

# Legal Update



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# Alexandra R. Rosenblatt

Alexandra represents Head Start agencies in all aspects of grants management: drafting and reviewing policies, procedures and contracts, advising on compliance, and advocating for Head Start agencies in deficiency findings, disallowance determinations, OIG investigations, and grant suspensions and terminations.

Alexandra is an attorney in Washington, D.C. She is licensed in D.C., Colorado and Hawaii.



# Disclaimer

This training session is not legal advice. To give legal advice, we need to enter an engagement agreement so that I can understand all of the facts of your particular situation, research the relevant law, and advise you on my findings.



# Agenda



Under-enrollment



Monitoring



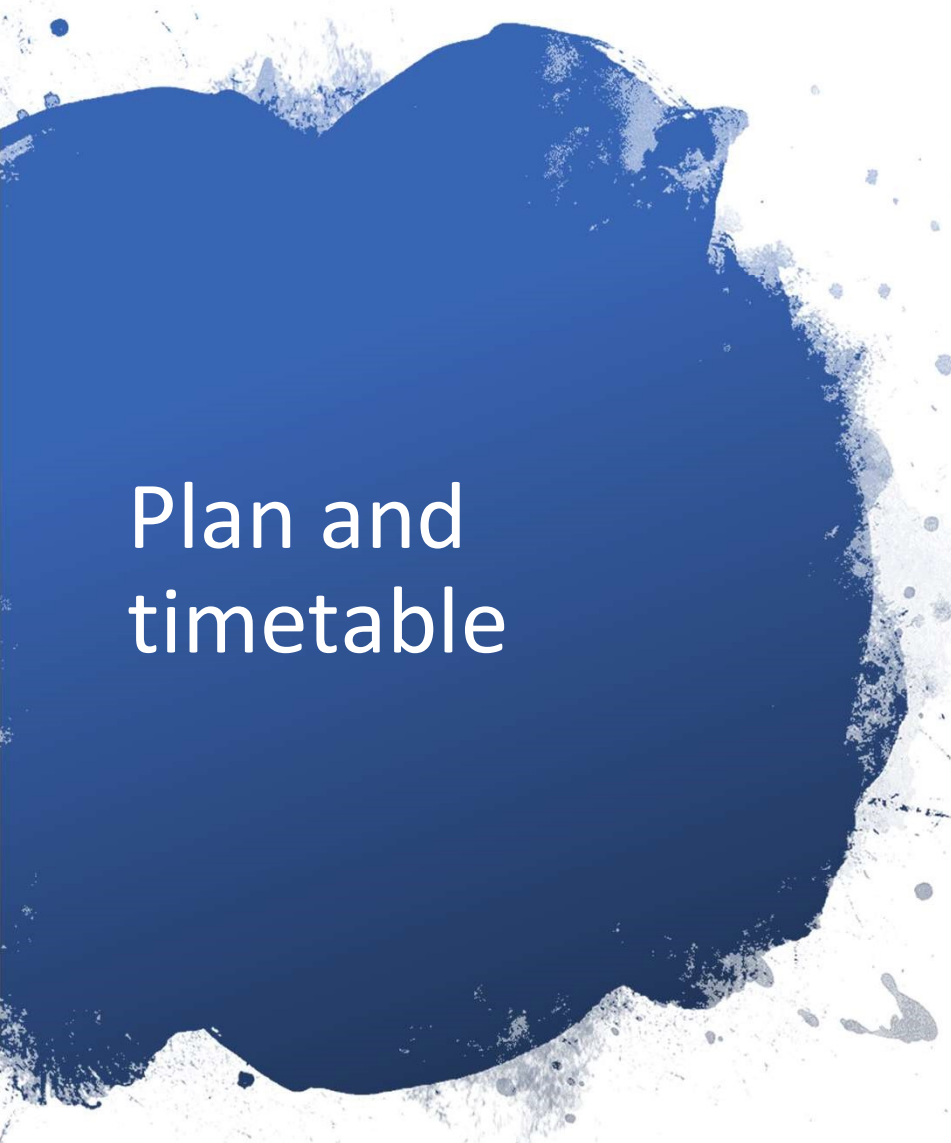
Case Studies

# Underenrollment



When


Four **consecutive**  
months of  
underenrollment.



## Plan and timetable

- (i) outreach, recruitment, and communitywide strategic planning and needs assessment;
- (ii) changing demographics, mobility, and underserved low-income populations;
- (iii) facilities-related issues;
- (iv) the ability to provide full-working-day programs;
- (v) other childcare options; and
- (vi) agency management procedures

Section 641A(h)(3)(B)



## Training and Technical Assistance

OHS **must** provide timely and ongoing technical assistance for the purpose of assisting the Head Start agency to implement the plan.

Section 641A(h)(3)(C)





## Enforcement

If, **after** receiving technical assistance and developing and implementing the plan for 12 months, a Head Start agency is operating a program with an actual enrollment that is less than 97 percent of its funded enrollment, the Secretary may--

- (i) designate such agency as chronically underenrolled; and
- (ii) recapture, withhold, or reduce the base grant for the program by a percentage equal to the percentage difference between funded enrollment and actual enrollment for the program for the most recent year for which the agency is determined to be underenrolled under paragraph (3)(A).

Head Start Act §641A(h)(5)

*Nation v.  
Azar*, 302 F.  
Supp. 3d 429,  
439 (D.D.C.  
2018)

Grantees have a right to a hearing before OHS recaptures, withholds, or reduces the base grant.

“Struggling Head Start programs have the opportunity to go through a lengthy remediation process—with extensive notice and interaction with HHS—before being designated as chronically under-enrolled and losing funding.”

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# Underenrollment PI 18-04



# Process

- Underenrollment Letter from the Regional Office.
- Grantees must develop, in collaboration with the Regional Office, a plan and timetable for reducing or eliminating underenrollment.



# Outcomes

## Achieve and Maintain 97 Percent Funded Enrollment

OHS continues monitoring for six consecutive months.

## Fall Short of 97 Percent Funded Enrollment.

OHS has the authority to designate the agency as **Chronically Underenrolled** and recapture, withhold, or reduce the base grant.



## Appeal

- Filed within 30 days
- May request a hearing
- Decision within 30 days of hearing

# Waiver

- (i) the causes of the enrollment shortfall, or a portion of the shortfall, are related to the agency's serving significant numbers of highly mobile children, or are other significant causes as determined by the Secretary;
- (ii) the shortfall can reasonably be expected to be temporary; or
- (iii) the number of slots allotted to the agency is small enough that underenrollment does not create a significant shortfall.

Section 641A(h)(5)(B)

# Monitoring





## Monitoring – what does Congress require?

- For new grantees, a review immediately after completion of the first year
- A full review, including the use of a risk-based assessment approach, at least once every three years
- Follow-up reviews



## The full review – who?

Review teams must be knowledgeable about Head Start/Early Head Start and early childhood development.



## The full review – what?

- Programmatic
- ERSEA
- Fiscal
- CLASS (a valid and reliable research-based observational instrument, implemented by qualified individuals with demonstrated reliability, that assesses classroom quality)



## The full review – how?

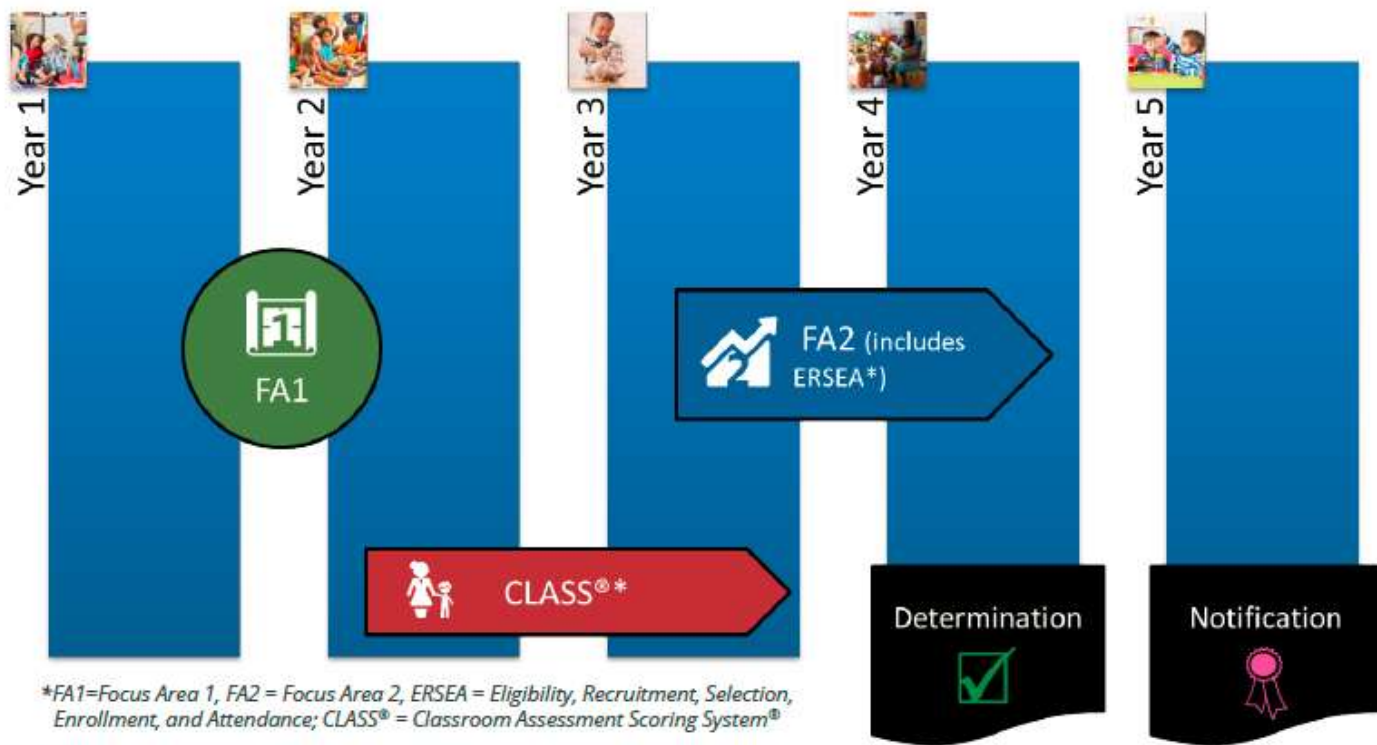
- Quality and consistency
- Reviews must be conducted in a manner that evaluates programs with **consistency** and **objectivity**, must be based on a transparent and reliable system of review.
- Reviewers must undergo periodic reliability checks.

Monitoring

Focus Area One

Focus Area Two

CLASS



**CLASS**

# Congress requires CLASS to be reliable.

- When Congress mandated that OHS use an observational tool like CLASS to monitor Head Start programs, Congress required that the tool be “valid and reliable.”
- Congress required that the designation renewal system be “fair, consistent and transparent” and that designations be renewed “in a timely manner.”
- OHS must periodically evaluate whether DRS is being applied “in a manner that is transparent, reliable and valid.”





Is CLASS  
reliable?

19 Senators sent a letter to  
OHS questioning the reliability  
of CLASS

12/17: First round of public  
comment

2/18: Second round of public  
comment

What can be  
done?



Lawsuit?



Document CLASS review

## Focus Area 2

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Program Management and Quality Improvement

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Education and Child Development Services

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Health Program Services

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Family and Community Engagement Services

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Fiscal Infrastructure

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Eligibility, Recruitment, Selection, Enrollment, and Attendance (ERSEA)

# Program Management and Quality Improvement

## Scenario

A popular teacher tests positive for drugs and is terminated pursuant to the program's personnel policies and procedures. The policy council (PC) objects and refuses to approve the budget or any applications or amended applications for funding.

Does the PC have to approve the termination?

If so, what happens if the board and PC disagree?

What can you do to prevent this problem?

# Governance and Human Resources

**The role  
of the  
governing  
body**

Approve  
personnel  
policies

Approve  
standards of  
conduct

+

Approve  
policies re  
hiring,  
evaluation,  
compensation,  
and  
termination of  
C-Suite



# Governance and Human Resources

## The role of the policy council

Approve personnel policies

Approve hiring decisions

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Approve standards of conduct

Approve criteria for hiring and firing



# Governance and Human Resources

## The role of parent committees

Participate in  
recruitment  
and screening  
of Head Start  
and Early Head  
Start  
employees







## Impasse

- Demonstrate that each body considers the decisions of the other body;
- If there is disagreement, require the governing body and policy council to notify each other in writing of the disagreement;
- Describe a decision-making process and timeline to resolve disputes and reach decisions that are not arbitrary, capricious and illegal.
- If the decision-making process and timeline does not work, the governing body and policy council must select a mutually agreeable third-party mediator and engage in mediation
- If mediation does not work, the governing body and policy council must select a mutually agreeable arbitrator, whose decision is final.



## Impasse Policy and Procedure

- Limit the definition of a “dispute.”
- Require that the policy council and governing body continue to discharge their duties in good faith.
- Have a process for emergencies.
- Try to agree on a mediator or arbitrator in advance.
- Limit the expense of mediation and arbitration.

# Impasse best practices



Facilitate communication between the governing body and policy council.



Identify disputes early and get out ahead of them.



Create a record.



Provide adequate training on roles and responsibilities.

## Checklist

- Do we have an impasse policy and procedure that was written or updated after implementation of the HSPPS (2016)?
- Was the impasse policy jointly developed between the governing body and policy council and approved by both parties?
- Does the policy follow best practices?
- Have the governing body and policy council been trained on roles and responsibilities?

## Scenario

Sam is a member of the Head Start agency's board. His brother-in-law owns Construction Company ("CC"). CC submits a bid to perform construction work for the agency. During board discussion, Sam persuasively argues that the agency should accept CC's bid. He does not disclose that his brother-in-law is the owner of CC.

What do you think of Sam's actions?

What can the program do to prevent this in the future?

What should you do if you discover this has happened?

# Policy and Procedure

The governing board must:

Establish, adopt and periodically update written standards of conduct that establish standards and formal procedures for disclosing, addressing, and resolving:

Any conflict of interest, and any appearance of a conflict of interest, by members of the governing body, officers and employees of the Head Start agency, and consultants and agents who provide services or furnish goods to the Head Start agency.

Head Start Act § 642(c)(1)(E)(iv)(IX)





# Conflicts of interest

Board members shall

- Not have a financial conflict of interest
- Not receive compensation for serving on the governing body or providing services to the Head Start agency
- Not be employed, nor shall members of their immediate family be employed, by the Head Start agency.



# Conflicts of interest

Policy Council members shall

- Not have a conflict of interest
- Not receive compensation for serving on the policy council or for providing services to the Head Start agency



## 45 C.F.R. § 75.327(c)(1)

Grantee must maintain written standards of conduct.

No employee, officer, or agent may participate in the selection, award, or administration of a contract ... if he or she has a real or apparent conflict of interest.

The officers, employees, and agents of the non-Federal entity may neither solicit nor accept gratuities, favors, or anything of monetary value from contractors or parties to subcontracts.

The standards of conduct must provide for disciplinary actions to be applied for violations of such standards by officers, employees, or agents of the non-Federal entity.

# To Do

- Do you have a conflict of interest policy that applies to governing body, policy council, and staff and includes all required components?
- Has it been approved by the governing body?
- Do you collect conflict of interest disclosure forms in accordance with the policy?
- Do you collect conflict of interest disclosure forms from contractors/ potential contractors?

# Education and Child Development Services



# Scenario

## Focus Area 2, Non-compliance

The grantee did not ensure center-based EHS teachers have a minimum of a CDA credential or comparable credential, and have been trained or have equivalent coursework in early childhood development with a focus on infant and toddler development.

- How do you attract and retain qualified staff?
- What can you do to minimize potential review findings if you find yourself in this position?

## Early Head Start – center-based teachers

An Early Head Start center-based teacher must have

- a CDA or comparable credential, and
- training or equivalent coursework in early childhood development with a focus on infant and toddler development

## Checklist

- Do position descriptions match requirements in HSPPS?
- Do current staff possess required qualifications?
- If not, do staff have a professional development plan?
- Are professional development plans being monitored?

# Health Program Services

## Scenario

Your agency does an internal investigation which reveals the following about a teacher. What do you do?

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A child bit the teacher and said it was because the teacher grabbed her arms and it hurt.

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A child was forcefully placed into her cubby and hit her head on a coat hanger inside the cubby causing the child to cry.

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A child cried during and after being shoved by the teacher toward the child's cubby.

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A child told a staff member the teacher hurt her by squeezing her stomach with her hands on her sides.

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A child bumped her head on a wall when the teacher picked her up and sat her down against the wall.



# Non-compliance or deficiency?

- Parent witnessed her child being pulled by the arm down the hallway by his teacher.
- When asked what happened child expressed that he was “bad” and the teacher did not like him.
- Parent reported to program and program performed internal investigation and suspended teacher.

# Reporting

- significant incidents affecting health and safety of program participants,
- circumstances affecting financial viability,
- breaches of PII,
- legal proceedings,
- any matter for which notification or a report to state, tribal, or local authorities is required by applicable law

45 C.F.R. §1302.102(d)

# Reporting

- Organized reporting to HHS
  - Policies and Procedures
  - Training
  - Record of implementation
  - Proof of monitoring
  - Remediation
- Report to state authorities, parents, governing body, policy council

# Family and Community Engagement Services

## Scenario

What systems do you have in place to prevent a non-compliance finding of this nature?

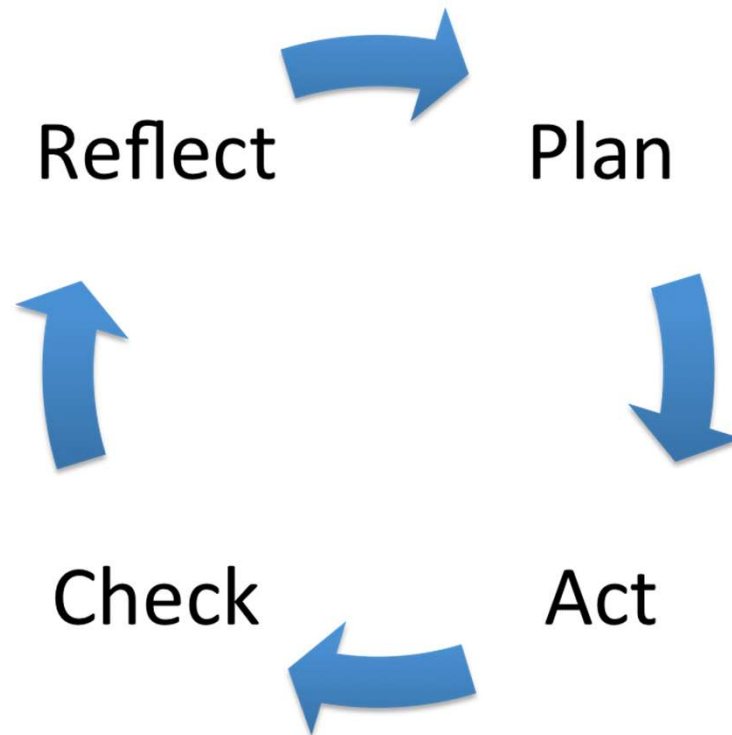
The Family Services Specialist (FSS) stated the ChildPlus reporting module is not set up to provide an ongoing snapshot of family goals, progress toward goals, family outcomes, or trends in these efforts. As a result, the FSS stated he completes spot check monitoring for all 930 enrolled families to determine if family goals are established, documented, and tracked. This monitoring process is not documented or reported to the Head Start Director or the management team. A sampling demonstrated family goals and outcomes are inconsistently developed and tracked for progress toward completion. As a result, the FSS is unable to create program-wide improvement efforts in family services or report family outcomes to the management team, governing board, or policy council.

# Use of data

1302.102 Achieving program goals. (c) Using data for continuous improvement. (2) This process must:(iv) Use information from ongoing monitoring and the annual self-assessment, and program data on teaching practice, staffing and professional development, child-level assessments, family needs assessments, and comprehensive services, to identify program needs, and develop and implement plans for program improvement



# Ongoing Monitoring and Continuous Improvement



# Checklist

- Do you use data to identify program strengths and needs, develop and implement plans that address program needs, and continually evaluate compliance with program performance standards and progress toward achieving program goals?
- Can you effectively demonstrate this process to reviewers?





# Fiscal Infrastructure

## Scenario

National Bank is willing to give you a line of credit, but will require you to use your building as collateral. You added classrooms and a small kitchen to the facility ten (10) years ago and counted the cost (\$250,001) as match. **Can you enter into an agreement with the bank? What do you need to do first?**



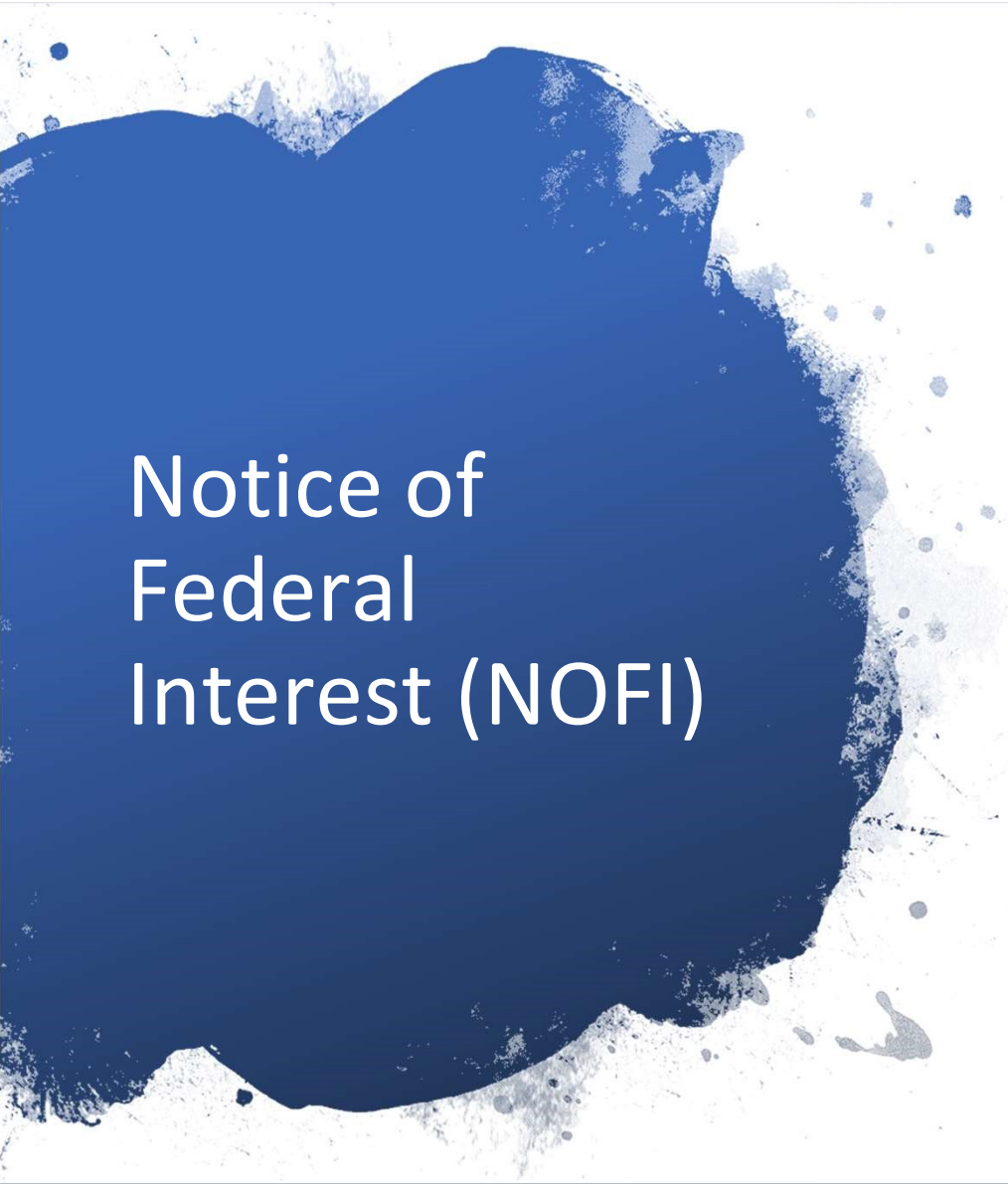
## What is it?

A property right which secures the right of the federal awarding agency to recover the current fair market value of its percentage of participation in the cost of the facility in the event the facility is no longer used for Head Start purposes by the grantee or upon disposition of the property.

When does it arise?

When a grantee uses Head Start funds to purchase, construct or renovate a facility

When a grantee uses Head Start funds to make mortgage payments



# Notice of Federal Interest (NOFI)

## **Real property**

Grantee must file a NOFI in the official real property records for the jurisdiction where the facility is or will be located.

## **Modular**

NOFI must be clearly visible locations on the exterior of the modular unit and inside the modular unit.



# Limitations

Grantee must obtain written permission to:

- Mortgage;
- Use as collateral for a credit line or for other loan obligations;
- Sell or transfer to another party;
- Use for a purpose other than that for which the grantee's application was approved.

Grantee must immediately notify HHS of any default that implicates the property.



## Record retention

Retain all records for as long as the grantee owns or occupies the facility, plus three years

# Disposition



When the property is no longer needed for its intended purpose, grantee must obtain disposition instructions.



Retain title and compensate HHS



Sell property and compensate HHS



Transfer title to HHS. Grantee must be compensated for its share.



## Checklist

- Have we filed/ posted notices of federal interest for all properties with federal interest?
- Do we have any lines of credit with blanket collateral clauses?
- Are we accurately completing the SF-429?

**ERSEA**

## Scenario

Over 30 percent of the child files reviewed did not contain one or more of the requirements for the eligibility determination record. Specifically, 22 out of 27 files did not contain documentation of an in-person or telephone interview and 4 out of 27 files did not contain documentation of income eligibility.

**How do you ensure proper training and accountability of eligibility staff?**

# What is in the eligibility record?

Copies of any documents or statements that are deemed necessary to verify eligibility

A statement that program staff has made reasonable efforts to verify by

- Conducting an interview
- Making efforts to verify eligibility (describe these); and
- Collecting documents required for third party verification that includes the family's written consent to contact each third party, the third parties' names, titles, and affiliations, and information from third parties regarding the family's eligibility

A statement regarding the basis of the family's eligibility

## Monitoring checklist

- Is there an eligibility determination record?
- Does it contain copies of documents and statements to verify eligibility?
- Is there a statement that program staff conducted an in-person or telephonic interview?
- Is there a description of efforts made to verify eligibility?
- Does the record contain required information re third parties?
- Is there a statement that identifies the basis for the child's eligibility?

# Upcoming trainings

The Fiscal Institute, New York, New York;  
July 16-17

Save the Date, Arlington, Virginia;  
September 26-27





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