CAPLAW
Community Action Program Legal Services, Inc.

September 17, 2015

Ms. Colleen Rathgeb
Policy and Planning Division Director
Office of Head Start
U.S. Department of Health and Human Services
1250 Maryland Avenue SW
Washington, D.C. 20024

Re: Comments on Proposed Head Start Program Performance Standards, Docket No. ACF-2015-0008-0001

Dear Ms. Rathgeb:

This comment letter is being submitted in response to the Notice of Proposed Rulemaking ("NPRM") published by the U.S. Department of Health and Human Services ("HHS") in the Federal Register on June 19, 2015. Community Action Program Legal Services ("CAPLAW") is a member-based, non-profit organization comprising local Community Action Agencies ("CAAs"), all of which receive federal Community Services Block Grant ("CSBG") Act funds through their states. A majority of CAAs also receive funds under the Improving Head Start for School Readiness Act of 2007 (the "Head Start Act") and directly operate and/or work with delegate agencies and childcare partners to provide Head Start and Early Head Start services as part of their mission to reduce poverty and move individuals and families towards self-sufficiency. CAPLAW provides legal advice and training and technical assistance to the national network of over 1,000 CAAs. CAPLAW also advises state CAA associations and state CSBG offices on legal, financial and management issues, including Head Start and other federal grant law matters.

CAPLAW appreciates this opportunity to comment on HHS's proposed Head Start Program Performance Standards (the "Standards"), which are promulgated under the Head Start Act. For reference purposes, the text of the proposed Standards has been reproduced in bold, with CAPLAW's comments addressing the applicable proposed Standard following immediately below. Section references used in this comment letter refer to sections of the proposed Standards unless otherwise indicated.

CAPLAW supports the detailed, insightful and well-informed comments made by the National Head Start Association ("NHSA"), with the handful of exceptions noted below in Comment 65 in which our perspective differs somewhat from that of NHSA.

Following are CAPLAW's comments:

Part 1301 – Program Governance

1. **General**

COMMENT: Throughout Part 1301, the proposed Standards should reiterate language from the Head Start Act instead of merely referencing section numbers. The Head Start Act is referenced repeatedly in this Part, and understanding the governance requirements requires frequent cross-referencing. The regulations will be more understandable—especially for non-lawyers such as Head Start program staff—if minimal cross-referencing to the Head Start Act is required.

2.

§ 1301.3(a) – Governing body	**(a) *Composition.*** **...** **Agencies must ensure members of the governing body do not have a conflict of interest, pursuant to section 642(c)(1)(C) of the Act.**
§ 1301.3(c)(4) – Governing body	**(c) *Advisory committees.*** **…** **(4)** **...** **Such procedures must prohibit any conflict of interest described in section 642(c)(1)(C).**
§ 1301.4(b) – Policy councils and policy committees	**(4) *Composition.*** **...** **The program must ensure members of policy groups do not have a conflict of interest pursuant to sections 642(c)(2)(C) and 642(c)(3)(B) of the Act.**

COMMENT: The proposed Standards should make clear that an agency board member whose child is in the agency's Head Start program and/or who is otherwise receiving services from the agency does not constitute a conflict of interest when the individual receiving services is eligible and does not receive preferential treatment. We recommend adding the following language to Part 1301: "Provision of services or benefits by a Head Start agency, or delegate agency, to a member of the governing body or policy council is not a conflict of interest, provided that: (i) the individual meets all applicable eligibility criteria for the services/benefits; (ii) the individual does not receive preferential treatment in receiving the services/benefits due to his or her connection with the Head Start program or as an Immediate Family Member; (iii) the services/benefits are provided on terms similar to services/benefits provided to individuals who are neither members of the governing body or policy council, nor immediate family members; and (iv) the governing body or policy council member is not involved in the decision about whether to provide services/benefits to the individual."

The proposed Standards should also define "immediate family" as is used in section 642(c)(1)(C)(iii) of the Head Start Act (42 U.S.C. § 9837(c)(1)(C)(iii)). The Head Start Act does not define this term, and the only relevant guidance comes from Head Start Policy Clarification PC-E-029, which states that the definition of immediate family "generally includes the spouse, parents and grandparents, children and grandchildren, brothers and sisters, mother-in-law and father-in-law, brothers-in-law and sisters-in-law, daughters-in-law and sons-in-law, and adopted and step family members." Given the importance of the Head Start conflict of interest rules, the definition of "immediate family" should be found in binding regulations rather than the non-binding guidance of a policy clarification. Also, the definition should be more concrete. The current language in the policy clarification says that immediate family "*generally includes* the spouse, parents…," which creates vagueness around the definition of immediate family and therefore makes compliance difficult.

3.	**§ 1301.3(b)(2) – Governing body**	**(b) *Duties and responsibilities.*** **...** **(2) The governing body must rely on ongoing monitoring results, school readiness goals, and information described at section 642(d)(2) of the Act to conduct its responsibilities.**
	§ 1301.4(c)(2) – Policy councils and policy committees	**(4) *Duties and responsibilities.*** **...** **A policy council, and a policy committee at the delegate level, must rely on ongoing monitoring results, school readiness goals, and information described in section 642(d)(2) of the Act to conduct its responsibilities.**

COMMENT: These sections should be stricken because the proposed Standards already provide detailed requirements for the achievement of program performance goals in section 1302.102. It is clear from section 1302.102 of the proposed Standards that the governing body and the policy council must be involved in assuring that program performance goals are met. If these sections are not stricken, the sections should, at a minimum, reference the more detailed requirements in section 1302.102.

4.	**§ 1301.3(c)(3) – Governing body**	**(c) *Advisory committees.*** **A governing body may, at its own discretion, establish an advisory committee to oversee key responsibilities related to program governance, including supervision of program management…**

COMMENT: The proposed Standards should clarify that the governing body may establish one or more advisory committees. The Head Start Act specifies that the governing body's powers include, "to the extent practicable and appropriate, at the discretion of the governing body, establishing advisory *committees* to oversee key responsibilities related to program governance and improvement of the Head Start

program involved." Section 642(c)(1)(E)(iv)(XI) of the Head Start Act; 42 U.S.C. § 9837(c)(1)(E)(iv)(XI) (emphasis added). The Head Start Act speaks of "committees," indicating that the governing body may establish more than one advisory committee. The proposed Standards appear to limit the governing body to one advisory committee.

5.	**§ 1301.3(c)(3) – Governing body**	**(c) *Advisory committees.*** **...** **(3) Specify how and with what frequency, but not less than twice a year, the advisory committee will keep the governing body apprised of its decisions related to program governance;**

COMMENT: The advisory committee should not be making "decisions" related to program governance. Generally speaking, a committee created by a governing body can only exercise authority that is explicitly delegated to it by the governing body. As an *advisory* committee, the committee should only be tasked with making recommendations to the full governing body. It is more appropriate, therefore, for the proposed Standards to give the advisory committee the authority to "make recommendations to the governing body." In the proposed Standards, that can be accomplished by simply changing "decisions" to "recommendations."

If the advisory committee is making recommendations, there is then no need for the advisory committee to regularly update the governing body. Rather, the committee would update the board whenever the governing body seeks a recommendation or the advisory committee offers a recommendation.

6.	**§ 1301.3(c)(4) – Governing body**	**(c) *Advisory committees.*** **...** **(4) Describe the membership of the advisory committee and the process for how members are selected, including requiring that members of the advisory committee meet the same composition requirements that apply to governing bodies in section 642(c)(1)(B) of the Act.**

COMMENT: We recommend eliminating the requirement that "members of the advisory committee meet the same composition requirements that apply to governing bodies." It is typical for Head Start governing bodies to establish multiple advisory committees, such as a Finance Committee to address financial matters and a Head Start and Children's Services Committee to address programmatic matters. While it may make sense to require the governing body's financial expert to serve on the Finance Committee, it would not generally make sense to require the early childhood expert to serve on that committee, especially if the early childhood expert is serving on the Head Start and Children's Services Committee. If the governing body actually delegated authority to the advisory committee to act on behalf of the full governing body, it would make sense to require the committee, as a whole, to reflect the composition requirements in the Head

Start Act (e.g., one member with financial expertise, one member with early child education expertise, one licensed attorney, etc.). However, as noted above, the committee by definition is merely advisory and cannot exercise the authority of the governing body.

7.	**§ 1301.3(c)(4) – Governing body**	**(c) *Advisory committees.*** **...** **(4) …If a governing body intends to establish an advisory committee to oversee key responsibilities related to program governance, it must do so by written agreement and must notify the responsible HHS official by submission of such agreement prior to its effective date.**

COMMENTS: The proposed Standards should eliminate the requirement that advisory committees be established by written agreement. Governing bodies, such as a board of directors, typically do not enter into agreements to create committees. Rather, a governing body will use its standard decision-making process (e.g., vote by a quorum of directors) to create a committee and specify any delegation of authority. The creation of the committee and delegation of authority will be recorded in the meeting minutes and possibly memorialized in a committee charter. The governing body's written procedures regarding the creation of committees should be sufficient to establish the advisory committee. Moreover, using an agreement to delegate authority implies that the governing body and committee are on equal footing; whereas, in fact, the committee depends on the governing body to establish and delineate the committee's authority and responsibilities.

8.	**§ 1301.4 – Policy councils and policy committees**	**Parent committees**

COMMENT: The preamble to the NPRM states that although programs are no longer required to have parent committees, they may choose to retain them. However, the proposed Standards contain no references to parent committees. The proposed Standards should make clear that parent committees are still allowed, although no longer prescribed. The proposed Standards should also clarify the role and function of parent committees if programs should choose to use them.

9.	**§ 1301.4(c)(1) – Policy councils and policy committees**	**(c) *Duties and responsibilities.*** **(1) A policy council is responsible for activities specified at section 642(c)(2)(D) of the Act.**

COMMENT: Clarification is needed for the policy council responsibility requiring that "[t]he policy council shall approve and submit to the governing body: . . . decisions regarding the employment of program staff" in section 642(c)(2)(D)(vi) of the Head Start Act (42 U.S.C.§ 9837(c)(2)(D)(vi)). The phrase is ambiguous as to the level and kind of

involvement the policy council must have in employment decisions. For example, the phrase fails to address questions such as: Must the policy council actually approve the hiring and firing of all Head Start staff or just make recommendations regarding the hiring and firing of Head Start staff that the governing body (through its designee, the Executive Director) then has the discretion to accept or reject? Is the policy council involved in both hiring and firing decisions, or only hiring decisions?

We recommend that the policy council's role in employment decisions be limited to making recommendations regarding the hiring of Head Start program staff. If the proposed Standards require the policy council to approve all decisions regarding the hiring and termination of program staff, then the policy council effectively is exercising decision-making authority. While the governing body of a nonprofit Head Start grantee is the legal entity with attendant rights, responsibilities and liabilities, the policy council is not. Rather, the policy council is an advisory body and should not have final say over sensitive and often complex matters such as employment terminations, especially when such matters impact the overall organization and may result in legal proceedings.

We also seek clarification of the definition of "program staff" used in section 642(c)(2)(D)(vi) of the Head Start Act (42 U.S.C.§ 9837(c)(2)(D)(vi)). Does the term refer to all staff who work primarily for the Head Start program (as is specified in the current Standards, 45 C.F.R. § 1304.50(d)(1)(xi))? If so, the proposed Standards should define "primarily." Does the term "program staff" include the Head Start director? What about central office staff (such as the executive director, finance director or HR director) who are paid through the agency's indirect cost rate?

10.	**§ 1301.4(d)(3) – Policy councils and policy committees**	**(c) *Term.*** **…** **(3) The policy group must include in its bylaws how many one-year terms, not to exceed five terms, a person may serve.**

COMMENT: We applaud the additional flexibility granted to Head Start agencies by increasing the permissible term limits for policy group members from three to five one-year terms.

11.	**§ 1301.5(b) – Impasse procedures**	**(b) A program must establish and follow impasse procedures that: (1) Demonstrate that the governing body considers recommendations from the policy group; (2) Require the governing body to notify the policy group in writing why it does not accept a recommendation; (3) Describe a process and a timeline to resolve issues and reach decisions that are not arbitrary, capricious, or illegal; and, (4) Require the governing body to notify the policy group in writing of its final decision.**

COMMENT: We support the proposed Standards regarding impasse procedures. Under the Head Start Act, the governing body has the legal and fiscal responsibility for the Head Start agency. Section 642(c)(1)(A) of the Head Start Act; 42 U.S.C. § 9837(c)(1)(A). The governing body, not the policy council, is subject to legal liability for decisions made by the grantee. Since the governing body bears legal and fiscal responsibility, it is appropriate that it should, after taking into consideration the recommendations of the policy council and, if applicable, the policy committee, make the ultimate decisions on issues relating to the Head Start program.

Part 1302 – Program Operations

12.	**§ 1302.11(a)(1) – Determining community strengths and needs**	**(1) A program must propose a service area in the grant application and define the area by county or sub-county area, such as a municipality, town or census tract or jurisdiction of a federally recognized Indian reservation.**

COMMENT: We recommend that HHS continue to require that service areas not overlap. Permitting overlapping service areas is likely to result in: (1) services being duplicated within a single geographic area; (2) unnecessary competition for eligible children and families between programs with overlapping service areas; and (3) an inequitable distribution of Head Start services across communities served by Head Start.

If overlapping service areas are permitted, the Standards should articulate or provide examples of circumstances that would justify them, clarify steps that programs with overlapping service areas may take to avoid duplication of services and specify the criteria that HHS will use to determine when overlapping service areas will be approved. Providing this information will: (1) help grantees and prospective grantees understand when it may be appropriate to propose overlapping service areas in their applications; (2) provide benchmarks for consistency in HHS's determinations concerning overlapping service areas; and (3) ensure that Head Start funds are used as efficiently as possible.

13.	**§ 1302.12(b)(2)(ii) – Determining, verifying, and documenting eligibility**	**(2) For Head Start, a child must . . . (ii) Be no older than the age required to attend school.**

COMMENT: We recommend that HHS revise section 1302.12(b)(2)(ii) to read, "Not be older than compulsory school age." This revision, which is the provision currently used in section 1305.4(b)(2)(iii) of the current Standards, would track the language used to determine eligibility in the Head Start Act. The Head Start Act provides that "a Head Start agency may use funds that were awarded under this subchapter to serve children age 3 to compulsory school age." Section 645(a)(5)(A) of the Head Start Act; 42 U.S.C. § 9840(a)(5)(A); see also section 638 of the Head Start Act (42 U.S.C. § 9833) (providing

for five-year grants to Head Start and programs serving "children from low-income families who have not reached the age of compulsory school attendance").

The language in the proposed Standards conflicts with the Head Start Act, as the proposed Standards define eligibility on the basis of school eligibility age rather than "compulsory school age." A child may reach the age at which he or she is eligible to attend kindergarten, and yet not be required under state law to attend school. Compulsory school age varies from state to state (ranging from age five to age eight), and in many states, compulsory school age also differs from kindergarten entrance age. See National Center for Education Statistics, *Table 5.3. Types of state and district requirements for kindergarten entrance and attendance, by state: 2014*, https://nces.ed.gov/programs/statereform/tab5_3.asp. Further, not all states require kindergarten attendance or require districts to offer full-day kindergarten programs.

If HHS proposes to use school attendance eligibility to establish priority for enrolling children who do not have access to or are not otherwise eligible for high quality, publicly-funded school programs, the proper place to do so is in the selection provisions in section 1302.14 of the proposed Standards. This section 1302.12 should merely establish the eligibility criteria for Head Start services as described in the Head Start Act. This would clarify that while children are eligible for Head Start services up to compulsory school age, as specified in the Head Start Act, programs should consider other factors such as the child's eligibility for comparable public school programs or a child's need for Head Start services in the selection and enrollment process. See Comment 17 regarding selection below.

14.	**§ 1302.12(c)(2) and (d)(1)-(2) – Determining, verifying, and documenting eligibility**	**(c) *Eligibility requirements*.** **…** **(2) If the family does not meet a criterion under paragraph (c)(1) of this section, a program may enroll a pregnant woman or a child who would benefit from services, provided that these participants only make up to 10 percent of a program's enrollment in accordance with paragraph (d) of this section.** **(d) Additional allowances for programs. (1) A program may enroll an additional 35 percent of participants whose families do not meet a criterion described in paragraph (c) of this section and whose incomes are below 130 percent of the poverty line, if the program:** **(i) Establishes and implements outreach, and enrollment policies and procedures to ensure it is meeting the needs of eligible pregnant women, children, and children with disabilities, before serving ineligible pregnant women or children; and,** **(ii) Establishes criteria that ensure eligible pregnant women**

and children are served first.

(2) If a program chooses to enroll participants who do not meet a criterion in paragraph (c) of this section, and whose family incomes are between 100 and 130 percent of the poverty line, it must be able to report to the Head Start regional program office:
(i) How it is meeting the needs of low-income families or families potentially eligible for public assistance, homeless children, and children in foster care, and include local demographic data on these populations;
(ii) Outreach and enrollment policies and procedures that ensure it is meeting the needs of eligible children or pregnant women, before serving over-income children or pregnant women;
(iii) Efforts, including outreach, to be fully enrolled with eligible pregnant women or children;
(iv) Policies, procedures, and selection criteria it uses to serve eligible children;
(v) Its current enrollment and its enrollment for the previous year;
(vi) The number of pregnant women and children served, disaggregated by whether they are eligible or meet the over-income requirement in paragraph (c)(2) of this section; and,
(vii) The eligibility criteria category of each child on the program's waiting list.

COMMENT: Section 645(a)(1)(B)(iii) of the Head Start Act (42 U.S.C. § 9840(a)(1)(B)(iii)) gives programs two options—the "10% option" and the "35% option"—for enrolling over-income children and pregnant women. Currently, the 10% option is located in subsection (c) and the 35% option is located in subsection (d). We recommend that HHS reorganize section 1302.12 to put the 10% option and the 35% option in a single subsection (d) to make clear the two circumstances in which grantees may enroll children and pregnant women who do not otherwise meet the income and categorical eligibility criteria for Head Start-funded enrollment slots in subsection (c).

Further, we request that HHS delete the phrase at the end of the sentence in section 1302.12(c)(2) requiring that the 10% option be executed "in accordance with paragraph (d) of this section." This phrase is inconsistent with the requirements of the Head Start Act, which does not require agencies to undertake the efforts in paragraph (d) before enrolling over-income children and pregnant women pursuant to the 10% option. Paragraph (d) reflects the requirements in sections 645(a)(1)(B)(iii)(II)(aa) - (bb) and (iv) of the Head Start Act (42 U.S.C. § 9840(a)(1)(B)(iii)(II)(aa) - (bb) and (iv)) that apply to agencies choosing to serve children pursuant to the 35% option. Paragraph (d) requires agencies to establish and implement outreach, prioritization and enrollment policies and

procedures that ensure they are meeting the needs of eligible children and pregnant women prior to serving pregnant women and children from families with incomes between 100% and 130% of the federal poverty guidelines, as well as report annually on their efforts to meet these requirements. Agencies, however, are not required under the Head Start Act to undertake such efforts before enrolling over-income children and pregnant women pursuant to the 10% option, so the reference to "paragraph (d)" in the context of the 10% option is misleading and potentially confusing to grantees.

15.	**§ 1302.12(i)(3)(ii) – Determining, verifying, and documenting eligibility**	**(i) *Verifying eligibility*.** **...** **(3) To verify whether a family is homeless…** **…** **(ii) If a family cannot provide one of the documents described in paragraph (i)(5) of this section to prove the child is homeless, a program may accept the family's signed declaration to that effect, if, in a written statement, program staff:**

COMMENT: The reference to "paragraph (i)(5)" should be revised to read "paragraph (i)(3)." There is no paragraph (i)(5) in subsection (i), and the documentation indicating the child is homeless is listed in paragraph (i)(3) of subsection (i).

16.	**§ 1302.12(k)(2)(ii)(A) and (B) – Determining, verifying, and documenting eligibility**	**(k) *Records*.** **…** **(2) Each eligibility determination record must include:** **(ii) A statement that program staff has made reasonable efforts to verify information by:** **(A) Conducting either an in-person, or a telephonic interview with the family as described under paragraph (a) of this section; and (B) Describing efforts made to verify eligibility, as required under paragraphs (h) through (i) of this section;**

COMMENT: Section 1302.12(a)(3) of the proposed Standards includes a new provision allowing programs to use an alternate effective method to determine eligibility and to petition HHS for a waiver of the in-person interview and eligibility verification requirements in subsections (a)(1)(i) and (a)(1)(ii). However, programs opting to use the alternate method are still required to create an eligibility determination record for enrolled participants that meet the requirements of subsection (k). We request that HHS revise sections 1302.12(k)(2)(ii)(A) and (B) to clarify what programs using the alternate effective method to determine eligibility must do to verify the information they review.

17.	**§ 1302.14(a)(3) – Selection process**	**(a) *Selection criteria.*** **…**

(3) If a program operates in a service area with high quality publicly funded pre-kindergarten that is available for a full school day, the program must prioritize child age to serve younger children.

COMMENT: Like NHSA, we recommend that this proposed Standard be revised to state that "the program should consider prioritizing child age to serve younger children."

As we note in Comment 13 above, if HHS's priority is to serve primarily three- and four-year olds despite language in the Head Start Act indicating that children up to compulsory school age are eligible for Head Start, it should state that in this section. This would clarify that HHS's preference is to prioritize children for whom no full-day public school option is available, even though compulsory school age is the cut-off for eligibility in the Head Start Act. We also request guidance on other factors and circumstances for Head Start programs to consider in determining when they: (1) should consider prioritizing enrolling younger children and (2) may enroll children who have already received Head Start services for two years but may benefit from additional services, provided they continue to be eligible for Head Start under section 1302.12.

We also note that if a Head Start program's service area includes several school districts and some provide full school day pre-kindergarten, while others do not, this provision would appear to require different child age priorities in different portions of the service area, which could pose difficulties in administration for the Head Start program. In addition, the criteria and process to determine whether publicly funded, full school day pre-kindergarten available in a Head Start program's area is "high quality" are unclear. Since the Head Start program will be more familiar than HHS with the quality of the publicly funded pre-kindergarten in its local area (including whether the publicly funded pre-kindergarten has the capacity to serve all children who apply), we recommend that the determination of whether a particular publicly funded pre-kindergarten is "high quality" be left to the discretion of the Head Start grantee.

18. § 1302.15(b)(2) – Enrollment

(b) *Continuity of enrollment.*
…
(2) Children who are enrolled in a program receiving funds under the authority of section 645A of the Act remain income eligible while they participate in the program. When a child moves from a program serving infants and toddlers to a Head Start program serving children age three and older, the program must verify family income again

COMMENT: We note that this provision is duplicative of section 1302.12(j)(2) and (3). We recommend that HHS delete this provision, as it deals with eligibility and would be more appropriate to include in the eligibility section.

19.	**§ 1302.15(b)(3) – Enrollment**	**(b) *Continuity of enrollment.*** **…** **(3) Under exceptional circumstances, a program may maintain a child's enrollment for a third year, provided that family income is verified again.**

COMMENT: We recommend that HHS delete this provision, as it appears to introduce a different measure of eligibility than that used in the Head Start Act and the eligibility provision in section 1302.12(b)(2) of the proposed Standards (the number of program years already completed, rather than age). As we note in Comments 13 and 17 regarding compulsory school age and selection, though children are eligible for Head Start services up to compulsory school age, HHS should provide guidance in the selection provision in section 1302.14 regarding how programs should prioritize selecting and enrolling children. This could include discussing the "exceptional circumstances" under which a program may maintain a child's Head Start enrollment for a third year (provided the child remains eligible for Head Start services under the eligibility regulations in section 1302.12). Like NHSA, we recommend that such a provision apply specifically to Head Start (as opposed to Early Head Start) and to include services for five-year-olds in states where compulsory education does not begin until age six or older.

20.	**§ 1302.16(a)(1) – Attendance**	**(a) *Promoting regular attendance*.** **…** **(1) If a child is unexpectedly absent and a parent has not contacted the program within 1 hour of program start time, the program must contact the parent to ensure the child is safe.**

COMMENT: While we support the goal of ensuring that children who do not come to school are safe, this new requirement is overly burdensome and not always feasible nor effective. Collecting information about all absent children and contacting their parents within an hour may not always be possible depending on the number of children absent on a given day and the simultaneous occurrence of other unanticipated, time-sensitive events. Moreover, leaving an automated or live message for a parent does not ensure that the child is safe. Programs should be allowed to develop their own policies and procedures for checking on the safety of an absent child, consistent with applicable state law. Some Head Start programs already have procedures in place to check on students who are tardy or absent, and such programs should be allowed to maintain their current systems. Programs that do not have any mechanism to foster child safety should be required to adopt one that fits their particular needs. This approach is consistent with HHS's overarching goal in the NPRM to move away from prescribing specific requirements and give programs greater flexibility in determining the best ways to achieve their goals.

21.	**§ 1302.21(c)(1) – Center-based option**	**(c) *Service*—(1) Days per year. At a minimum, a program that serves preschool age children must offer no less than 180**

days of planned operation per year, and Early Head Start programs must offer no less than 230 days of planned operation per year. A program must:
(i) Plan their year using a reasonable estimate of the number of days during a year that classes may be closed due to problems such as inclement weather, based on their experience in previous years; and,
(ii) Make every effort to schedule makeup days using existing resources if days of planned operation fall below the number required per year.
…
(3) Hours per day. A [center-based] program must offer a minimum of six hours of operation per day but is encouraged to offer longer service days if it meets the needs of children and families.

COMMENT: We support NHSA's thorough and insightful analysis of and comments on these proposed Standards. To the extent that the Standards use the term "days of planned operation," we request that HHS clarify what is covered in that term, as we note that it is not defined in Part 1305, though a similar term, "hours of operation," is specifically defined. If the term "days of planned operation" is used, we recommend that the definition of that term include, at a minimum, days involving staff orientation and training and professional development activities.

22. § 1302.22 – Home-based option

(a) *Setting*. The home-based option delivers education and early childhood development services, consistent with § 1302.20(b), through visits with the child's parents, primarily in the child's home and provides group socialization opportunities in a Head Start classroom, community facility, home, or on field trips. The home-based option is only a standard program option for children under 36 months of age. When serving children 36 months and older in the home-based option would better meet a community's need, programs can apply to operate a locally designed option.

COMMENT: We request that HHS replace references to "Head Start" in this section with "Early Head Start," since the home-based option is a standard option only for Early Head Start programs.

23. § 1302.90(a) – Personnel policies

(a) *In general.* A program must establish written personnel policies and procedures that are approved by the policy council or policy committee.

COMMENT: This proposed Standard should be revised as follows to reflect the requirements of the Head Start Act: "A Head Start agency must establish written agency-

wide personnel policies that are approved by the governing body. To the extent the agency has additional, Head Start program-specific personnel policies, decisions about such program personnel policies must be approved by the policy council and submitted to the governing body." Under the Head Start Act, the governing body is charged with reviewing and approving all major policies *of the agency*, including personnel policies regarding the hiring, evaluation, termination, and compensation of agency employees and with approving *agency* personnel policies and procedures. Section 642(c)(1)(E)(iv)(V)(cc) and (IX) of the Head Start Act; 42 U.S.C. §§ 9837(c)(1)(E)(iv)(V)(cc) and (IX). Under the Head Start Act, the policy council is charged with approving and submitting to the governing body decisions about, among other things, *program* personnel policies. Section 642(c)(2)(D)(vi) of the Head Start Act; 42 U.S.C. §§ 9837(c)(2)(D)(vi) (emphasis added).

24.

§ 1302.90(b)(1) – Personnel policies

(b) *Recruitment and selection procedures for all staff*.
(1) Before an individual is hired, a program must conduct an interview, verify references, and obtain the following to ensure child safety: (i) (A) State or tribal criminal history records, including fingerprint checks; or, (B) Federal Bureau of Investigation criminal history records, including fingerprint checks; and, (ii) Clearance through child abuse and neglect registry, if available; and, (iii) Clearance through sex offender registries, if available.

§ 1302.47(b)(3) – Safety practices

(b) *Recruitment and selection procedures for all staff*.
…
(3) *Background checks*. All staff have complete background checks in accordance with § 1302.90(b).

COMMENT: An employer's ability to run and obtain fingerprint-based checks is governed by state law and, if state law does not authorize FBI fingerprint-based checks, there is no alternative means for an employer to obtain such a check. The FBI's website states as follows:

> The FBI's authority to conduct an Identity History Summary check for non-criminal justice purposes is based upon Public Law (Pub. L.) 92-544. Pursuant to that law, the FBI is empowered to exchange Identity History Summary information with officials of state and local governments for employment, licensing, which includes volunteers, and other similar non-criminal justice purposes, if authorized by a state statute which has been approved by the Attorney General of the United States. The U.S. Department of Justice has advised that the state statute establishing guidelines for a category of employment or the issuance of a license must, in itself, require fingerprinting and authorize the governmental licensing or employing agency to exchange fingerprint data directly with the FBI.

> An Identity History Summary search obtained pursuant to U.S. Department of Justice Order 556-73 may not meet employment requirements. Governmental licensing or employing agencies covered by federal laws and/or state statutes may refuse to accept identity history record information directly from the subject of the record, as there would be no way to verify that the information contained on the record had not been altered. Also, an Identity History Summary provided to the subject for personal review contains only information maintained by the CJIS Division and may lack dispositional data and/or arrest records that are maintained only at the state level.
>
> FBI Identity History Summary Checks for Employment and Licensing, available at https://www.fbi.gov/about-us/cjis/identity-history-summary-checks/backgroundchk (accessed on Aug. 8, 2015).

As noted above, the FBI exchanges criminal history information with state government officials, not directly with employers. It is not unusual for there to be significant delays in the communication by states of check results to child care providers. In recognition of the fact that these delays may make it impossible to hire teachers in a timely way in order to meet staffing ratio requirements, states may permit hiring staff on a conditional basis, after successful completion of a state criminal records history check (and, if available, clearance through child abuse and neglect and sex offender registries), pending completion of the FBI fingerprint-based check.

In some states, fingerprint-based checks and child abuse and neglect registry checks are limited to individuals with unsupervised access to children. Similarly, the background check requirements contained in the Child Care Development Block Grant Act of 2014 (the "CCDBG Act") (discussed further in Comment 25 below) only apply to staff whose activities involve the care or supervision of children or unsupervised access to children. See Section 658H of the CCDBG Act; 42 U.S.C. § 9858f.

In addition, the Head Start Act only requires a Head Start agency to conduct criminal background checks on individuals it employs. Section 648A(g) of the Head Start Act; 42 U.S.C. § 9843a(g). The proposed Standards, however, require criminal background checks for all "staff," which is defined in section 1305.2 of the proposed Standards to mean "paid adults who have responsibilities related to children and their families who are enrolled in programs." The term "staff" as used in the proposed Standards could encompass staff employed by delegate agencies and child care partners with which a Head Start agency contracts to provide Head Start services. However, a Head Start agency does not employ the individuals who work for its delegate agencies and child care partners. Under state background check law, a delegate agency or partner (and not the Head Start agency) would generally be the entity authorized to conduct the criminal background check for staff working at its sites. Moreover, due to statutory and regulatory privacy restrictions on the sharing of background check information, a delegate or partner may not be permitted to disclose background check information about those individuals

to the Head Start agency. Thus, it may be difficult, if not impossible, for the Head Start agency to monitor whether its delegates and partners have conducted the required background checks and to ascertain the results of those checks. The only option that a Head Start agency may have in this circumstance is to require in its agreement with the delegate or partner that the delegate or partner conduct the requisite background check and specify that failure to obtain a check is grounds for immediate termination of the agreement.

Therefore, we recommend that the proposed Standard in section 1302.90(b)(1) be re-worded as follows:

> (b) *Recruitment and selection procedures for all staff.* (1) Before an individual is employed by a Head Start agency to work in its Head Start or Early Head Start program, the agency must conduct an interview, verify references, and obtain the following to ensure child safety: (i) A State or tribal criminal history records check; and (ii) as required by State or tribal law or regulation for staff whose activities involve the care or supervision of children or unsupervised access to children: (A) A fingerprint-based criminal records history check; (B) Clearance through child abuse and neglect registry, if available; and, (C) Clearance through sex offender registries, if available.

25.	**§ 1302.90(b)(2) – Personnel policies**	**(b) *Recruitment and selection procedures for all staff.*** **…** **(2) Within 90 days after an employee is hired, a program must complete the background check process by obtaining whichever check listed in (b)(1)(i) was not obtained prior to employment.**

COMMENT: We recommend eliminating this provision. As discussed in Comment 24 above, an employer's ability to run and obtain fingerprint-based checks is governed by state law and if state law does not authorize and utilize either or both state and/or FBI fingerprint-based criminal history record checks, there is no alternative means for an employer to obtain such a check.

Note that states receiving funds under the CCDBG Act must adopt background check policies and procedures applicable to child care staff of child care providers which include, among other checks, an FBI fingerprint check using the Integrated Automated Fingerprint Identification System. States receiving CCDBG funds are required to do so by the last day of the second full fiscal year after November 19, 2014, the date of enactment of the CCDBG Act. See Section 658H of the CCDBG Act; 42 U.S.C. § 9858f. To the extent states do not already require an FBI fingerprint check for child care providers, they will most likely soon do so. Therefore, requiring both a state check and an FBI check would be redundant for Head Start grantees in states that receive CCDBG funds (which we assume is all states), since the check required by the state would already include an FBI check.

26.	**§ 1302.90(b)(3) – Personnel policies**	**(b)** ***Recruitment and selection procedures for all staff.*** **…** **(3) A program must review each employment application to assess the relevancy of any issue uncovered by the complete background check including any arrest, pending criminal charge, or conviction and must use State licensing disqualification factors in any employment decisions.**

COMMENT: Requiring the consideration of any arrest or pending criminal charges, where no conviction has resulted, could result in violations of Title VII of the Civil Rights Act of 1964. According to the federal Equal Employment Opportunity Commission ("EEOC"):

> The fact of an arrest does not establish that criminal conduct has occurred. Arrests are not proof of criminal conduct. Many arrests do not result in criminal charges, or the charges are dismissed. Even if an individual is charged and subsequently prosecuted, he is presumed innocent unless proven guilty.
>
> An arrest, however, may in some circumstances trigger an inquiry into whether the conduct underlying the arrest justifies an adverse employment action. Title VII calls for a fact-based analysis to determine if an exclusionary policy or practice is job related and consistent with business necessity. Therefore, an exclusion based on an arrest, in itself, is not job related and consistent with business necessity.
>
> Another reason for employers not to rely on arrest records is that they may not report the final disposition of the arrest (e.g., not prosecuted, convicted, or acquitted). As documented in Section III.A. [of the EEOC Enforcement Guidance] the DOJ/BJS reported that many arrest records in the FBI's III database and state criminal record repositories are not associated with final dispositions. Arrest records also may include inaccuracies or may continue to be reported even if expunged or sealed.
>
> EEOC Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964 (Apr. 25, 2012), available at http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm#VB2 (accessed on Aug. 8, 2015) (citations omitted).

We also recommend revising the clause, "must use State licensing disqualification factors in any employment decisions," so that it reads, "must use applicable State-mandated disqualification factors in any employment decisions" to clarify that school-based grantees may use whichever state-imposed disqualification factors apply to them.

27. § 1302.90(b)(5) – Personnel policies

(b) *Recruitment and selection procedures for all staff.*
…
(5) A program must consider current and former program parents for employment vacancies for which such parents are qualified.

COMMENT: The proposed Standards should acknowledge the fact that, under section 642(c)(2)(C) of the Head Start Act (42 U.S.C. § 9837(c)(2)(C)), parents who are members of the policy council may not receive compensation for providing services to the Head Start agency and that policy council members are prohibited from having a conflict of interest with the agency. Therefore, a parent serving on the policy council would presumably need to resign from the policy council before being hired and may need to resign prior to applying for an agency position to avoid a conflict of interest with the agency.

28. § 1302.90(b)(6) – Personnel policies

(b) *Recruitment and selection procedures for all staff.*
…
(6) A program must conduct the background screening described in paragraphs (b)(1)(ii) and (iii) of this section for individuals with whom the agencies contract to transport children.

COMMENT: Section 640(i) of the Head Start Act (42 U.S.C. § 9835(i)) requires that HHS issue Head Start transportation regulations, including requirements to ensure appropriate background checks for individuals with whom Head Start agencies contract to transport Head Start children. We request clarification regarding whether this proposed Standard refers only to individuals with whom a Head Start agency contracts directly to transport children or also to individuals engaged by an entity with which a Head Start agency contracts to transport children. As noted above, state law background check procedures may not permit Head Start agencies themselves to conduct background screenings of individuals hired by a transportation vendor; such screenings may need to be conducted by the vendor.

29. § 1302.92(b)(3) Training and professional development

(b) A program must establish and implement a systematic approach to staff training and development designed to assist staff in acquiring or increasing the knowledge and skills needed to provide high quality services within the scope of their job responsibilities, and attached to academic credit as appropriate. At a minimum, the system must include:
…
(4) A coordinated coaching strategy that aligns with the program's school readiness goals, curricula, and other approaches to professional development, and that:
(i) Utilizes a coach with adequate training and experience in

using assessment data to drive coaching strategies aligned with program performance goals;
(ii) Ensures the coach has training or experience in adult learning; and,
(iii) Ensures ongoing communication between the coach, program director, education director, and any other relevant staff.

COMMENT: While HHS's goal of strengthening Head Start staff training and professional development by focusing on individualized, intensive coaching is laudable, we are concerned about the financial burden of this requirement on Head Start grantees. We recommend including the intensive coaching as an option, rather than as a requirement, for how grantees may establish an approach to staff training and development. We also recommend allowing grantees to develop their own policies and procedures for staff training and development which may be subject to approval by the regional office. Doing so enables programs to adopt an approach that fits their particular needs and budgets. Again, this approach is consistent with HHS's overarching goal in the NPRM to move away from prescribing specific requirements and give programs greater flexibility in determining the best ways to achieve their goals.

30. § 1302.101(b)(4)(i) – Management system

(4) The data system and data governance procedures effectively support the overall management of Head Start data, including the availability, usability, integrity, and security of data. As part of these procedures, a program should:
(i) Identify a data governance body or council with clear roles and responsibilities, establish a framework for decision-making and/or procedures on data management, including how data quality will be monitored, how data will be shared while protecting privacy and confidentiality, a plan to execute those procedures, and an accountability structure for meeting these requirements;

COMMENT: While we support HHS taking a coordinated approach to ensuring effective data system management and governance in order to better integrate Head Start data into state longitudinal data systems, the requirements listed in section 1302.101(b)(4)(i) are so broad that it is not clear exactly what the data management roles and responsibilities should be. Further, we question the need to require agencies to establish a formal data governance body or council. Many Head Start grantees already have departments or staff members whose responsibilities include the data management functions contemplated in this provision. Agencies should have the flexibility to execute these responsibilities through a variety of staffing structures without necessarily having a data governance body.

To the extent that a data governance body is required, we request that HHS clarify that the data governance body may be comprised of qualified agency staff members and is not intended to be a subcommittee of the agency's governing body or policy council. The name, "data governance body or council" suggests that the group has governing authority and may be confused with the agency's legal governing body. Thus, we recommend that HHS refer to this group as a "data governance work group" or a "data governance team" to clearly distinguish it from the agency's governing body or policy council.

31.	**§ 1302.102(d)(1) – Achieving program performance goals**	**(d) *Reporting.* (1) A program must submit [various reports to HHS].**

COMMENT: We request that HHS explain the purpose for requiring the various reports detailed in this section and how HHS intends to process and use the information reported.

32.	**§ 1302.102(d)(1)(ii) – Achieving program performance goals**	**(ii) Reports, as appropriate, to the responsible HHS official immediately or as soon as practicable, related to any risk affecting the health and safety of program participants;**

COMMENT: We recommend deleting this provision. It is so broad that it is impossible for Head Start agencies to know what situations are to be reported and when it is "appropriate" to report them. It is not clear what the phrase "as appropriate" means or who is to determine when reporting is appropriate. If a standard of appropriateness is to be applied to reporting any information, the provision should specify that the decision as to whether it is appropriate to report is within the discretion of the Head Start agency (e.g., by saying "as the Head Start agency deems appropriate"). Moreover, the term "any risk" could encompass practically any circumstances, such as a child's older sibling having a case of head lice.

33.	**§ 1302.102(d)(1)(iii) – Achieving program performance goals**	**(iii) Reports, as appropriate, to the responsible HHS official immediately or as soon as practicable, regarding circumstances affecting … program involvement in legal proceedings, including at a minimum: (A) Any matter for which notification or a report to state, tribal, or local authorities is required by applicable law; (B) Any reports regarding agency staff or volunteer compliance with federal, state, tribal, or local laws governing sex offenders or laws addressing child abuse and neglect; … (D) Legal proceedings by any party that involve the program, management, program staff, or volunteer as a party;**

COMMENT: As we note in Comment 32, we request clarification of the clause "as appropriate." Requiring reports "as appropriate" is a broad and unclear criterion. If a standard of appropriateness is to be applied to reporting any information, the provision

should specify that the decision as to whether it is appropriate to report is within the discretion of the Head Start agency (e.g., by saying "as the Head Start agency deems appropriate").

We also seek clarification with regard to the multiple scenarios when reporting is required. The clause mandating reports regarding "circumstances affecting … program involvement in legal proceedings" is vague which makes compliance difficult. Does this mean that, if an agency is involved in a lawsuit, it must report on every motion made in connection with that proceeding? Or that it must report on every subpoena received requesting employment information about an employee in a matter extraneous to the operation of its Head Start program?

Also, requiring reports relating to "[a]ny matter for which notification or a report to state, tribal or local authorities is required by applicable law" seems to extend reporting beyond matters that are legal proceedings and encompasses matters that would not normally merit reporting to HHS. For example, nonprofit corporations are generally required to file corporate annual reports with the secretary of state (or a similar state governmental body). Presumably, this is not the type of information that HHS intends this provision to cover.

Moreover, the clause, "any reports regarding agency staff or volunteer compliance with federal, state, tribal or local laws governing sex offenders or laws addressing child abuse and neglect" is similarly vague. Does it mean any reports made by the Head Start agency to governmental authorities or does it include allegations received by (i.e., reports made to) the Head Start agency, prior to the agency's investigation of those allegations and determination of whether there is sufficient evidence to require a report to government authorities? With respect to this report, for the sake of clarity, we recommend that Head Start agencies be required to report circumstances where reports of abuse or neglect involving staff or volunteers have been substantiated by the applicable state child welfare agency or where the Head Start agency's license to operate a child care center is suspended by a state or local licensing entity.

Lastly, requiring reports on "legal proceedings by any party that involve the program, management, program staff or volunteer as a party," is again so broad as to make compliance difficult. Presumably, HHS does not want to receive reports on legal proceedings by creditors to garnish Head Start employees' wages in debt collection matters. We recommend that the clause be narrowed to read, "legal proceedings against the agency or management or program staff or volunteers that relate to the operation of the agency's Head Start program."

Part 1303 – Financial and Administrative Requirements

34.	**§ 1303.22(a)(2) – Disclosure with, and without, parental consent**	**(a) *Disclosure with parental consent.*** **…** **(2) The procedures must require the program to ensure that the parent's written consent specifies what child records will be disclosed and explains why and to whom the records will be disclosed. The written consent must be signed and dated.**

COMMENT: We request that HHS clarify that where disclosures of child records are made to a class of recipients (e.g., parents, agency officials not employed by the program, etc.), a separate consent form for each disclosure would not be required. The regulations promulgated under the Family Education Rights and Privacy Act of 1974, as amended (20 U.S.C. § 1232g) ("FERPA"), allow the parental consent to designate a "party or class of parties to whom the disclosure may be made." 34 C.F.R. § 99.30(b)(3). To maintain consistency with the FERPA regulations, we recommend that this provision be revised to read, "The procedures must require the program to ensure that the parent's written consent specifies what child records will be disclosed, explains why the records will be disclosed, and identifies the party or class of parties to whom the disclosure may be made."

35.	**§ 1303.22(c)(1) – Disclosure with, and without, parental consent**	**(c) *Disclosure without parental consent.* Subject to the provisions referenced in § 1303.21, the procedures must allow the program to disclose personally identifiable information from child records without parental consent to:** **(1) Officials within the program or acting for the program (*i.e.* individuals in the Head Start or Early Head Start program who provide program services to the child), if the program determines the official has legitimate educational interests and informs parents of this provision at enrollment;**

COMMENT: It is unclear here whether "officials" (a term not defined in the proposed Standards) means the same thing as "staff" (defined in section 1305.2 of the proposed Standards as "paid adults who have responsibilities related to children and their families who are enrolled in programs"). We recommend that the proposed Standards use the defined term "staff" to avoid any confusion about whether disclosure without parental consent is permitted. We also recommend that staff of the "agency" (rather than the "program") whom the program deems to have legitimate "Head Start-related" interests (rather than legitimate "educational" interests) may obtain personally identifiable information ("PII") from child records without parental consent. Many Head Start programs are operated as part of larger agencies or entities, such as CAAs or other non-profit organizations, which share centralized administrative functions. For example, in some instances, the program may need to allow the agency's information technology staff members access to PII from child records in connection with maintaining and

troubleshooting the program's electronic child records systems. Moreover, because the scope of the Head Start program extends beyond just education to encompass comprehensive child development and family support services, we recommend changing the phrase "legitimate educational interests" to "legitimate Head Start-related interests."

We also request that the proposed Standards deem third-party contractors, subrecipients, consultants, volunteers or other parties with whom programs have entered into an agreement to provide services to the agency as "staff" of the agency for purposes of permitted disclosures under this subsection, provided that programs determine that such parties have legitimate Head Start-related interests in the child record and are prohibited from further disclosing the information to any other party without parental consent before receiving the information. This would, for example, allow programs to use web-based data systems such as PROMIS, Teaching Strategies (TS) GOLD and other comparable systems to maintain child records in accordance with section 1303.24(b) of the proposed Standards.

Thus, we recommend that section 1303.22(c)(1) be revised to read, "Agency staff, if the program determines the staff member has legitimate Head Start-related interests and informs parents of this provision at enrollment. A contractor, subrecipient, consultant, volunteer, or other party to whom the agency has outsourced institutional services or functions, or with whom the agency has entered into partnerships or collaborations as contemplated under the Head Start Act, may be considered 'staff' under this paragraph; provided that the program may disclose personally identifiable information from the child record only on the conditions that (i) the party to whom the information is disclosed will not disclose the information to any other party without parental consent and (ii) the officers, employees, and agents of the party that receives such information may use the information only for the purposes for which the disclosure was made." This language is similar to analogous FERPA regulations, 34 C.F.R. §§ 99.31(a)(1)(i)(B) and 99.33(a).

36.	**§ 1303.22(c)(5)(ii) – Disclosure with, and without, parental consent**	**(c) *Disclosure without parental consent.* Subject to the provisions referenced in § 1303.21, the procedures must allow the program to disclose personally identifiable information from child records without parental consent to:** **…** **(5) Comply with a judicial order or lawfully issued subpoena, provided the program makes a reasonable effort to notify the parent about all such subpoenas and court orders in advance of the compliance therewith, except if:** **…** **(ii) A parent is a party to a court proceeding involving child abuse and neglect (as defined in section 3 of the Child Abuse Prevention and Treatment Act (42 U.S.C. 5101)) or dependency matters, and the order is issued in the context of that proceeding, additional notice to the parent by the program is not required.**

COMMENT: The proposed Standards should clarify that programs may disclose PII from child records without parental consent if required by applicable law, even in the absence of a judicial order or lawfully issued subpoena, so long as the program makes a reasonable effort to provide advance notice to the parent. However, programs should be permitted to make such disclosures without advance notice to parents in child abuse and neglect matters either: (i) if they are required to do so by law (e.g., under state "mandated reporters" laws); or (ii) in connection with administrative proceedings. This better reflects the practices of many state child welfare agencies, which conduct such proceedings through administrative agencies rather than through the courts. Thus, we recommend that sections 1303.22(c)(5) and 1303.22(c)(5)(ii) of the proposed Standards be revised to read as follows:

> (5) Comply with a judicial order or lawfully issued subpoena or applicable law, provided the program makes a reasonable effort to provide advance notice to the parent prior to any such required disclosure, except if:
> …
> (ii) Such disclosure involves suspected or actual child abuse and neglect and is required by applicable law, or a parent is a party to a court or administrative proceeding involving child abuse and neglect (as defined in section 3 of the Child Abuse Prevention and Treatment Act (42 U.S.C. 5101)) or dependency matters and compliance is required by judicial order or lawfully issued subpoena or applicable law, additional notice to the parent by the program is not required.

The proposed Standards should also clarify the definition of "dependency matters." Dependency matters could refer to cases involving child support, child custody, divorce, guardianship of a minor, adoption, and/or any other case involving a dependent child and an adult caregiver. The proposed Standards should specify the scope of dependency matters to ensure Head Start agencies have a clear understanding when records must be disclosed without parental consent.

37.	**§ 1303.22(c)(7) – Disclosure with, and without, parental consent**	**(c) *Disclosure without parental consent.* Subject to the provisions referenced in § 1303.21, the procedures must allow the program to disclose personally identifiable information from child records without parental consent to:** **…** **(7) A caseworker or other representative from a state, local, or tribal child welfare agency, who has the right to access a case plan for a child who is in foster care placement, when such agency is legally responsible for the child's care and protection, under state or tribal law, if the agency agrees in writing to protect personally identifiable information, to use information from the child's case plan for specific purposes intended of addressing the child's needs, and to destroy information that is no longer needed for those purposes.**

COMMENT: The proposed Standards should clarify this section by striking "a case plan for a child who is in foster care placement" and replacing it with "information about the child held by the child welfare agency." Given that the definition and understanding of the terms "case plan" and "foster care" could differ from state to state, using more descriptive language could mitigate the likelihood of confusion.

More generally, we question the need to provide a right of access to a child welfare agency that already "is legally responsible for the child's care and protection" since, presumably, an agency that is legally responsible for the child would have a right of access to that child's records.

38.	**§ 1303.22(d) – Disclosure with, and without, parental consent**	**(d) *Written agreements.* If a program establishes a written agreement with a third party identified in paragraph (c) of this section, the procedures must require the program to review and update the agreement annually, if necessary, and to prohibit the third party from access to records for at least 5 years, if the third party violates the agreement.**

COMMENT: While we support the goal of holding third parties accountable for violations of the child records privacy provisions, barring third parties from accessing child records for <u>any</u> violation of the third party agreement is too broad. An agreement with a third party could cover issues not related to the treatment of PII, and violation of those terms should not require denial of access to PII for five years. Further, the proposed Standards should require, as the FERPA regulations do in 34 C.F.R. § 99.67(e), a finding by a designated office of the federal awarding agency (i.e., HHS) that the third party has violated the provisions of Part 1303, Subpart C – Protections for the Privacy of Child Records (rather than violation of the third party agreement) prior to denying access to child records.

Further, it is not clear why programs need to review and update third party agreements annually and under what circumstances it would be "necessary" to do so. Programs must take steps to bar third parties who violate the child records privacy and protection provisions from accessing child records, so an annual review requirement seems arbitrary and unnecessary.

Thus, section 1303.22(d) of the proposed Standards should be revised to read as follows, "(d) *Written agreements.* If a program establishes a written agreement with a third party identified in paragraph (c) of this section, the procedures must require the program to, upon a finding by the responsible HHS official that a third party has violated any of the applicable provisions in this Subpart C, prohibit the third party from access to records for at least 5 years."

39.	**§ 1303.31(a) – Determining and**	**(a) If a grantee enters into an agreement with another entity to serve children, the grantee must determine whether the**

establishing delegate agencies	**agreement meets the definition of ‘‘delegate agency’’ in section 637(3) of the Act.**

COMMENT: The proposed Standards should include the following definition of "delegate agency" used in the Head Start Act:

> The term "delegate agency" means a public, private nonprofit (including a community based organization, as defined in section 9101 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 7801), or for profit organization or agency to which a grantee has delegated all or part of the responsibility of the grantee for operating a Head Start program.
>
> Section 637(3) of the Head Start Act; 42 U.S.C. § 9832(3).

The proposed Standards should also clarify what it means for a grantee to "delegate all or part of the responsibility of the grantee for operating a Head Start program." For example, would contracting with a licensed family child care provider to serve three children as part of the grantee's funded Head Start (or Early Head Start) enrollment and to whom the Head Start program performance standards would apply constitute delegating a part of the grantee's responsibility for operating a Head Start program? What about contracting with a licensed child care center to serve 18 children? To avoid confusion and to provide clarity to grantees in determining whether a particular contractual relationship with another entity to serve Head Start children constitutes a delegate agency relationship, we recommend defining the phrase "delegate all or part of the responsibility of the grantee for operating a Head Start program" to mean "delegating all or substantially all of a grantee's responsibilities for operating a Head Start program in the grantee's entire service area or a designated portion thereof."

40.	**§ 1303.32 – Evaluations and corrective actions for delegate agencies**	**A grantee must evaluate and ensure corrective action for delegate agencies according to section 641A(d) of the Act.**

COMMENT: The proposed Standards should include the language of section 641A(d) of the Head Start Act (42 U.S.C. § 9836A(d)) here and clarify that the Head Start Act's requirement that each Head Start agency establish procedures for evaluating and defunding delegate agencies and for delegate agencies to appeal defunding decisions may be satisfied by including provisions on those topics in its delegate agency agreement(s).

41.	**§ 1303.33 – Termination of delegate agencies**	**(a) If a grantee shows cause why termination is appropriate or demonstrates cost effectiveness, the grantee may terminate a delegate agency's contract.** **(b) The grantee's decision to terminate must not be arbitrary or capricious.** **(c) The grantee must establish a process for defunding a**

delegate agency, including an appeal of a defunding decision and must ensure the process is fair and timely.
(d) The grantee must notify the responsible HHS official about the appeal and its decision.

COMMENT: We support this provision and applaud the removal of the complex delegate agency appeals procedures. The streamlining of delegate agency termination procedures provides helpful flexibility to Head Start agencies that, for reasons of cost or inadequate delegate agency performance, may find it necessary to terminate a delegate agency relationship.

42. Subpart E – Facilities **In general.**

COMMENT: We applaud the streamlined definition of "major renovations" in section 1305.2 of the proposed Standards. We also request that references to "federal funds" throughout Part 1303, Subpart E – Facilities specify that this subpart only applies to "federal funds received under this subpart" (see, e.g., the distinction made in section 1303.46(a)). Many Head Start grantees use multiple sources of federal funds to purchase, construct, or make major renovations to facilities, and the proposed Standards should make it clear that the requirements of Subpart E only apply to the use of Head Start funds disbursed under the Head Start Act. For example, the mortgage agreement requirements in section 1303.49(a) of the proposed Standards should only apply to federal Head Start funds.

43. § 1303.40 – In general **This subpart prescribes what a grantee must establish to show it is eligible to purchase, construct and renovate facilities as outlined at section 644(c), (f) and (g) of the Act. It explains how a grantee may apply for funds, details what measures a grantee must take to protect federal interest in facilities purchased, constructed or renovated with grant funds, and concludes with other administrative provisions. This subpart applies to major renovations. It only applies to minor renovations and repairs, when they are included with a purchase application and are part of purchase costs.**

COMMENT: Sections 644(f) and (g) of the Head Start Act (42 U.S.C. § 9839(f) and (g)) require that grantees receive prior approval before using grant funds for the purchase, construction, or major renovation of Head Start facilities, including "through payments made in satisfaction of a mortgage agreement (both principal and interest)…." We note that HHS indicated in Head Start Program Instruction ACF-PI-HS-09-10 that a Head Start grantee that pays the down payment and the mortgage principal payments with non-federal funds and only charges the Head Start grant for the mortgage interest payments remains subject to the facilities requirements of the current Standards, 45 C.F.R. 1309, including the filing of a federal interest in the facility. The Program Instruction also

notes that the Standards take precedence over Office of Management and Budget provisions that generally apply to federal awards (e.g., Uniform Administrative Requirements, Cost Principles, and Audit Requirements for HHS Awards, 45 C.F.R. Part 75 (the "Uniform Guidance")). Since Head Start program staff members may not be aware of this Program Instruction, we request that HHS make this requirement clear in section 1303.40 of the proposed Standards.

We also request clarification on calculating HHS's federal interest in the property if the Head Start grantee is only charging mortgage interest payments to its Head Start funds. The proposed Standards define "federal interest" as the "current fair market value of [the federal awarding agency's] percentage of participation in the cost of the facility." Given that interest typically would not be a part of the "cost of the facility," it is not clear how grantees should calculate HHS's federal interest if only interest payments are charged to the Head Start grant.

44.	**§ 1303.41 – Approval of previously purchased facilities**	**If a grantee purchased a facility beginning in 1987, and continues to pay purchase costs for the facility or seeks to refinance current indebtedness, the grantee may apply for funds to meet those costs. The grantee must submit an application that conforms to requirements in this part and in the Act to the responsible HHS official. If the responsible HHS official approves the grantee's application, the grantee may only use the funds to pay purchase costs, which include amortizing, principal, and interest on loans.**

COMMENT: We recommend that "beginning in 1987" be revised to read, "in or after 1987" to make clear that this provision applies to purchases in 1987 as well as in subsequent years.

45.	**§ 1303.42(a) – Eligibility to purchase, construct, and renovate facilities**	**(a) *Preliminary eligibility*. Before a grantee can apply for funds to purchase, construct, or renovate a facility under § 1303.44, it must establish that:** **(1) The facility will be available to Indian tribes, or rural or other low-income communities;** **(2) The proposed purchase, construction or major renovation is within the grantee's designated service area; and,** **(3) The proposed purchase, construction or major renovation is necessary because the lack of suitable facilities in the grantee's service area will inhibit the operation of the program.** **(4) If applying to construct a facility, that the construction of such facility is more cost-effective than the purchase of available facilities or renovation.**

COMMENT: We request that the proposed Standards clarify what grantees must do to "establish that…" the requirements in section 1303.42(a)(1) through (4) are satisfied. Must grantees make a preliminary submission to HHS and obtain a formal determination that the grantee has established preliminary eligibility?

46.	**§ 1303.42(b) – Eligibility to purchase, construct, and renovate facilities**	**(b) *Proving a lack of suitable facilities.* To satisfy paragraph (a)(3) of this section, the grantee must have a written statement from a licensed independent certified appraiser in the grantee's service area that supports factors the grantee considers and supports how the grantee determines there are no other suitable facilities in the area.**

COMMENT: We note that the requirement in this provision is a change from the requirement in the current Standards that a grantee obtain a written statement regarding the lack of other suitable facilities from a "licensed real estate professional." 45 C.F.R. §§ 1309.4(b); 1309.5(b); 1309.10(f). While we support the new requirement that this individual be "independent," it is not clear what factors establish independence. We believe it is clearer to require that the individual not be otherwise involved in the grantee's purchase, construction, or major renovation of the facility. Further, a certified appraiser's role is to establish the value of property, not the availability of other suitable facilities. Thus, we request that this provision be revised to read, "To satisfy paragraph (a)(3) of this section, the grantee must have a written statement from a licensed real estate professional in the grantee's service area who is not otherwise involved in the transaction that supports factors the grantee considers and supports how the grantee determines there are no other suitable facilities in the area."

47.	**§ 1303.43 – Use of grant funds to pay fees**	**A grantee may submit a written request to the responsible HHS official for reasonable fees and costs necessary to determine preliminary eligibility under § 1303.42 before it submits an application under § 1303.44. If the responsible HHS official approves the grantee's application, the grantee may use federal funds to pay fees and costs.**

COMMENT: We support the inclusion of this section to allow grantees to apply for and receive funds to pay for reasonable fees and costs necessary to determine preliminary eligibility. In addition, we recommend clarifying that grantees that have established preliminary eligibility may either use funds from their then-current Head Start grant or apply for and receive funds to pay for reasonable fees and costs of preparing the application required by section 1303.44 of the proposed Standards.

48.	**§ 1303.44 – Applications to purchase, construct, and renovate facilities**	**A grantee may submit a written request to the responsible HHS official for reasonable fees and costs necessary to determine preliminary eligibility under § 1303.42 before it submits an application under § 1303.44. If the responsible HHS official approves the grantee's application, the grantee**

may use federal funds to pay fees and costs.

COMMENT: We request that HHS add the provision in the current Standards, 45 C.F.R. § 1309.12, requiring the responsible HHS official to promptly review and make final decisions regarding completed applications to purchase, construct or renovate facilities. We recommend that HHS add a new subsection 1303.44(d) to the proposed Standards which reads, "The responsible HHS official shall promptly review and make final decisions regarding completed applications under this subpart."

49.	**§ 1303.44(a)(12) – Applications to purchase, construct, and renovate facilities**	**(a) *Application requirements.* If a grantee is preliminarily eligible under § 1303.42 to apply for funds to purchase, construct, or renovate a facility, it must submit to the responsible HHS official:** **…** **(12) A Phase I environmental site assessment that describes the environmental condition of the proposed facility site and any structures on the site; and,**

COMMENT: Phase I environmental site assessments are typically conducted only in connection with the acquisition of real property. If a grantee is constructing or conducting major renovations on property that the grantee does not own, a Phase I assessment should not be required.

50.	**§ 1303.45(a)(1) – Cost-comparison to purchase, construct, and renovate facilities**	**(a) *Cost comparison.* (1) If a grantee proposes to purchase, construct, or renovate a facility, it must submit a detailed cost estimate of the proposed activity, compare the costs associated with the proposed activity to other available alternatives in the service area, and provide any additional information the responsible HHS official requests. The grantee must demonstrate that the proposed activity will result in savings when compared to the costs that would be incurred to acquire the use of an alternative facility to carry out program.**

COMMENT: We request that the last sentence of this provision be revised such that the cost comparison is made to a "comparable" alternative facility, so that this sentence reads, "The grantee must demonstrate that the proposed activity will result in savings when compared to the costs that would be incurred to acquire the use of a comparable alternative facility to carry out program."

51.	**§ 1303.47(a)(4) – Contents of notices of federal interest**	**(a) *Facility and real property a grantee owns.* A notice of federal interest for a facility, other than a modular unit, and real property the grantee owns or will own, must include:** **…** **(4) Acknowledgement that the notice of federal interest**

includes funds awarded in grant award(s) and any Head Start funds subsequently used to purchase, construct or to make major or minor renovations on the real property;

COMMENT: We request that HHS delete the phrase "or minor" from this provision. Section 1303.40 of the proposed Standards provides that Part 3, Subpart E – Facilities "only applies to minor renovations and repairs when they are included with a purchase application and are part of purchase costs." We note that section 1303.47(b)(iv), a comparable provision that applies to notices of federal interest for facilities leased by a grantee, does not cover minor renovations on the facility.

52.	**§ 1303.47(a)(8) – Contents of notices of federal interest**	**(a) *Facility and real property a grantee owns.* A notice of federal interest for a facility, other than a modular unit, and real property the grantee owns or will own, must include:** **...** **(8) A statement that proves the grantee disclosed to the governing body that it filed a notice of federal interest and that shows the date the governing body approved a copy of the proposed notice of federal interest; however, the governing bodies' failure to approve a copy of the proposed notice of federal does not defeat the federal interest and,**
	§ 1303.47(c)(8) – Contents of notices of federal interest	**(c) *Modular units.* A notice of federal interest on a modular unit the grantee purchased or renovated must be visible and clearly posted on the exterior of the modular and inside the modular and must include:** **…** **(8) A statement that confirms the grantee disclosed to the agency's governing body that it filed a notice of federal interest and the date the governing body approved a copy of the proposed notice of federal interest; however, the governing bodies' failure to approve a copy of the proposed notice of federal does not defeat the federal interest and,**

COMMENT: While we understand the desire to ensure the governing body is aware of and understands the contents of any notices of federal interest filed by the agency, we recommend that HHS remove the requirement that the governing body formally approve the notice of federal interest, as this requirement is unnecessarily prescriptive. We are not aware of any legal requirement that a governing body must approve other types of notices of liens on real property that are filed with the applicable jurisdiction in order to properly discharge its "legal and fiscal responsibility for administering and overseeing programs…including the safeguarding of federal funds" (Section 642(c)(1)(E)(i) of the Head Start Act; 42 U.S.C. § 9837(c)(1)(E)(i)). Further, we recommend that HHS delete the term "proves", as the statement can only say what the grantee did, so that the

provisions in both sections 1303.47(a)(8) and (c)(8) are revised to read, "A statement that the grantee disclosed to the governing body that it filed a notice of federal interest."

53.	**§ 1303.47(b)(1)(vi) – Contents of notices of federal interest**	**(b) *Facility leased by a grantee.* (1) A notice of federal interest for a leased facility, excluding a modular unit, on land the grantee does not own, must be recorded in the official real property records for the jurisdiction where the facility is located and must include:** **…** **(vi) The lease or occupancy agreement that includes information from paragraphs (a)(1) through (9) of this section may be recorded in the official real property records for the jurisdiction where the facility is located.**
	§ 1303.47(b)(2) – Contents of notices of federal interest	**(2) If a grantee cannot file the lease or occupancy agreement described in paragraph (b)(1)(vi) of this section in the official real property records for the jurisdiction where the facility is located, it may file an abstract. The abstract must include the names and addresses of parties to the lease or occupancy agreement, terms of the lease or occupancy agreement, and information described in paragraphs (a)(1) through (9) of this section.**

COMMENT: It is not clear why notices of federal interest for a facility leased by the grantee need to include the information described in section 1303.47(a)(1) through (9). These provisions require, among other things, "(6) A statement that the facility and real property will not be mortgaged or used as collateral, sold or otherwise transferred to another party, without the responsible HHS official's written permission." If the Head Start grantee merely has a leasehold interest in the property, the federal interest in the leasehold would not extend to barring the owner of the property from mortgaging or encumbering the property. We note that section 1303.50(b) covers the terms of a lease or occupancy agreement when a grantee uses federal funds to construct or renovate a facility on real property the grantee does not own, so perhaps the reference to "paragraphs (a)(1) through (9) of this section" should be revised to reference "§ 1303.50(b)(1) through (4)" instead.

54.	**§ 1303.49(b) – Protection of federal interest in mortgage agreements**	**(b) A grantee must immediately notify the responsible HHS official about any default under a real property or mortgage agreement.**

COMMENT: It is not clear what "a real property…agreement" means. We recommend that this provision simply cross-reference the agreements described in subsection (a), such that this provision reads, "A grantee must immediately notify the responsible HHS official about any default under an agreement described in § 1303.49(a)."

55.	**§ 1303.52(b)(3) – Insurance, bonding and maintenance**	**(3) A grantee must submit to the responsible HHS official, within 10 days after coverage begins, copies of insurance papers.**

COMMENT: For clarity, we recommend that this provision be revised to read, "A grantee must submit to the responsible HHS official, within 10 days after coverage begins, copies of applicable certificates of insurance."

Part 1304 – Federal Administrative Procedures

56.	**§ 1304.3(g) – Suspension with notice**	**(g) *Modify or rescind suspension.* The responsible HHS official may modify or rescind suspension at any time, if the grantee can satisfactorily show that it has adequately corrected what led to suspension and that it will not repeat such actions or inactions. Nothing in this section precludes the HHS official from imposing suspension again for an additional 30 days if the cause of the suspension has not been corrected.**
	§ 1304.4(f) – Emergency suspension without advance notice	**(f) *Modify or rescind suspension.* The responsible HHS official may modify or rescind suspension at any time, if the grantee can satisfactorily show that is has adequately corrected what led to the suspension and that it will not repeat such actions or inactions. Nothing in this section precludes the HHS official from imposing suspension again for an additional 30 days if the cause of the suspension has not been corrected.**

COMMENT: We recommend removing the second sentence of each of these proposed Standards, which states, "Nothing in this section precludes the HHS official from imposing suspension again for an additional 30 days if the cause of the suspension has not been corrected." Section 646(a)(5)(A) of the Head Start Act (42 U.S.C. § 9841(a)(5)(A)) requires the Secretary to prescribe "procedures to assure that the Secretary may suspend financial assistance to a recipient under this subchapter (A) except as provided in subparagraph (B), *for not more than 30 days*; or (B) in the case of a recipient under this subchapter that has multiple and recurring deficiencies for 180 days or more and has not made substantial and significant progress toward meeting the goals of the grantee's quality improvement plan or eliminating all deficiencies identified by the Secretary, during the hearing of an appeal described in paragraph (3), for any amount of time" (emphasis added). Allowing the responsible HHS official to impose an additional 30 days' suspension directly conflicts with the Head Start Act.

We believe that interpreting an additional 30 days' suspension as a new suspension, rather than as an extension of the prior suspension, would result in an end run around the

Head Start Act and should not be permitted. For example, if the additional suspension is on the same grounds as the prior suspension—which appears to be the scenario contemplated in the proposed Standards, based on the language, "an additional 30 days *if the cause of the suspension has not been corrected*"— this additional 30 days' suspension would be attempting to circumvent the imposed suspension limit.

Lastly, allowing the responsible HHS official to impose additional 30 days' suspensions would constitute an effective termination of funding. Although not officially terminated, if a Head Start program loses funding for 60, 90, or more days, the program is likely to be so financially handicapped that the result could be the same as a termination of funding. The proposed Standards and the Head Start Act provide separate procedures for termination of funding and those procedures should be relied upon if HHS wishes funding to be suspended for more than 30 days (unless, of course, the scenario is one contemplated in section 646(a)(5)(B) of the Head Start Act (42 U.S.C. § 9841(a)(5)(B)), quoted above, when a suspension may be indefinite if certain conditions have been met).

57.	**§ 1304.5(a)(2)(i) – Termination and denial of refunding**	**(a) *Grounds to terminate financial assistance or deny a grantee's application for refunding.*** **…** **(2) The responsible HHS official may terminate financial assistance in whole or in part to a grantee or deny a grantee's application for refunding for one or all of the following reasons:** **(i) The grantee is no longer financially viable.**
	§ 1305.2 – Definitions	***Financial viability* means that an organization is able to meet its financial obligations, balance funding and expenses and maintain sufficient funding to achieve organizational goals and objectives.**

COMMENT: As defined in the proposed Standards, the term "financial viability" is too broad and subjective. For example, many organizations, even financially healthy ones, may not have sufficient funding to achieve all of their organizational goals and objectives, which may be aspirational in nature. In addition, it is not clear what is meant by "balance funding and expenses." Therefore, we propose the following definition: "Financial viability means that an organization is able to meet its financial obligations as they come due."

58.	**§ 1304.5(a)(2)(ii) – Termination and denial of refunding**	**(a) *Grounds to terminate financial assistance or deny a grantee's application for refunding.*** **…** **(2) The responsible HHS official may terminate financial assistance in whole or in part to a grantee or deny a grantee's application for refunding for one or all of the following reasons:**

	… **(ii) The grantee has lost the requisite legal status.**
§ 1305.2 – Definitions	***Legal status* means the existence of an applicant or grantee as a public agency or organization under the law of the State in which it is located, or existence as a private nonprofit or for-profit agency or organization as a legal entity recognized under the law of the State in which it is located. Existence as a private non-profit agency or organization may be established under applicable State or Federal law.**

COMMENT: If two Head Start agencies merge or consolidate and one ceases to exist as a corporate entity, HHS takes the position that the Head Start program of the non-surviving entity will be terminated due to loss of legal status and thus subject to competition. We have seen many situations where it would have been beneficial for two Head Start agencies to combine in order to strengthen their financial position, achieve economies of scale and become more sustainable, but they abandoned their plans due to a concern that one agency's Head Start program would be terminated and competed. We echo NHSA's recommendation that the proposed Standards' definition of legal status be amended to permit HHS to follow the HHS Grants Policy Statement process for merging two legal entities in which the procedures for recognizing a successor-in-interest will apply. As noted by NHSA, "Under the successor-in-interest process, the rights to and obligations under an HHS grant are acquired incidental to the transfer of all of the assets involved in the performance of the grant. In other words, the merging grantee has the right to transfer its Head Start grant to the surviving grantee without being in jeopardy of re-competing for its grant."

In addition, we recommend that the proposed Standards specifically permit, with prior HHS approval, two Head Start agencies to enter into a parent-subsidiary relationship without termination and competition of the subsidiary agency's Head Start grant. Under the plain language of the current and proposed Standards, if one Head Start agency becomes the corporate subsidiary of the other Head Start agency, the agency that becomes the corporate subsidiary will not lose its legal status – it will continue to exist as the same corporate entity (and even retain the same Employer Identification Number) and there will be no grounds for termination due to loss of that status.

<u>Part 1305 – Definitions</u>

59. General

COMMENT: We support the consolidation of all defined terms into a single Part 1305. However, to help grantees readily identify defined terms to know to reference the Definitions section, any term that is defined in Part 1305 should be capitalized each time it is used.

60.	**Definition of "income"**	***Income* means gross cash income and includes earned income, military income (including pay and allowances), veteran's benefits, Social Security benefits, unemployment compensation, and public assistance benefits. Additional examples of gross cash income are listed in the definition of "income" which appears in U.S. Bureau of the Census, Current Population Reports, Series P-60-185.**

COMMENT: We recommend revising the definition of "income" to conform to the requirements of the Head Start Act. Section 645(a)(3)(B) of the Head Start Act (42 U.S.C. § 9840) explicitly excludes certain military pay and allowances from the definition of income for eligibility determination, including "the amount of special pay payable under section 310 of title 37, United States Code, relating to duty subject to hostile fire or imminent danger," as well as "the amount of basic allowance payable under section 403 of such title, including any such amount that is provided on behalf of the member for housing that is acquired or constructed under the alternative authority for the acquisition and improvement of military housing under subchapter IV of chapter 169 of title 10, United States Code, or any other related provision of law." However, the definition of "income" in Part 1305 of the proposed Standards does not exclude the military pay and allowances described in the Head Start Act and in fact explicitly includes all military pay and allowances.

Effective Dates

61.	**Effective Dates**	**Current Head Start program performance standards remain in effect until this NPRM becomes final. We propose for this NPRM to become effective 60 days after it is published as a final rule in the Federal Register.**
	Preamble to Section 1302.103 – Implementation of program performance standards	**The effective date for the majority of the proposed changes in this NPRM has been set for one full program year following the publication of this NPRM.**

COMMENT: The NPRM contains discrepancies as to the proposed effective date of the final Standards. While the section of the preamble entitled "Effective Dates" indicates that the final Standards will be effective 60 days after a final version of the Standards is published in the Federal Register, the preamble section discussing implementation (section 1302.103) indicates that HHS expects that the final Standards will be effective one full program year following the publication of the NPRM. The text of the proposed Standards itself, however, does not address the effective date of the Standards beyond the one-year extension option discussed in the immediately following comment. We request that HHS clarify the effective date of the final Standards.

62.	**Preamble – Effective Dates: One-year extension**	**However, programs may require more time to implement §§ 1302.21(b)(2); 1302.21(c)(1) and (3); 1302.22(c)(1) and (2); and 1302.23(c); 1302.32(a)(1)(iii) and (a)(3); 1302.32(b); 1302.90(b),(2) and (4); 1302.91(f)(1); 1302.92(b)(4) and (5). Therefore, we propose for these provisions to become effective 12 months after the final rule becomes effective. We solicit comments on these effective dates.**
	§ 1302.103(c) – Implementation of program performance standards	**(c) A program may request a one year extension from the responsible HHS official of the requirements outlined in §§ 1302.21(c)(1), 1302.22(c)(1) and 1302.23(c), if an extension is necessary to ensure currently enrolled children are not displaced from the Early Head Start or Head Start program as described in paragraph (b)(2) of this section.**

COMMENT: We request that the proposed Standards include an "Effective Dates" section that makes clear that programs have an additional 12 months after the final rule becomes effective to implement the sections specified in the Effective Dates section of the preamble to the NPRM (page 35502, second column).

We also request that HHS clarify in section 1302.103(c) of the proposed Standards that the one-year extension of the requirements in sections 1302.21(c)(1), 1302.22(c)(1) and 1302.33(c) would be, if granted by the responsible HHS official, in addition to the 12-month automatic delay of the effective dates of those sections, as currently contemplated in the preamble to the NPRM (page 35502, second column).

Other Comments

63.	**Eligibility – Residency Requirement**	**OHS – PC – I – 043** **Does Head Start require proof of residency?** **The three factors to be used in determining a child's eligibility for Head Start are the child's age, the income of the child's family, and the categorical status of the child or family. However, a program must also assure itself, using such procedures as the program thinks appropriate, that the child resides within the program's approved service area. Head Start regulations require that each Head Start grantee have an approved service area and that service area must not overlap the service area of another grantee (1305.3(b)). Therefore, the appropriate placement of a Head Start child should be based solely on where the child lives and grantees may request whatever reasonable documentation is**

appropriate to confirm that a child being considered for Head Start enrollment does, in fact, live within the grantee's approved service area.

COMMENT: The Head Start Act does not define the term "service area." Both the current and proposed Standards define the term "service area" as "the geographic area identified in an approved grant application within which a grantee may provide Head Start services." However, none of the Head Start Act, current Standards or proposed Standards specifically requires children and families served by Head Start to reside in a program's service area to be served by that program. If HHS treats residency as a requirement (as is indicated by Policy Clarification OHS – PC – I – 043 above), the Standards should clarify that and specify to what extent such a requirement applies to families who move during the program year, homeless families and families applying for or served by a Migrant and Seasonal Head Start program. If residency is not a requirement, and a program has the flexibility to serve, for example, children whose parents work in the program's service area, that flexibility should be specified in the Standards.

64. Child Care Partnerships **Subrecipient and contractor determinations**

COMMENT: We request that HHS provide clarification regarding the appropriate classification of child care partners as a "subrecipient" or a "contractor" under the Uniform Guidance. The Uniform Guidance provides that "characteristics which support the classification of the non-Federal entity as a subrecipient include when the non-Federal entity: (1) Determines who is eligible to receive what Federal assistance; (2) Has its performance measured in relation to whether objectives of a Federal program were met; (3) Has responsibility for programmatic decision making; (4) Is responsible for adherence to applicable Federal program requirements specified in the Federal award; and (5) In accordance with its agreement, uses the Federal funds to carry out a program for a public purpose specified in the authorizing statute, as opposed to providing goods or services for the benefit of the pass-through entity." 45 C.F.R. § 75.351(a). Factors weighing in favor of finding a contractor relationship include when the non-Federal entity "(1) Provides the goods and services within normal business operations; (2) Provides similar goods or services to many different purchasers; (3) Normally operates in a competitive environment; (4) Provides goods or services that are ancillary to the operation of the Federal program; and (5) Is not subject to compliance requirements of the Federal program as a result of the agreement, though similar requirements may apply for other reasons." 45 C.F.R. § 75.351(b).

Though all child care partners are subject to the Standards, it is our understanding that HHS takes the view that certain child care partners may be more appropriately classified as contractors rather than subrecipients. Thus, we request that HHS clarify in the proposed Standards that a partner will not automatically be considered a subrecipient simply on the basis that it is subject to the Standards but that Head Start agencies should

weigh all of the factors listed in 45 C.F.R. § 75.351(a) and (b) in classifying each agreement as a subaward or a procurement contract.

65. National Head Start Association Comments

COMMENT: Overall, we support the detailed, insightful and well-informed comments made by NHSA, with the exception of the following handful of comments, on which we have a somewhat differing perspective:

NHSA Comment	CAPLAW Comment
#3	See our Comments 61 and 62 on Effective Dates.
#4	We support this NHSA comment except for the reference to stronger shared governance. We support shared governance that reflects the governing body's role, under the Head Start Act, as the body with ultimate legal and fiscal responsibility for the grantee's Head Start program.
§ 1301.4(b)	See our Comment 8 regarding parent committees.
§ 1301.5(b)	See our Comment 11 regarding impasse procedures.
§ 1302.11 (a)	See our Comments 12 and 63 regarding overlapping service areas and residency requirements.
§ 1302.90(a)	See our Comments 9 and 23.
§ 1302.102(d)(1)(ii)	See our Comment 32 regarding risks affecting health and safety.
Subpart C, § 1303	See our Comments 34-38 regarding privacy of child records.

Thank you for your consideration of these comments.

Sincerely,

Eleanor Evans, Esq.
Executive Director and General Counsel