

441 G St. N.W.
Washington, DC 20548

B-333809

December 13, 2021

The Honorable Patty Murray
Chairwoman
The Honorable Richard Burr
Ranking Member
Committee on Health, Education, Labor, and Pensions
United States Senate

The Honorable Robert C. "Bobby" Scott
Chairman
The Honorable Virginia Foxx
Ranking Member
Committee on Education and Labor
House of Representatives

Subject: *Department of Health and Human Services, Administration for Children and Families: Vaccine and Mask Requirements To Mitigate the Spread of COVID-19 in Head Start Programs*

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the Department of Health and Human Services, Administration for Children and Families (ACF) entitled "Vaccine and Mask Requirements To Mitigate the Spread of COVID-19 in Head Start Programs" (RIN: 0970-AC90). We received the rule on December 1, 2021. It was published in the *Federal Register* as an interim final rule with comment period (IFC) on November 30, 2021. 86 Fed. Reg. 68052. The effective date is November 30, 2021.

According to ACF, this IFC adds new provisions to the Head Start Program Performance Standards to mitigate the spread of the coronavirus disease 2019 (COVID-19) in Head Start programs. See generally 45 C.F.R. 1301–1305 (Head Start Program Performance Standards regulations). ACF stated that this IFC, effective upon publication, requires universal masking for all individuals two years of age and older, with some noted exceptions, and all Head Start staff, contractors whose activities involve contact with or providing direct services to children and families, and volunteers working in classrooms or directly with children to be vaccinated for COVID-19 by January 31, 2022.

The Congressional Review Act (CRA) requires a 60-day delay in the effective date of a major rule from the date of publication in the *Federal Register* or receipt of the rule by Congress, whichever is later. 5 U.S.C. § 801(a)(3)(A). The 60-day delay in effective date can be waived, however, if the agency finds for good cause that delay is impracticable, unnecessary, or contrary to the public interest, and the agency incorporates a statement of the findings and its reasons in the rule issued. 5 U.S.C. §§ 553(b)(3)(B), 808(2). Here, ACF stated that it found good cause to waive notice and comment procedures and the delay in effective date requirement. ACF asserts that a combination of factors, including but not limited to failure to achieve sufficiently high levels of vaccination based on voluntary efforts and patchwork

requirements, potential harm to children from unvaccinated staff, continuing strain on the health care system, and known efficacy and safety of available vaccines, have persuaded ACF that a vaccine requirement for Head Start staff, certain contractors, and volunteers is an essential component of the nation's COVID-19 response. ACF stated further that it would endanger the health and safety of staff, children, and families, and be contrary to the public interest to delay imposing the vaccine mandate. Thus, according to ACF, it would be impractical and contrary to public interest to delay the effective date of the IFC.

Enclosed is our assessment of ACF's compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. If you have any questions about this report or wish to contact GAO officials responsible for the evaluation work relating to the subject matter of the rule, please contact Shari Brewster, Assistant General Counsel, at (202) 512-6398.

A handwritten signature in black ink that reads "Shirley A. Jones". The signature is written in a cursive style with a large, looped initial 'S'.

Shirley A. Jones
Managing Associate General Counsel

Enclosure

cc: Vanessa Jones
Regulations Coordinator

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE
ISSUED BY THE
DEPARTMENT OF HEALTH AND HUMAN SERVICES,
ADMINISTRATION FOR CHILDREN AND FAMILIES
ENTITLED
“VACCINE AND MASK REQUIREMENTS TO MITIGATE
THE SPREAD OF COVID-19 IN HEAD START PROGRAMS”
(RIN: 0970-AC90)

(i) Cost-benefit analysis

The Department of Health and Human Services, Administration for Children and Families (ACF) prepared a summary of the cost and benefits expected to result from this interim final rule with comment period (IFC). ACF stated that it estimates a range of total monetized benefits between \$200 million and \$296 million under a 7 percent discount rate, and a range between \$196 million and \$288 million under a 3 percent discount rate. ACF also stated that these monetized benefits cover a time period between November 30, 2021 and March 1, 2022. According to ACF, the estimated range of costs is between \$16 million and \$83 million, which cover a time period between November 30, 2021 and March 1, 2022. ACF stated further that these cost estimates do not vary with the discount rate. Lastly, ACF’s analysis included several qualitative costs and benefits that may result from this IFC.

(ii) Agency actions relevant to the Regulatory Flexibility Act (RFA), 5 U.S.C. §§ 603–605, 607, and 609

ACF certified that this IFC will not have a significant economic impact on a substantial number of small entities. ACF prepared an Initial Regulatory Flexibility Analysis for the IFC. According to ACF, the IFC will impact small entities in North American Industry Classification System (NAICS) category 624410, Child Day Care Services, which has a size standard of \$8 million. ACF stated that it assumes that all 20,717 Head Start centers are below this threshold and are considered small entities. ACF estimates that the mandates imposed by this rule would cost a total of \$17.5 million or about \$847 per small entity, or \$864 per small entity excluding closed Head Start centers. ACF stated that it awards about \$10 billion in grants to Head Start programs, including Early Head Start-Child Care Partnerships. ACF also stated that across 20,717 centers, this averages to \$466,192, which is well above the 3 percent impact on revenue threshold, which is \$113,000. Thus, ACF concluded that the IFC is not likely to result in a significant impact on a substantial number of small entities.

(iii) Agency actions relevant to sections 202–205 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1532–1535

ACF did not discuss the Act in this IFC.

(iv) Other relevant information or requirements under acts and executive orders

Administrative Procedure Act (APA), 5 U.S.C. §§ 551 *et seq.*

ACF stated that it found good cause to waive notice and comment procedures. ACF asserts that a combination of factors, including but not limited to failure to achieve sufficiently high levels of vaccination based on voluntary efforts, patchwork requirements, potential harm to children from unvaccinated staff, continuing strain on the health care system, and known efficacy and safety of available vaccines, have persuaded ACF that a vaccine requirement for Head Start staff, certain contractors, and volunteers is an essential component of the nation's COVID-19 response. ACF stated further that it would endanger the health and safety of staff, children, and families, and be contrary to the public interest to delay imposing the vaccine mandate. Thus, according to ACF, it would be impractical and contrary to public interest to undertake notice and comment procedures.

Paperwork Reduction Act (PRA), 44 U.S.C. §§ 3501–3520

ACF determined that this IFC contains information collection requirements (ICRs) under PRA. ACF stated that this IFC establishes new recordkeeping requirements under PRA related to staff vaccination rates and a written testing protocol. ACF also stated that it will submit, to the Office of Management and Budget (OMB), a request for approval of these recordkeeping requirements. ACF stated further that the recordkeeping activity of maintaining program policies and procedures including the associated burden with updating them on an annual basis is already approved under an existing OMB information collection (OMB Control Number 0970-0148).

Statutory authorization for the rule

ACF promulgated this IFC pursuant to section 9801 *et seq.* of title 42, United States Code.

Executive Order No. 12866 (Regulatory Planning and Review)

ACF stated that OMB's Office of Information and Regulatory Affairs has determined that this IFC is an economically significant regulatory action as defined by the Order, and that the IFC has been reviewed by OMB.

Executive Order No. 13132 (Federalism)

ACF stated that this IFC would preempt some state laws that prohibit employers from requiring their employees to be vaccinated for COVID-19. ACF also stated that the IFC preempts state or local laws that provide exemptions to the extent such law provides broader grounds for exemptions than provided for by federal law and are inconsistent with the IFC. ACF stated further that it has considered other alternatives (for example, relying entirely on measures such as voluntary vaccination, source control alone, and physical distancing) and has concluded that the mandates established by this IFC constitute the minimum regulatory action necessary.