "Breaking the Cycle? Intergenerational Effects of an Anti-Poverty Program in Early Childhood"). We are very concerned about how the mask mandate and vaccine mandate could negatively impact the relationship between programs and families. For millions of families, Head Start has been a trusted caregiver which supports their children's emotional, physical, and social development and needs, as well as the parents through a multitude of engagement activities.

Head Start programs are facing unprecedented disengagement by families, not only from those who are reluctant for their children to wear a mask throughout the program day, but also from families concerned with the persistence and emerging variants of the COVID-19 pandemic. We need flexibility to prevent a potentially irreversible loss of relationship with our Head Start families and volunteers.

a. **Encouraging compliance with the mask mandate *(Safety practices, 45 CFR § 1302.47(b)(5)(vi)*)**

We urge OHS to issue guidance on how it expects to monitor masking practices as well as how programs should communicate with children and families who may be hesitant about adopting universal masking practices. Programs are seeking support, including training and resources, to continue to engage with families on masking guidelines. Programs should be prepared to demonstrate during monitoring how they are encouraging children to wear masks, not that masking is universally enforced.

This is particularly relevant for masking among young children. Most Head Start staff have experienced

the difficulty of ensuring that children wear their masks properly and keep them on throughout the day. As with all new rules and skills, children must be taught to wear a mask, and many are not accustomed to wearing masks for long periods of the day. The abrupt, immediate effective date of the mask mandate upon the IFC's publication made it particularly challenging for Head Start programs to adequately prepare children and families for compliance. We encourage OHS to acknowledge that achieving full compliance with the mask mandate will take time. Head Start programs should not be penalized for using their best efforts to enforce the mask mandate for children and families. We also propose that children be allowed to remove their masks outdoors in accordance with CDC guidance.

b. Impact of the volunteer vaccine mandate on federal match requirements ***(45 CFR § 1302.94(a), Volunteers; 1303.4, Federal financial assistance, non-federal match, and waiver requirements)***

While Head Start programs have been expecting the vaccination mandate for paid staff for some time, they were not prepared to require vaccines for volunteers, let alone on the same compliance timeline as for paid staff. Volunteers provide key support to Head Start staff in all aspects of service provision, and the majority of volunteers who work directly with children in the classroom are parents of Head Start children.

Further, Head Start grantees count and rely on parent volunteer service hours to meet their non-federal share match requirements. Many Head Start programs have reported significant numbers of parent volunteers refusing to get vaccinated or requesting an accommodation. A widespread resignation of its volunteers leaves a Head Start program at risk of failing to meet its non-federal share match requirements.

While we appreciate OHS's confirmation that programs may request a waiver for the non-federal match requirement in its FAQs, we need more definitive action. We urge OHS to provide a blanket waiver for non-federal match requirements through 2022. This will allow programs that experience a widespread resignation of volunteers time to adjust without fearing being out of compliance.

c. Accommodation for vaccination of volunteers (*Volunteers, 45 CFR § 1302.94(a)(iii))*

We seek further clarification regarding a Head Start program's obligations to accommodate volunteers seeking an exemption to the vaccine mandate. The amended HSPPS say that volunteers may be exempted from the vaccine mandate if they are "legally entitled to an accommodation with regard to the COVID-19 vaccination" (see 45 CFR § 1302.94(a)(iii)). However, we are not aware of any federal legal obligation to accommodate unpaid volunteers. Unlike employees, volunteers are not protected by the Americans with Disabilities Act (ADA) or Title VII of the Civil Rights Act (Title VII). We request that OHS share the legal basis for this requirement. Further, we request guidance for programs evaluating

accommodations for volunteers.

While the process of weighing accommodations against the costs of providing one is clearly established under the ADA and Title VII, there has been no guidance on what standards apply to accommodations for volunteers. Programs need to know what documentation they may request to support an exemption request, what costs or burdens they can consider in determining whether they are able to provide an accommodation, and the implications of not accommodating a volunteer. Programs also need to know if they are required to pay for the testing costs of volunteers who receive an exemption and if that will be allowed to come from their federal grant funds.

4. **Targeted flexibilities will help manage the challenges in recruiting and retaining Head Start staff, which will otherwise be exacerbated by the vaccine mandate.**

We support vaccination for all Head Start staff, volunteers, and contractors who are safely able to receive it. However, due to the workforce crisis in which our nation – and specifically the early childhood field – finds itself, if staff do not receive the vaccine and opt to or are forced to leave, programs would be faced with an untenable choice of either closing classrooms and cutting services for children or being out of compliance with the vaccine mandate.

We urge OHS to consider the IFC's implications for maintaining adequate staffing capacity to provide the level and quality of Head Start services needed in our communities. We further ask that OHS consider administrative and operational flexibilities to enable programs to retain staff and continue to function despite the loss of staff who are unwilling to be vaccinated. In addition to the flexibilities detailed below, this could include a waiver of the vaccine mandate, granted and renewed annually, if a program can demonstrate that instituting a mandate would result in a disruption of services for children (including a loss of slots) and the efforts it has and will continue to make to educate staff on the importance and safety of vaccination.

a. **Implementation of exempt employee testing and returns to the classroom *(Staff health and wellness, 45 CFR § 1302.93(a))***

We request additional clarity on how to implement testing for exempt employees and allow employees who have contracted COVID to return to the classroom. We also emphasize that waiver or postponement of full enrollment requirements would relieve some of the recruitment burden currently weighing on Head Start programs.

Return-to-work criteria

The IFC addresses removal from the classroom due to COVID-19 infection, but it does not include any criteria for Head Start staff, contractors, and volunteers returning to work. Head Start programs need access to such criteria to consistently address breakthrough COVID-19 cases. As amended, 45 CFR § 1302.93(a)(2) could be interpreted to suggest that staff must produce a negative test result to return to the classroom or work directly with children. It could also be interpreted as allowing those with positive test results to return when "they are determined to no longer be infectious." Since an individual diagnosed with COVID-19 may continue to test positive for the virus even after they are no longer infectious, these two interpretations could produce disparate results. We suggest that OHS adopt the approach taken by OSHA (Standard 1910.501(h)), which requires the individual be removed until they:

1. receive a negative result on a COVID-19 nucleic acid amplification test (NAAT) following a positive result on a COVID-19 antigen test if choosing to seek a NAAT test for confirmatory testing;
2. meet the return-to-work criteria in CDC's "Isolation Guidance" (incorporated by reference); or
3. receive a recommendation to return to work from a licensed healthcare provider.

Costs of testing

We applaud OHS for allowing the costs associated with regular testing of employees and volunteers to be charged to Head Start funds so long as it is included in a program's policies and procedures. However, many programs are finding it difficult to make an informed decision about whether to pay for such testing because they do not know how long the IFC will be in effect—e.g., for the duration of the public health emergency declared by the Department of Health and Human Services, or until the HSPPS are amended to remove the requirements.

Staffing difficulties and full enrollment

We urge OHS to support Head Start programs as they work toward full enrollment and fully in-person comprehensive services by issuing administrative flexibilities that will alleviate some of the compliance burdens currently preventing programs from meeting urgent staffing challenges. Head Start programs are working tirelessly to recruit and attract new staff, which takes time, especially considering the credentials required of Head Start and Early Head Start teachers and staff. Providing programs with the flexibility to hire staff on a provisional basis if they are vaccinated and on track to receive appropriate credentials within a reasonable time frame would allow Head Start programs to hire new staff more efficiently and open additional Head Start classrooms immediately.

Exempting fully remote staff from the vaccine mandate

We also urge OHS to follow OHSA's approach with respect to fully remote staff and exempt them from the vaccine mandate. Under the OSHA ETS, employees are not required to be fully vaccinated when they are working remotely. From a public health perspective, individuals who are not providing in-person services, and have no possibility of coming into contact with individuals serving Head Start children and families, pose a significantly lower risk of COVID-19 transmission. Further, exempting fully remote Head Start staff allows Head Start programs to maintain staff who are reluctant to get vaccinated, or who need additional time to weigh the risks and benefits of doing so. In light of the competitive job market, Head Start programs need as much flexibility as possible to retain qualified staff.

b. Home-based and virtual staff *(Program Structure, Part 1302—Subpart B)*

We request that OHS provide grantees with a streamlined process to continue home-based and virtual program options. Head Start programs need additional guidance to help their workforce come into compliance with the vaccine mandate without permanent losses in staff capacity. One way to address this would be to allow programs the flexibility to shift their program options to include home based/virtual options to serve families who prefer that option or if their staffing models limit their ability to serve children and families in center-based settings. Allowing remote service delivery could be a locally designed program option variation permitted under the HSPPS, 45 CFR §1302.24. We ask that OHS reconsider allowing remote program options, and streamline the process for approving them, at least on a temporary basis. The regular process of program option modification is burdensome and allowing expedited flexibility would allow programs to serve children and families in ways that address their fears.

c. Staffing and enrollment *(45 CFR § 1302.15)*

Head Start programs are working tirelessly to recruit and attract new staff to fill positions left empty by the pandemic and the implementation of the IFC. This process takes time, especially considering the current job market and the credentials required of Head Start and Early Head Start teachers and staff. Providing programs with the flexibility to hire staff on a provisional basis if they are on track to receive appropriate credentials within a reasonable time frame would allow Head Start programs to hire new staff more efficiently and open additional Head Start classrooms immediately.

Due to a perfect storm of factors, including unusually high staff turnover, rising cost of living in many communities across the nation, and parental/caregiver concerns over the safety of in-person services, many programs will likely remain under-enrolled in 2022 despite aggressive recruitment and educational

efforts. Programs have a responsibility to continue these recruitment efforts, but they should not be punished for factors outside of their control. Suspending (until the end of the 2021-22 school year) the implementation of under-enrollment plans, which OHS is planning to begin in January 2022, would mitigate unnecessary burden, reduce debilitating anxiety, and free up capacity for programs to innovate and think creatively about how to increase vaccination rates among staff and fill their classrooms.

5. **Head Start programs need to be able to adopt these rules within the existing Head Start governance and operational framework.**

Changes to Head Start policies do not happen in a vacuum; they must fit within the existing Head Start framework for governance and operational requirements. As programs work to adopt the IFC, there is tension between the implications of the rule and the other program requirements. We seek clarification on aspects of the IFC that may be challenging to implement in light of this existing framework.

a. **Penalties for mask non-compliance** ***(45 CFR § 1302.47(b)(5)(vi), Safety Practices, 45 CFR § 1302.17, Suspension and expulsion)***

We request confirmation from OHS that programs will not be deemed out of compliance if some children are not masking due to a parent's refusal to allow them to do so.

Programs are facing significant challenges in enforcing the mask mandate for children whose parents refuse to allow their child to wear a mask. We are aware of many families withdrawing their children from Head Start due to the mask mandate, while others have told programs that they refuse to allow their children to mask, but nonetheless continue to seek Head Start services. Some family members refuse to comply with the mask mandate themselves when they enter Head Start facilities to drop off or pick up their children. These circumstances are extremely challenging for Head Start program staff. They do not want to deny children and families much-needed services, but they are also mindful of the health and safety risks to other children and staff in the program, as well as the consequences of being out of compliance with the IFC.

We acknowledge and appreciate that OHS addresses a parent's refusal to allow their child to wear a mask in its FAQs. However, allowing an unmasked child to remain in the classroom may hinder a program's ability to enforce the mask mandate for other children and staff. A parent who sees the program respecting another parent's refusal to mask their child is more likely to refuse to mask their own child, which could have a cascading effect. We request assurance from OHS that programs will not be deemed out of compliance if some or all of their children are not complying with the mask mandate due to their parents' refusal to allow them to mask.

If no flexibilities are possible, OHS should clarify that the appropriate enforcement mechanism for the mask mandate is to exclude a child or parent from receiving in-person services if they do not wear a mask. If OHS expects programs to exclude these children, and there are no options to provide remote services, the guidance should directly address the restrictions on suspension and expulsion in the HSPPS (45 CFR 1302.17). Repeated exclusion from services due to refusal to mask could result in a child's de facto suspension from Head Start, but the HSPPS impose robust procedural protections for children prior to being suspended or expelled.

It is critical that OHS address the implications of a child's non-compliance with the mask mandate so that Head Start programs are clear about their responsibilities to enforce it. It may be appropriate, for example, for OHS to consider requests to waive the requirements in 45 CFR § 1302.17(a) with respect to individuals that refuse to comply with the IFC, if necessary to protect the health and safety of other unvaccinated children in the program.

b. Intersection with Head Start Policy Councils ***(45 CFR § 1301.3, Policy council and policy committee; 45 CFR § 1301.6, Impasse procedures; 45 CFR § 1302.90(a) Personnel policies)***

Under the Head Start Act, one of the responsibilities of the Head Start Policy Council is to approve and submit decisions to the governing body about personnel policies and standards of conduct for program staff, contractors, and volunteers (see Section 642 of the Act). The HSPPS requires that all personnel policies and procedures be approved by the governing body and policy council or policy committee. We are aware that some Policy Councils are unwilling to approve, or recommend to the governing body for approval, policies that implement the IFC. We ask OHS to address the role of the Policy Council in adopting policies that comply with the IFC, and specifically, whether disagreements between the Policy Council and the governing body on adopting such policies must follow the impasse procedures required by the HSPPS.

6. Legal Costs

a. Allowability of legal defense costs ***(Defense and prosecution of criminal and civil proceedings, claims, appeals, and patent infringements, 45 CFR § 75.435)***

We ask OHS to clarify that legal costs that Head Start programs may incur in defense of legal actions challenging the IFC are allowable costs and may be charged to Head Start funds. Head Start programs anticipate that such lawsuits could be brought by Head Start employees, families, as well as state and local governments in states that have passed laws limiting a private employee's ability to require vaccines or masks.

The State of Texas and the Lubbock Independent School District filed an initial lawsuit seeking to enjoin implementation of the IFC. And, on December 21, 2021, Attorney General Jeff Landry of Louisiana filed a lawsuit with 23 other states arguing that the mandate is unlawful and unconstitutional. We anticipate that additional lawsuits could be brought by Head Start employees, families, as well as state and local governments in states that have passed laws limiting a private employer's ability to require vaccines or masks.

Legal actions brought by private individuals

Under the Uniform Administrative Requirements, Cost Principles, and Audit Requirements (the Uniform Guidance), federal grantees are not prohibited from charging legal defense costs to their federal award with respect to proceedings brought by employees and families. The definition of "costs" includes the services of in-house or private counsel, accountants, consultants, or others engaged to assist the Head Start grantee before, during, and after commencement of a judicial or administrative proceeding, that bear a direct relationship to the proceeding (see 45 CFR § 75.435(a)(2)).
The Uniform Guidance lists various types of legal costs that are unallowable. However, this list does not include costs that arise from legal actions brought by current or former employees or third parties (except in limited circumstances). Since Head Start programs are required to implement and enforce the IFC mandates pursuant to the HSPPS, we believe it is appropriate for OHS to allow grantees to charge such costs to their Head Start awards. We request that OHS make this explicit, as many grantees are confused about the allowability of these costs.

Legal actions brought by state or local governments

Costs incurred in connection with a civil or administrative proceeding commenced by a state or local government are typically unallowable if the grantee is found to be liable as a result of the legal proceeding(see 45 CFR § 75.435(b)(1)). This is an area of concern for Head Start grantees, as states and local governments that have passed laws prohibiting employers from requiring vaccines and/or masks may bring legal action against the grantee for violating state or local law. In these situations, where state and local governments sue the Head Start program for violating state or local law, 45 CFR § 75.435(d) further provides:

The authorized Federal official may allow the costs incurred if such authorized official determines that the costs were incurred as a result of:

1. A specific term or condition of the Federal award, or
2. Specific written direction of an authorized official of the HHS awarding agency.

The IFC is required for Head Start grantees as a condition to operating the Head Start program. Thus, we request that OHS clarify that it intends to allow legal costs incurred to defend the program against state and local government-initiated proceedings for violations of state and local laws that conflict with the IFC. We request that OHS address the potential need for additional funding to support programs that face significant legal costs as a result of the IFC.

7. **Duration of the IFC**

We are concerned that the IFC, as it makes permanent changes to the HSPPS, mandates vaccines and masks beyond the end of COVID-19. We recommend modifying the rule to have it expire when the federal Public Health Emergency Declaration is allowed to expire.

Conclusion

Again, the health and safety of children, families, staff, and communities served by Head Start has been and remains our top priority. The qualified and dedicated staff who have their children's best interest at heart, and the parents who welcome the opportunity to be involved in their child's education, all benefit from the strength of Head Start's local flexibility. We strongly urge you to consider this fact in making critical modifications to this new rule and allowing for that important local flexibility. And, as the CDC has stated,[2] flexibility works.

The impact of the IFC does not accurately reflect the very dissimilar needs and circumstances of Head Start communities across the country. Head Start's strength comes from the local flexibility that enables programs to meet community and family needs. We must move forward in a way that maintains this precedent.

With all this in mind, we strongly urge the OHS to make the changes we have requested and any necessary additional policy changes at the federal level in writing and with consistent technical assistance available to all regional offices on their implementation. This will allow programs and regional office staff to be in continuous and consistent communication about addressing the specific needs of children and families in their communities.

None of these proposed flexibilities will immediately solve the exigencies facing Head Start programs across the country; however, we strongly urge OHS to consider every possible flexibility, accommodation, and opportunity for creative approaches that enable Head Start programs to stay in operation and best meet the needs of children and families in their communities.

[2] Coronado F, Blough S, Bergeron D, et al. Implementing Mitigation Strategies in Early Care and Education Settings for Prevention of SARS-CoV-2 Transmission — Eight States, September–October 2020. MMWR Morb Mortal Wkly Rep 2020;69:1868-1872. DOI: http://dx.doi.org/10.15585/mmwr.mm6949e3

Thank you for your consideration and your prompt action. We stand ready to work with you to ensure Head Start can continue to be the lifeline to success in school and in life for generations to come.

Sincerely,

National Head Start Association
National Indian Head Start Directors Association

New England Head Start Association
Region II Head Start Association
Region III Head Start Association
Region IV Head Start Association
Region V Head Start Association
Region VI Head Start Association
Region VII Head Start Association
Region VIII Head Start Association
Region 9 Head Start Association
Region X Head Start Association

Alabama Head Start Association
Alaska Head Start Association
Arizona Head Start Association
Arkansas Head Start Association
Head Start California
Colorado Head Start Association
Connecticut Head Start Association
Delaware Head Start Association
DC Head Start Association
Florida Head Start Association
Georgia Head Start Association
Head Start Association of Hawaii
Idaho Head Start Association
Illinois Head Start Association
Indiana Head Start Association
Iowa Head Start Association
Kansas Head Start Association
Kentucky Head Start Association
Louisiana Head Start Association
Maine Head Start Directors Association
Massachusetts Head Start Association
Michigan Head Start Association
Minnesota Head Start Association
Mississippi Head Start Association
Missouri Head Start Association
Montana Head Start Association
Nebraska Head Start Association
Nevada Head Start Association
New Jersey Head Start Association
New Hampshire Head Start Association
New Mexico Head Start Association
North Carolina Head Start Association
North Dakota Head Start Association
Ohio Head Start Association, Inc.
Oklahoma Head Start Directors
Oregon Head Start Association
Pennsylvania Head Start Association
Rhode Island Head Start Association
South Carolina State Head Start Association
South Dakota Head Start Association
Tennessee State Head Start Association
Texas Head Start Association
Utah Head Start Association
Vermont Head Start Association
Virginia Head Start Association, Inc.
West Virginia Head Start Association, Inc.
Wisconsin Head Start Association
Wyoming Head Start Association Inc