



January 26, 2024

Ms. Karen Ward
Director, Office of Private Sector Exchange Designation
Bureau of Educational and Cultural Affairs
U.S. Department of State
Washington, D.C. 20522

RE: Notice of Proposed Rulemaking - Exchange Visitor Program-Au Pairs [RIN 1400-AF12]

Dear Ms. Ward:

The Alliance for International Exchange and its members that implement the Au Pair Program appreciate the opportunity to comment on the Notice of Proposed Rulemaking (NPRM) for the Exchange Visitor Program – Au Pair Program (RIN 1400—AF12). We greatly value our long-standing partnership with the Bureau of Educational and Cultural Affairs (ECA) at the Department of State, and hope that this strong relationship will enable us to work together to substantially change this NPRM from its current proposed state. If enacted, this NPRM would turn an international cultural exchange program with nearly 40 years of success into a domestic labor program, dramatically damaging and leading to the functional end of the Au Pair Program in its current form.

I. Introduction

The Alliance and our members have long encouraged the publication of a proposed regulation to update, modernize, and clarify keys aspects of the Au Pair Program. We welcome strong federal regulations, as they have been a foundation of the Au Pair Program’s success for nearly 40 years.

Based on our many conversations and interactions with ECA over the years, we expected that this NPRM would be a narrowly tailored modernization of the program with specific preemption language. Every previous regulatory action for the Au Pair Program focused on changes that addressed specific issues in need of updates – for example, a stipend increase when the federal minimum wage increased, the establishment of the extension program, and the most recent update to allow electronic signatures for DS-2019 forms. We expected that this regulatory action would follow this long-established pattern of activity.

Based on statements made by Department representatives at conferences and in other public settings, we expected that this NPRM would focus on several core issues:

- 1) A clear statement of federal preemption to clarify any confusion regarding the fact that the federal regulations of the program always have and continue to preempt all state and

local labor laws as to the program's terms and conditions, including local wage and hour laws that may otherwise seek to regulate au pair compensation.

- 2) A reasonable and uniform increase to the au pair stipend.
- 3) An update to the educational component to include volunteer and online opportunities with a reasonable increase to the allowance families would pay.
- 4) Modest changes to other administrative aspects of the program that might require reasonable operational changes from sponsors.

Instead, we were dismayed to see that the NPRM was not narrowly tailored or focused, but rather the most comprehensive set of changes proposed in the program's entire history and a wholesale re-regulation of the program. Our comparison of the current regulations to these proposed regulations shows *more than 220 changes* being proposed – some large, some small, and all consequential.

While the sheer number of proposed changes is daunting, it's the dramatic impact these changes would have on the program that is most distressing. These changes would, as noted before, change an international cultural exchange program with nearly 40 years of success into a domestic labor program.

According to a [2020 EurekaFacts Review of the Au Pair Program](#), au pairs are highly motivated to participate in the program because it provides important opportunities for cultural exchange. Nearly three-quarters of the au pairs surveyed view the program as very important “to experience daily life in a different culture (73%)” and even more shared that the program provides critical opportunities “to gain new or improved personal skills (77%).” The respondents also noted that “money is the least important reason” for participating in the program.

Host families also view the cultural exchange experience as an essential part of their decision to participate in the program. The majority of those surveyed by EurekaFacts recognize the benefit of “interacting with individuals from other countries (67%)” and “providing experiences for young people to carry home to their native country (71%).”

Additionally, according to a 2024 survey of more than 3,100 current and recent host families by the firm McDermott Will & Emery (McDermott Will & Emery comment letter [on behalf of the Alliance for International Exchange], Exhibit 1), 94.17% of respondents said that participating in a cultural exchange – and thus welcoming an au pair into their homes to be a part of their families – was important in their decision to host an au pair.

If enacted, these regulatory changes would:

- Strip away this essential cultural exchange nature from the program;
- Dramatically diminish participation in the Au Pair Program by making it far too expensive and outpricing many American families, including middle-class and military

families, and essential workers and first responders, and thus concurrently diminishing the number of au pairs who could participate; and

- Negatively impact the Department of State’s public diplomacy goals by diminishing the connections made with young adults from around the world.

The program would no longer be an international cultural exchange program and would become a domestic labor program, going against the wishes of Congress when it authorized the Au Pair Program. This would also go against the Department’s mandate as a foreign affairs agency and its own view that the Au Pair Program serves a valuable foreign policy and public diplomacy function. This view was maintained in a [Department 2018 Amicus Brief](#) (“the program is a valuable tool of U.S. foreign policy”), as well as in the preamble to this NPRM (the program is “an important tool of U.S. public diplomacy that furthers the Administration’s foreign affairs objectives”).

These changes would so dramatically decrease participation as to functionally end the program in its current form. The Department notes in the NPRM that it knows that “this rulemaking *may* decrease the number of au pairs participating in sponsor programs” (emphasis added).¹ Yet we know from the cautionary tale of Massachusetts that these regulations would *certainly* and quite dramatically decrease participation in the program, by both au pairs and host families. The 2018 *Capron v. Office of the Attorney General of Massachusetts* decision required that many similar provisions as found in this NPRM go into effect in Massachusetts. That included a mandate that au pair stipends increase from \$195.75 for a 45-hour work week to \$528.63 – or by approximately 170%.

Since the *Capron* decision, **the number of au pairs in Massachusetts has dropped by nearly 70%**. Per [Department data](#), Massachusetts hosted 1,530 au pairs in 2018, and only 466 in 2022. For comparison, states with historically similar placement numbers, New Jersey [1,721 in 2018 and 1,542 in 2022] and Virginia [1,611 in 2018 and 1,325 in 2022], have largely rebounded from the pandemic. Massachusetts has not, as a result of the *Capron* ruling.

We fully expect that this NPRM, if it were to go into effect, would cause the whole program to contract by at least the same amount – and data suggests the impact would actually be far more devastating. The survey data from McDermott Emery & Will firmly shows that these increased stipend amounts would decrease participation by precipitous amounts. When asked if they would continue to participate in the program if the stipend were increased by certain amounts, host family respondents said:

¹ It is also important to point out that elsewhere in the NPRM, it is noted that this regulation might “help increase participation and ultimately benefit sponsors.” These contradictory views – that the NPRM would simultaneously decrease and increase participation – are difficult to reconcile.

- If the stipend rose to Tier II, or \$349.46: **64.5% of host families said they would not or probably would not participate** (29.63% no; 34.87% probably not);
- If the stipend rose to Tier III, or \$469.46: **92.53% of host families said they would not or probably would not participate** (72.94% no; 19.59% probably not); and
- If the stipend rose to Tier IV, or \$589.46, **97.29% of host families said they would not or probably would not participate** (88.97% no; 8.32% probably not).

In addition to the lack of affordability, the onerous administrative requirements that would be mandated by this NPRM would greatly decrease participation in the program. The proposed regulation would impose many new requirements on host families, including the following:

- Track meals an au pair does and does not eat at home.
- Track nights that an au pair does and does not sleep at home.
- Stay up to date on, interpret, and comply with state and local minimum wage and overtime laws even when it is not always clear how or if they do or do not apply to the Au Pair Program.
- Track an au pair's daily and weekly childcare hours for purposes of knowing when to compensate him or her for overtime under state and local law, including any premiums required in that locality.
- Commit to a fixed weekly schedule in a Host Family Agreement prior to au pair arrival, which does not allow flexibility needed for host family schedule changes due to spring/winter and summer breaks and holidays or any number of other reasons.
- Obtain approval from the sponsor organization before making any changes to an au pair's schedule.
- Obtain approval from the sponsor organization before making any changes to an au pair's list of duties.

In its survey, McDermott Will & Emery asked respondents if these requirements would *discourage* them from continuing to participate in the program. **90.76% said yes, with another 7.64% saying probably yes.**

The survey uncovered that one of the reasons why respondents would leave the program is that these requirements would completely change the nature of their familial relationship with their au pair. It would turn the program into a complex, transactional labor program, rather than a cultural exchange. As previously noted, 94.17% of respondents said that participating in a cultural exchange – and thus welcoming an au pair into their homes to be a part of their families – was important in their decision to host an au pair (63.49% *very important*; 30.68% *important*). Yet, when asked to contemplate how the addition of these transactional requirements would impact

them, a vast majority said that they would disrupt the familial dynamic between family and au pair:

- **93.31% said it would disrupt the host family and au pair dynamic** if they were required to monitor the meals that an au pair eats at home, essentially increasing the au pair's stipend if he or she declines to eat meals at home; and
- **92.43% said it would disrupt the host family and au pair dynamic** if they were required to monitor the nights an au pair spent at home, essentially increasing the au pair's stipend if he or she sleeps elsewhere.

When asked to contemplate their family's access to cultural exchange if they were unable to participate in the program, 65.16% said they would have minimal access to cultural exchange experiences, with another 31.79% saying they would only have some access. Losing the ability to host an au pair in their homes would cause many families to lose out on a principal reason they decided to participate in the program in the first place: exposing their families, especially their children, to a valuable exchange experience.

Simply put, it is clear these proposed regulations would make the program too expensive and too administratively burdensome for most host families to participate. Participation by both host families and au pairs would plummet, irreparably harming the program and threatening its existence.

II. Summary of Principal Problematic Aspects of NPRM

A. Counter to the cultural exchange mission and mandate of the program

The regulation would inappropriately turn an international cultural exchange program regulated by the Department of State, with a mission centered on public diplomacy and foreign affairs, into a domestic labor program. The Department has maintained its view that the Au Pair Program serves a valuable diplomatic function. [Department of State 2018 Amicus Brief (“The program is a valuable tool of U.S. foreign policy.”).] This regulation, if enacted, would go directly against that view.

B. Does not include a clear statement of federal preemption

There is a critical need for the Department to clarify their longstanding view that its comprehensive federal regulations have always preempted and continue to preempt state and local labor employment laws as to the program's terms and conditions, including those related to wage and hour laws that would otherwise seek to regulate au pair compensation. This statement should reiterate and clarify what has always been the case: that the Department has exclusive

regulatory authority over the program's terms and conditions, including the authority to issue regulations. Specifically, the Department must be clear that their regulations preempt state law that would treat au pairs as "employees" or sponsors as "employers," including local wage and hour laws as to an au pair's compensation.

This NPRM does not clearly or sufficiently provide this statement of preemption. It suggests but does not expressly state that the current federal regulations preempt state and local labor laws as to the program's terms and conditions, and then specifies a complex partial preemption approach prospectively after an implementation period. But this prospective preemption language is inconsistent and incomplete, confirming the preemptive scope of the federal regulations in some but not all-important programmatic areas. And most importantly, it does not expressly preempt state and local labor laws as to all aspects of an au pair's compensation, which is the critical issue at the heart of the current challenges to the program.

C. Undermines the experience of au pairs

First, by turning the program into a domestic work program and stripping it of its essential nature as a cultural exchange, these proposed regulations would deprive au pairs of the very experience they are seeking. As previously noted, according to a 2020 EurekaFacts Review of the Au Pair Program, au pairs' primary motivations to participate in the program are "to improve personal skills and engage in cultural exchange," while "money is the least important reason."

Second, in the proposed four-tiered wage system, any au pairs placed in a Tier I state would receive a *lower stipend* for a full-time program than current regulations allow (*\$189.46 per week instead of at least \$195.75 per week*). Approximately 16% of placements are in Tier I states; thus, this regulation would succeed in *decreasing* the pay for a substantial number of au pairs.

Third, many elements of the proposals in this NPRM would make au pairs *less safe*.

- The proposed rematch policies could encourage au pairs to stay in an unsuitable placement. For example, preventing au pairs from rematching after their ninth month or during an extension period poses a significant safety concern. By restricting their ability to seek new placements, au pairs may be discouraged from reporting problems or concerns they encounter. This disincentive to raise issues could lead to situations where au pairs remain in undesirable conditions rather than risk losing their placement altogether. Such a policy not only undermines the well-being of the au pairs but also jeopardizes the overall integrity and safety of the program.
- The proposal that host families can only deduct for "meals received" creates an unintended incentive for au pairs to skip meals. This approach risks incentivizing unhealthy eating habits. By providing a monetary benefit for au pairs to forgo meals to avoid deductions, the provision undermines their health and well-being. This oversight

could lead to negative health outcomes and detract from the enriching experience the program is meant to offer. Currently, host families are required to provide three meals each day, which invites full participation of the au pair in the family meal experience. By creating this transactional experience where they must confirm what they did or did not eat each day, and to be required to define what constitutes a meal, is an example of the way this kind of rule undermines the cultural exchange experience for both au pairs and families. Rather than focusing on experiences they share as a family, time will be spent detailing food consumption and working through conflicts related to permissible financial deductions.

- Similar to the issue of meals, au pairs could seek to avoid the housing deduction by removing themselves from the home for extended periods of time to live with friends or acquaintances. This undermines the hosting requirement and intention of the cultural exchange program and poses a risk to the safety of the au pairs.

D. Dramatic increase in costs for host families, and, consequently, a dramatic decrease in au pair and host family participation

The Department's proposal to adjust the au pair stipend according to a four-tier system based on state and local minimum wage laws will make the program prohibitively expensive for most host families and drastically reduce participation by host families, which will consequently shrink the program for au pairs as well. This would go directly against the "quintessential federal interest" in the program's viability (see 2018 Department of State Amicus Brief).

The regulation would dramatically increase the cost of the program via increases to the au pair stipend, price out a majority of current and potential families, and shrink the program by at least 70%, if not more. As noted previously, the *Capron* decision decreased the number of au pairs and host families in Massachusetts by approximately 70%. The Department itself noted that the *Capron* decision's impact – decreasing the program and thus the diversity of the program – was not in the program or Department's best interest. As it noted in its Amicus Brief, "limiting the Program to the wealthiest Americans not only reduces the number of families available to host, it also undermines the Program's objective of introducing foreign au pairs to a diversity of American families. Amici, who include data and program managers, a library worker, a doctor, and an active duty service member, reflect that diversity. They will not be able to do so if Massachusetts' law remains on the books."

Both *Capron* and the aforementioned McDermott Will & Emery data show that price increases of this magnitude will lead to a significant reduction in participation. This data was already included above, but bears repeating here:

- If the stipend rose to Tier II, or \$349.46: **64.5% of host families said they would not or probably would not participate** (29.63% no; 34.87% probably not);
- If the stipend rose to Tier III, or \$469.46: **92.53% of host families said they would not or probably would not participate** (72.94% no; 19.59% probably not); and
- If the stipend rose to Tier IV, or \$589.46, **97.29% of host families said they would not or probably would not participate** (88.97% no; 8.32% probably not).

The proposed tiered system is not only clearly far more expensive, but it is also unfair in several ways:

- Host families would be required to pay their au pairs for the maximum hours permitted in one of two program types *regardless of actual hours worked*.
- Host families would be required to pay their au pair at the highest rate within their Tier, or, if higher, at the applicable federal, state, or local minimum wage rate, *regardless of the actual rate in their locality and regardless of actual hours worked*.
- Host families must monitor and pay their au pairs consistent with any applicable federal, state, or local overtime laws, which could apply to locations with a daily overtime law or if exigent circumstances require an au pair to work over the 40-hour weekly maximum.
- The proposed regulations suggest that only a federal deduction for room and board is allowed, which may not exceed \$130.54 per week. Thus, while wages would increase depending on locality, the deduction would not. The host family is also required to document the provision of three meals per day in order to take the full maximum deduction.

E. Complex and burdensome administrative requirements would discourage participation and create new problems where there were none previously, and confusing and contradictory requirements would put host families at risk of liability.

The proposed regulations treat the home as the equivalent of a worksite and impose significant new administrative burdens on host families that will deter participation.

One of the distinguishing aspects of this successful federal exchange program is the federal regulatory scheme that balances the various components of cultural exchange and childcare. The proposed regulations would disrupt this balance by applying some state and local labor laws in certain circumstances and would introduce confusion for host families as to which laws apply and, consequently, make full compliance untenable. Furthermore, if families were to unintentionally make a mistake – and the possibility for that is quite high given that families are not labor and wage experts – it could put them at risk of legal liability.

As noted above, the proposed regulation would impose many new requirements on host families, including the following:

- Track meals an au pair does and does not eat at home.
- Track nights that an au pair does and does not sleep at home.
- Stay up to date on state and local minimum wage and overtime laws.
- Track an au pair's childcare hours for purposes of knowing when to compensate him or her for overtime under state and local law.
- Include a fixed weekly schedule in a Host Family Agreement prior to the au pair's arrival to the home.
- Obtain approval from the sponsor organization before making any changes to an au pair's schedule.
- Obtain approval from the sponsor organization before making any changes to an au pair's list of duties.
- Submit monthly reports to confirm hours, pay, and deductions.

This data was also already noted above, but bears repeating again: respondents were asked if these requirements would *discourage* them from continuing to participate in the program.

90.76% said yes, with another 7.64% saying probably yes.

Unfortunately, many of the proposals in this NPRM also would create problems where there were none before. For example:

- Unclear language about providing a private bathroom (if a private bathroom for exclusive use by an au pair were required, many host families would not be able to provide this and thus would not be able to participate).
- Unnecessary requirement that an au pair must have held a driver's license for a year.
- Excessive vaccination records and requirements.
- Requirement to have already purchased a round trip ticket/return flight voucher before arrival in the United States.
- Restriction on rematches after an au pair completes 75% of their program.
- Prohibition of au pair extension with a new family.

We include our specific responses and recommendations to these various proposals and more below. But in general, each of these are examples of attempting to solve a problem that, to a large extent, did not previously exist and, when it occurred, had been handled accordingly by the sponsor. Now, if enacted, each of these proposals would create new and unnecessary problems to address, while adding no value to the program.

F. Underestimation of financial burden on sponsors

The cost estimates provided by the Department in the NPRM preamble show that the proposed regulation vastly understates and does not recognize many costs that would be associated with these proposed changes. The Department focuses on the cost of a single staff member to revise or create a new template, but does not acknowledge the legal, technical, operational, training, and other costs associated with changes of this magnitude. These changes would not just be concerning a single form. Rather, a plethora of new activity would be required, including entire processes and full program participant reeducation, new and complex compliance systems, new standard operating procedures, increased staff time due to the additional oversight requirements, and additional staff due to massively increased oversight obligations. None of these are addressed in the Department's cost estimates.

There are costs that are also not addressed with respect to the impact on sponsors where the Department has proposed that sponsors assume certain financial obligations including unpaid stipends, food and lodging costs with replacement policy updates, unpaid educational costs, as well as a new refund structure. There is no analysis provided on the potential costs or impact on sponsors who would be required to provide up to a 75% refund to au pairs under certain conditions. The Department does not assess the lost revenue for the loss of program participants as a result of changes that would make the program unattractive or entirely inaccessible for many current host families. There is no consideration of the legal costs to defend sponsors as a result of the lack of clarification of federal preemption as to au pair compensation, therefore leaving sponsors vulnerable to legal claims and any adverse judgements and the cost to defend these against these filings. The Department also removes the option for many au pairs to rematch after 75% of their first term, as well as prohibits their placement with a new family in their extension year, which removes a revenue option for sponsors altogether.

III. Guiding principles and recommendations for a successful clarifying and modernizing regulation

The Alliance and the au pair exchange community have long called for the Department to issue a proposed regulation that would appropriately update and modernize the program, and in doing so clarify several key aspects of the regulations.

A. Guiding Principles for a Successful Regulation

We believe that a successful clarifying regulation would have followed the key principles below. **We respectfully request that any subsequent version of this NPRM, or a future NPRM, adhere to these principles:**

- 1) **The regulation must include an express, clarifying statement of federal preemption as to the program's terms and conditions.** Our specific recommendations on this topic can be found in the next section, B.
- 2) **The regulation must be narrowly tailored,** aiming to modernize and clarify only key issues. It should not be a wholesale and unnecessary re-regulation of the program that turns it from a successful cultural exchange program to a domestic labor program, as this NPRM would do.
- 3) **The regulation must continue to ensure that cultural exchange is at the heart of the program.** This is the reason for the program's very existence and we are committed to keeping it central to the operations and regulations of the program. Turning it into a transactional domestic labor program would strip away the familial and cultural exchange components that make the program unique and successful.
- 4) **A commitment to maintaining affordability and accessibility must be central.** The regulations should ensure that the program remains accessible to the diverse community of host families we support across the country. This NPRM's proposed four-tiered stipend structure would dramatically increase the cost of the program for more than 70% of host families, if not more, and make it inaccessible for most.
- 5) **The regulation should keep the administrative burden at a minimum.** The current program regulations offer strong protections for both au pairs and host families and are done in a way that keeps the program operationally workable. We are always open to strengthening these protections, but there must be an aim to keep the administrative burden and onerous program complications to a minimum. This proposed regulation, unfortunately, adds so much administrative complexity as to make it operationally impossible.
- 6) **The current flexibility must be retained.** The flexibility of the current program is what makes it so attractive to many families and au pairs. This is crucial to retain. By turning the program into a transactional one in which every schedule change must be approved, every meal must be tracked, every interaction must be documented, this NPRM takes away all that flexibility.

B. Recommendations For a Successful Regulation

The au pair exchange community's expectation was that this NPRM would include only narrowly tailored and key updates to the current regulations. As such, we believe that a future subsequent version of this NPRM will be most successful if it utilizes the current regulations as they stand, and then builds upon, updates, and modernizes those regulations in three key ways:

- 1) Include an express, clarifying statement of federal preemption as to the program's terms and conditions, specifically as to au pair compensation;
- 2) Using that preemptive authority, increase the au pair stipend in a nationally uniform and accessible way that balances all programmatic needs; and
- 3) Increase the educational component and stipend to a reasonable amount and expand the educational component to include more opportunities.

Later in this letter, we provide comments on many specific provisions included in this NPRM. We want to ensure that we comment on all problematic aspects of the proposal. However, we also want to state that we believe that the Department's next step should *not* be to redline or revise this proposal. The scope of the proposed changes is such a drastic rewriting of the regulations and restructuring of the program that we fear, even if the Department were to incorporate all our recommendations, some detrimental aspects would be missed that would still cause the program unnecessary harm.

Rather, we recommend that the Department use the current, successful regulations as is, and then update them by making several important and narrowly tailored changes only. These recommended changes are described below.

1) A Clear Statement of Federal Preemption

The regulation must include an express, clarifying statement of federal preemption as to the program's terms and conditions. There is a critical need for the Department to clarify and confirm their longstanding view that its comprehensive federal regulations have always preempted and continue to preempt state and local labor laws as to the program's terms and conditions, including those related to wage and hour laws that would otherwise seek to regulate au pair compensation and those that would treat au pairs as "employees" or sponsors as "employers." This statement should reiterate and clarify what has always been the case: that the Department has exclusive regulatory authority of the program's terms and conditions, including the authority to issue regulations that define and exclusively govern au pair compensation. Specifically, the Department must be clear that their federal regulations preempt state and local wage and hour laws as to the stipend host families provide to their au pair each week.

Recommendation: The text of the current regulation should be updated to include an explicit, clarifying statement of the Department's federal preemption. This language should further make clear:

- 1) That it is a "clarifying" statement of preemption, such that the legal effect of this new rule will apply retroactively and prospectively.
- 2) That the scope of clarification regarding the preemptive effect of the federal regulations as to state and local labor law regulation of au pair compensation is clear and complete.
- 3) That sponsors are not employers or joint employers of au pairs and never have been, and that any state or local laws that may make sponsors joint employers are explicitly preempted.

2) *A Reasonably Increased and Federally Uniform Au Pair Stipend*

Using DOS' preemptive federal authority, the current regulation should be updated to increase the au pair stipend at a federally uniform and accessible rate. We support an increased stipend for au pairs, and that increase must retain the current formula's uniformity and draw a reasonable balance between supporting the au pair and keeping the program accessible for host families. It must be recognized that host families bear the cost of actual living expenses, while the au pair is responsible for personal expenses beyond what the family is required to provide, i.e. recreation and personal travel.

It is imperative that the DOS-determined stipend formula preserves an affordability component by retaining a minimum of the existing 40% deduction for room and board that was originally developed by looking to and adopting standards consistent with the Fair Labor Standards Act. The regulation itself should provide a clear, objective calculation or the net specified result from an adopted calculation so that host families can rely exclusively on that, and not on an interpretation of the regulations by the Department, sponsors, or themselves.

Recommendation: The Department should *not* utilize its proposal of a four-tiered structure, or any non-uniform stipend structure. Instead, it should retain the current nationally uniform stipend structure that has served the program well.

Because the minimum wage has not increased from \$7.25 since 2009 and there is a need for a formula that incrementally, appropriately, and affordably increases the au pair stipend, we recommend utilizing inflation data from the Bureau of Labor Statistics' CPI Inflation Calculator (https://www.bls.gov/data/inflation_calculator.htm) to determine a reasonable and affordable set minimum stipend amount had the federal minimum wage kept pace with inflation.

- According to the BLC CPI calculator, the current stipend amount of \$195.75 in January 2009 has the same buying power as \$284.67 in November 2023 (the most recent month available).
- Calculated another way, with a slightly different result, the federal minimum wage of \$7.25 would be \$10.54 in November 2023. Thus:
 - $\$10.54 \times 45 \text{ hours per week} = \474.30
 - $\$474.30 \times 40\% \text{ room and board deduction} = \189.72
 - $\$474.30 - \$189.72 = \$284.58$
- Rounding up both results, we recommend a new minimum stipend of \$285 per week, which would be a reasonable, accessible, and uniform amount for au pairs to cover the cost of recreation and personal travel. Data from McDermott Will & Emery's survey supports the idea that this amount would be affordable to most host families and would

not cause the decrease in participation rates that the much higher stipend amounts in the Department's proposals would. As noted previously, if the stipend were to be increased to the amounts proposed in Tier II (\$349.46), Tier III (\$469.46), or Tier IV (\$589.46), 64.5%, 92.53%, and 97.29% of host family respondents would not or probably not participate in the program.

- McDermott also found that 87.28% of host families surveyed already pay more than the minimum stipend of \$195.75. 79.28% pay between \$200 and \$299 per week:
 - 59.32% pay between \$200 and \$239.
 - 16.68% pay between \$240 and \$269.
 - 3.28% pay between \$270 and \$299.
- Thus, the data supports the idea that a more reasonable increase in the stipend would not damage participation in the program.
- We then recommend that this minimum stipend amount of \$285 be raised to keep pace with inflation via the same calculation every three years.

3) *A Reasonably Increased, More Flexible, and More Inclusive Educational Component*

The educational component is an important part of the program, as it expands the au pairs' cultural exchange experience and personal growth opportunities.

- We support online and volunteer options and an increase to the educational allowance.
- The proposed allowance of \$1,200, in combination with the other increased costs, will further make the program inaccessible to many families.
- The education must be laid out in an appropriate way: i.e., the proposed regulation says an au pair can take an online course as one element of their education, but it has to be spread over two semesters, which is not possible.
- The NPRM proposes that au pairs take nine semester hours of classes (9 credits), not the current six semester hours.
- There are other educational options that perhaps make taking classes easier, but the increased educational burden on the au pairs may make it difficult for them to balance all their obligations and endeavors and would negatively impact their cultural exchange experience.

Recommendation: We recommend allowing for volunteering, community service, online courses, and in-person coursework to all be part of the educational component of the program, to be valued equally in terms of credit equivalency and to be interchangeably applicable to fulfill

the requirement. We also recommend retaining the six semester hours and increasing the host family educational allowance contribution by 50%, up to \$750 for a 12-month placement.

IV. **Overall Recommendation for the NPRM**

We strongly believe and firmly recommend that the Department cannot publish a final version of this regulatory update in its current form, or in a version close to its current form. This would have a fatal impact on the program.

Instead, we strongly recommend that the Department amend this NPRM in the manner described above. We recommend that the Department work to update the current regulations with a narrowly tailored focus on these issues. Doing so would have two important and positive effects: 1) it would update and modernize the program in important ways that would serve to further protect and support both au pairs and host families; and 2) it would *not* run the risk of unnecessarily and substantially harming the program in the way this NPRM would.

V. **Alliance response to specific provisions (62.31 Au pairs.)**

Even though our view is that it would be incredibly challenging to redline and fully amend this NPRM to make it workable, we nonetheless want to provide our responses to, and recommendations for, problematic provisions throughout the NPRM.

§62.31(a) Purpose.

Department Proposal:

“The purpose of the Au pair category is to provide foreign nationals the opportunity to live with and participate directly in the home life of an American host family, provide child care, complete an educational component, and participate in cultural activities. Au pairs may enroll in either a part-time program (24-31 hours per week) or a full-time program (32- 40 hours per week).”

Alliance Response:

The introduction of a part-time and full-time program structure in place of a maximum number of permitted hours limits flexibility for families and au pairs alike, and thus takes away from one of the main appeals of the program for both parties. Furthermore, the reduction of the maximum number of hours in the full-time program from 45 to 40 per week adds another difficulty for many host families. This change does not recognize that many host parents who work 40 hours per week also have commutes to and from their workplace that necessitate the additional five hours.

The distinction between a part-time and full-time program creates unnecessary added complexity due to the amount of additional documentation that is required between the host family and the sponsor to ensure that the hour requirements are being met each week. Codifying this structure and using the terms of part- and full-time contributes to the transformation of a program focused on cultural exchange to one used primarily for domestic labor purposes.

Alliance recommendation:

We recommend retaining the current structure that allows for a maximum of 45 hours per week, as well as EduCare as an option for families who need care for less than 30 hours per week.

§62.31(c) Program conditions.

“Sponsors designated by the Department of State to conduct au pair exchange programs must:”

Provisions (c)(1)(iii)

Department Proposal:

“Development of contingency plans covering au pairs at any time they are not living with a host family, (e.g., during the rematch process and following removal from one home and prior to a new placement and/or prior to departing the United States), that at a minimum, describe the following conditions: (A) Where au pairs live and who is responsible for providing living arrangements and food; (B) Who is responsible for transportation costs for moving an au pair to a different geographic location, if necessary; and (C) That the au pair is not responsible for costs associated with paragraphs (c)(1)(iii)(A) and (B) of this section.”

Alliance Response:

There is not a one-size-fits-all solution to situations where the au pair is no longer living with their host family. Sponsors are responsible for the health, safety, and welfare of au pairs, but au pairs also have a responsibility to work within the protocols and processes of the sponsor if this type of situation were to happen. Au pairs who choose alternative living arrangements during this rematch period, rather than those offered and willingly provided by the sponsor, should be responsible for the costs.

Alliance Recommendation:

This provision should be amended to remove subsection (C) as there are situations like those described above where the au pair should be responsible for these rematch costs.

Provision (c)(1)(v)

Department Proposal:

“Establish the allocation of the non-income-related cost of paid time off and/or paid sick leave for au pairs when a host family has/has not given a departing au pair some or all of paid leave, and an arriving/departing au pair has/has not taken any or all of paid leave.”

Alliance Response:

This provision incorrectly incorporates the sponsor as a joint employer into a process that should be between the host family and the au pair. Any unpaid stipend, regardless of circumstances, is the obligation of the host family and is the responsibility of the au pair to bring to the sponsor’s attention so that it can be immediately addressed. The sponsor’s role in administering the program involves supporting au pairs and their families and ensuring programmatic compliance, and as such, this responsibility would not fall within a sponsor’s jurisdiction. The host family is responsible for determining this allocation.

Alliance Recommendation:

We recommend that this provision be removed to ensure that the sponsor is not misclassified as a joint employer.

Provisions (c)(2)(iii) – (c)(2)(iv)

Department Proposal:

“[Require that all local coordinators] Be responsible for no more than 15 placements if they work with the program for fewer than 32 hours per week (i.e., part-time); and Be responsible for no more than 30 placements if they work with the program for 32–40 hours per week (i.e., full-time).”

Alliance Response:

The limits on cluster size for local coordinators (LCs), particularly for those working full-time, will create significant added costs for sponsors and negative effects for LCs, while not necessarily achieving the intended outcome of better quality of support. For example, one Alliance member estimates that they would need to engage more than 150 new LCs, in turn creating substantial additional costs.

Alliance members have indicated that feedback from both host families and au pairs consistently demonstrates a high level of satisfaction with support from local coordinators under the current regulations and shows no evidence of a strong correlation between a larger cluster and lower satisfaction. Data from the McDermott Will & Emery survey shows the current LC system works well:

- 91% of host families responded that they have just the right amount of contact with their LCs.
- 62% said they never had to contact their LC to resolve a dispute, with another 30% saying they rarely had to.

One Alliance member noted that in their sponsor organization's experience, larger cluster groups routinely have a positive effect on the LCs' quality of work. With more host families and au pairs to manage, these LCs are consistently working full-time hours and as such, are committed and effective in their role.

Instead of limiting the number of placements that an LC can be responsible for, the regulations should encourage sponsors to use their own performance matrix and satisfaction survey results. If there is a concern that the LC service levels vary and there are complaints from participants that feel they are not getting enough support, this should be addressed by the sponsor through regular reporting and feedback, training, and if needed, termination for poor performance as is handled in other business environments.

Alliance Recommendation:

The limitation on cluster size for local coordinators should be removed.

Provision (c)(3)(ii)(E)

Department proposal:

“[Annually review and maintain the following documentation] A copy of the foreign entity's notarized recent financial statements.”

Alliance Response:

The regulatory requirement for sponsors to review and maintain copies of foreign entities' proprietary financial statements is not necessary or appropriate. The sponsor is responsible for vetting their third-party partners, including any financial information that they feel is necessary to verify, but it should not be a regulatory matter. Furthermore, requiring those statements to also be notarized is unduly burdensome.

Alliance Recommendation:

We recommend that this provision be removed for the reasons stated above.

§62.31(d) Au pair eligibility.

Provision (d)(1)(iii)

Department Proposal:

“Are proficient in spoken English and able to seek aid or assistance in medical or other emergencies as evidenced by a report of a personal interview conducted in English by the sponsor;”

Alliance Response:

While we, of course, agree that au pairs must be proficient in spoken English, we believe that this evaluation does not have to be conducted solely by the sponsor. Sponsors rely on their international cooperators (ICs) to assess the au pair’s English proficiency and decide if it is sufficient for their participation in the program. These ICs are trained by sponsors and typically work from the materials they provide. They also operate in the same time zone as the au pairs and can meet with them in person, as well as communicate with participants in both their native language and English. Additionally, host families help determine if the au pair and their language skills are suitable enough for their needs. Requiring sponsors to take on this role would be an undue burden when there are already successful processes in place to measure language capability.

Alliance Recommendation:

The personal interview conducted in English with the au pair should be allowed to be administered by international cooperators.

Provision (d)(1)(iv)

Department Proposal:

“Are capable of fully participating in the program as documented by a report (with English translation) from a licensed physician that the applicant satisfactorily completed a physical exam (completed no more than 45 days prior to execution of the contract by the au pair and the host family) including, among other things proof of the following conditions:”

Alliance Response:

The 45-day limitation of validity for the health certificate creates a difficult window of time to work within and does not consider the accessibility of medical services in different countries. It could take several weeks to schedule an appointment for a physical exam in many countries, and often the timing of acceptance by a sponsor and then selection by a host family exceeds this 45-day requirement.

Alliance Recommendation:

Au pair candidates should be allowed to complete this eligibility requirement further in advance (e.g. six months) to avoid any delays.

Provision (d)(1)(iv)(A)

Department Proposal:

“Are fully vaccinated pursuant to the current recommendations of the Advisory Committee for Immunization Practices (see, e.g., <https://www.cdc.gov/vaccines/schedules/downloads/adult/adult-combined-schedule.pdf>);”

Alliance Response:

The requirement that au pairs are fully vaccinated pursuant to the current recommendations of the Advisory Committee for Immunization Practices is problematic. Many of the vaccines recommended are optional in most circumstances and not necessary for the safe completion of the program. In fact, many Americans do not even have some of these recommended vaccines. A number of these vaccines may not even be available in some sending countries, and if this requirement is adopted, it would negatively impact program diversity, running counter to ECA’s stated objectives.

Alliance Recommendation:

The provision should be amended to a more reasonable vaccine threshold, such as au pairs must follow all U.S. vaccine entry requirements.

Provision (d)(1)(iv)(B)

Department Proposal:

“Are free from active or latent tuberculosis demonstrated pursuant to a tuberculosis test currently approved by the Food and Drug Administration or a chest x-ray.”

Alliance Response:

As with the vaccine requirements in the above section (d)(1)(iv)(A), the availability of tuberculosis tests vary by country. Requiring every participant to take a tuberculosis test or a chest x-ray, even though most countries do not have levels of tuberculosis infection higher than the United States, would needlessly lessen program diversity.

Alliance Recommendation:

The provision should be amended to a more reasonable requirement, such as evidence of a current tuberculosis vaccine or a negative test if from a high-burden tuberculosis country as determined by the World Health Organization.

Provisions (d)(1)(vi) – (d)(1)(vii)

Department Proposal:

“Demonstrate good character, as evidenced by three, non-family related personal or employment references (with English translations) and a criminal background check report or its recognized equivalent (with English translation); and Demonstrate suitability to be an au pair, as evidenced by a personality profile (with English translation) that is based upon a psychometric test designed to measure differences in characteristics among applicants against those characteristics considered most important to successfully participate in the au pair program.”

Alliance Response:

The requirement for English translations of each document/report in this provision is unnecessarily burdensome, as the difficulty of gathering these translations will vary from location to location. The goal of this requirement, verification of eligibility for the sponsor, can be achieved without translations by having the references, criminal background check, and personality profile reviewed and approved by local organizational partners in-country.

Alliance Recommendation:

The provision should be amended to not include the English translations requirement.

Provision (d)(2)(i)

Department Proposal:

“For au pairs who will be placed with host families where driving is a requirement as written in the Host Family Agreement: Possess an active driver's license from their home country issued at least one year before the program begin date;”

Alliance Response:

The provision requiring au pairs to have held a driver's license for at least one year before participating in the program would unduly restrict participation. Merely possessing a license for a certain duration does not necessarily equate to being a skilled or experienced driver. On the contrary, an individual may have held a license for a shorter period but could have undergone comprehensive driving lessons, potentially making them more competent than someone who has had a license for longer but with less practice. Mandating a one-year minimum overlooks these nuances and undermines the sponsor's ability to assess each candidate's actual driving capabilities. Furthermore, this requirement would also decrease program diversity in that it will exclude au pairs who are 18 years old and from a country where the legal driving age is 18.

Alliance Recommendation:

We recommend removing this provision requiring an au pair to have had a license for at least one year. We recommend keeping with current practice that sponsors verify that an au pair has a valid driver's license if required for the placement, and then the evaluation of an au pair's driving skills is up to the discretion of the host family who can best determine whether the au pair's experience meets their needs.

§62.31(e) Au pair placement.

“Sponsors must demonstrate they have secured a host family placement prior to the au pair's departure from the home country or before being placed with a new host family (i.e., rematch) by obtaining the signatures of the host family and au pair on a dated Host Family Agreement.”

Provision (e)(1)(vi)

Department Proposal:

“[Sponsors shall not] Place an au pair with a host family that is not capable of providing a comfortable and nurturing home environment free from sexual harassment, exploitation, or any other type of abuse. Sponsors must ensure that the home is safe, comfortable and clean; and that the au pair has a private and lockable bedroom with a bed that is neither convertible nor inflatable in nature, and has adequate storage space for clothes and personal belongings; a private and lockable bathroom; and reasonable, unimpeded access to the outside of the house during non-child care hours, while the au pair is on leave, and in the event of a fire or similar emergency.”

Alliance Response:

While we agree with many of the requirements specified in this provision, including a private and lockable bedroom and a comfortable and nurturing home environment free from abuse, it is not feasible for many host families to provide a private bathroom that is not shared with other members of the family. If this requirement is enacted, many host families would be barred from participating as they wouldn't have an extra bathroom to designate solely for the au pair's use.

Alliance Recommendation:

The regulations should be amended so that a shared family bathroom is acceptable and permitted. Additionally, the Department should provide clarity that the sponsor must “ensure” that the family provides a comfortable and nurturing home environment. Given that sponsors cannot be held responsible for ensuring compliance with this requirement as they do not have power over what occurs within a household, their role should be to hold families accountable.

Provision (e)(2)(ii)(A)

Department Proposal

“[Before finalizing an au pair placement, sponsors must...Provide the au pair with a description of the placement, including at a minimum] Short biographical description of host family members, including age and educational level;”

Alliance Response:

The educational level of host parents is not indicative of how they will be as host parents and therefore not relevant for this purpose. This requirement may discourage diversity of host parents with different education levels, and as a result, share only a limited view of American culture with au pairs.

Alliance Recommendation:

We recommend that the regulatory language specifies that the educational level requirement for the biographical description applies only to the host children that the au pair will be caring for.

§62.31(f) Au pair orientation.

Provision (f)(1)(iii)

Department Proposal:

“An explanation of requirements for au pair to purchase a round-trip ticket or obtain and bring on program a pre-paid return-flight airline voucher of a value equal to the cost of out-bound flight;”

Alliance Response:

Requiring an au pair to have a round trip ticket/return flight voucher before arrival in the United States is unworkable. Round-trip airline tickets and vouchers have a maximum stay of one year. If the au pair were to extend their program, it would result in a loss of the ticket. It is also possible that an au pair may rematch and change locations, therefore requiring a change to that return flight ticket that would not be necessary if booked prior to departure from the United States.

Alliance Recommendation:

We recommend removing this provision and retaining the current practice that an au pairs' return flight can be booked at the appropriate time when they know their program end date and when they will be returning home.

§62.31(g) Au pair training.

“Prior to placing an au pair in a host family home, sponsors shall provide the au pair with, and compensate the au pair for, the following required training:”

Provision (g)(3)

Department Proposal

“For au pairs whose duties enumerated in the Host Family Agreement require driving, an online or in-person driving instruction course designed to introduce international drivers to U.S. driving customs; and information covering state and local driving laws (including safety information on, e.g., child car seats, seat belts, and dangers and penalties for driving while intoxicated).”

Alliance Response:

Similar to the stated position above regarding provisions (g)(1) – (g)(2), sponsors should not be required to compensate the au pair for this training as they are not in the role of the employer. This provision also adds another burdensome requirement on sponsors to provide information covering state and local driving laws, which would be better suited coming from the host family who lives in the community and is more familiar with these traffic laws. Additionally, this proposal presents a potential legal liability for the sponsor to provide driving instruction that is sufficient for all 50 states. If necessary, driving instruction would be more beneficial to the au pair in their host community where they can learn the applicable laws and customs.

Alliance Recommendation:

We recommend that this provision be removed and if further driving instruction is deemed necessary by the host family, the au pair can do so in the state where they are placed.

§62.31(h) Host family eligibility.

Department Proposal:

“Each sponsor must ensure that host families treat this program as an educational and cultural exchange and meet the following eligibility requirements prior to signing a Host Family Agreement with an au pair:”

Alliance Response:

Requiring that the sponsor “must ensure” the host families treat the program in the way it was intended is not an attainable stipulation. Given they are not in the home with the host families and the au pair, sponsors will not be able to completely ensure what goes on between the host family and the au pair. Additionally, despite highlighting that the Au Pair Program is an educational and cultural exchange in this section, much of this proposed rule directly contradicts

that purpose in altering the family dynamic that is a cornerstone of the cultural exchange mission to one of a transactional employer/employee relationship.

Alliance Recommendation:

This provision should be amended to denote that the sponsor must “educate” host families on the purpose of the program being educational and cultural exchange.

Provision (h)(1)

Department Proposal:

“Head of household(s) are U.S. citizens or lawful permanent residents;”

Alliance Response:

This provision refers to “head of household(s),” which is an unclear term except with regard to tax purposes. This language creates uncertainty for who is eligible to be a host family. This requirement also unnecessarily precludes host families where one parent is a U.S. citizen or lawful permanent resident and the other is not, and as a result, excludes families that would otherwise be strong candidates for hosting.

Alliance Recommendation:

We recommend retaining the current regulatory language of host parent, but amending the requirement so that only one host parent needs to be a U.S. citizen or lawful permanent resident.

Provision (h)(7)

Department Proposal:

“The host family commits not to reside outside of the United States and its territories, for longer than a cumulative total of 30 days or at a domestic location within the United States that is more than one hour's drive from a local coordinator during the au pair's program;”

Alliance Response:

The limit of up to a cumulative total of 30 days for a host family to travel abroad during an au pair's program term is not sufficient or realistic. Many families who have au pairs value international travel, as do the au pairs who have the opportunity to travel with them. 30 days throughout the course of 12 months is not a large amount of time to have spent abroad and is unduly restrictive. Additionally, some host families may have family members that live farther than an hour away from the local coordinator, who they visit for extended periods of time throughout the year.

Alliance Recommendation:

We recommend that this provision should be amended to assert that the host family understands and commits to the requirement that an au pair participate in the personal monthly contact with their LC and that family travel cannot impede the completion of the au pair's programmatic requirements, including the completion of their educational component.

Provision (h)(8)

Department Proposal:

“The host family commits to promptly report to the sponsor any material changes in the family composition, changes in circumstances that could create stress or anxiety within the family (e.g., death, divorce, loss of job); and any host parent arrests or moving traffic violations.”

Alliance Response:

Host parent moving traffic violations like speeding tickets are a relatively minor incident that do not have the same level of impact on the family as the other circumstances listed in this provision (death, divorce, arrests, etc.). As such, it should not be a requirement that these types of events are reported to the sponsor.

Alliance Recommendation:

This provision should be amended to exclude the required reporting of moving traffic violations.

§62.31(i) Host family orientation.

Provision (i)(1)(iii)

Department Proposal:

“A print-out of the current page from the Internal Revenue Service's website on the topic of “Taxation of Nonresident Aliens.””

Alliance Response:

Sponsors are not tax experts and, as such, any tax-related information that host families rely on should be provided by a tax professional to minimize potential errors. Additionally, any requirements for the provision of any information must reflect the option for digital production rather than a reliance on a “print-out.”

Alliance Recommendation:

This provision should be removed.

Provision (i)(2)(iii)

Department Proposal:

“[The sponsor should include, at a minimum, discussions on the following topics] The process and schedule for documenting and submitting the au pair’s child care hours, maximum hours of child care, and the requirement to report within five calendar days child care hours in excess of program limits with an accompanying explanation of the exigent circumstances;”

Alliance Response:

The requirement to report excess childcare hours to the sponsor within five calendar days is overreach and treating the sponsor as a joint employer.

Alliance Recommendation:

We recommend that this requirement be removed and, as a result, it is not necessary to discuss during the host family orientation.

Provision (i)(2)(vii)

Department Proposal:

“The requirement to provide a safe, comfortable, and clean home environment free from sexual harassment, exploitation, or any other form of abuse; the au pair's right to privacy when not providing child care duties (e.g., private bedroom and private bathroom, possession of personal belongings and travel or other documentation (i.e., passport, visa, Form DS–2019)).”

Alliance Response:

As noted above in section (e)(1)(vi), we agree with these requirements except the seeming requirement for a private bathroom that is not shared with any other family members. If this requirement is enacted, many host families would be unable to participate as they wouldn’t have an extra bathroom to designate solely for the au pair’s use.

Alliance Recommendation:

The regulations should be amended so that a shared family bathroom is acceptable and permitted in so long as the door is lockable.

§62.31(j) Host Family Agreement.

Department Proposal:

“Prior to issuance of Form DS–2019, sponsors must prepare a standard agreement between the au pair and host family that is printed on sponsor letterhead or otherwise indicates the placement is “under the sponsorship of [name of sponsor].” The agreement must include, at a minimum, the

following sections, and the au pair and host family must individually initial each section to demonstrate their review of and acceptance of the following provisions:”

Alliance Response:

As written, this entire provision outlining the host family agreement misclassifies the sponsor as a joint employer in all but name and is exemplary of how this NPRM moves the program away from its integral cultural exchange premise. Resembling an employment contract, many of the provisions within this Host Family Agreement section outline a strict transactional employer-employee relationship between the host family and au pair while inappropriately involving the sponsor as a joint employer throughout, which we discuss in more detail in the individual proposal sections below. Sponsors should not have to approve the majority of the provisions in this section (j), as they are not joint employers and do not have responsibility over what happens in a given home. To position the sponsor in the middle of the relationship between the au pair and the host family in this way undermines the cultural exchange aim of developing an environment where the au pair feels like a member of the family. Furthermore, it is unreasonable to think that an agreement of this scope made prior to the host family and au pair meeting in person would be able to govern their working relationship successfully throughout the au pair’s entire program term. Many of these decisions outlined in the Host Family Agreement also eliminate the flexibility that has been a major benefit of the Au Pair Program since its inception nearly 40 years ago.

Alliance Recommendation:

Due to the reasons above, we recommend that this entire section be removed and the current regulations regarding the sponsor’s role in a written host family agreement, as well as what should be included in this agreement, remain in place.

Provision (j)(2) Duties.

Department Proposal:

“The agreement must include lists of the types of child care duties that are appropriate for an au pair and the types of duties that are not: (i) Appropriate duties: A-G & (ii) Inappropriate duties: A-F”

Alliance Response:

The lists of appropriate duties and inappropriate duties give the impression of being exhaustive, but if a task is not listed, it would be difficult for a host family or an au pair to determine if it is appropriate. Family activities may include doing chores together, but in this case, an au pair may not be allowed to participate in that activity if it is on the inappropriate duties list. Examples include grocery shopping as a family, helping prepare meals together, and cleaning up afterwards, which are all activities that would involve a member of the family. Labeling these

tasks as inappropriate for an au pair to participate in without considering the family dynamic creates an environment where the au pair is more of a guest in the house than a family member.

Alliance Recommendation:

We recommend retaining the current regulatory requirements regarding appropriate and inappropriate duties.

Provision (j)(3) Weekly Schedule.

Department Proposal:

“The sponsor should ensure that the host family prepares a typical weekly schedule (including duties and hours) for the sponsor to review (to confirm its compliance with regulatory requirements) before including it in the agreement. To modify the schedule, the sponsor should ensure that the host family prepares a new typical weekly schedule (with input from the au pair, as appropriate) and submits it to the sponsor for review before seeking approval from the au pair.”

Alliance Response:

This provision is not only burdensome to all parties involved, but also incorrectly assigns the sponsor as a joint employer. Under the current regulations, host families and au pairs have the opportunity to come together to determine a schedule that works best for both parties for the upcoming week or month. It allows for flexibility so that host families and au pairs can work around events that necessitate schedule changes. It would not be necessary or practical to include the program sponsor in this process. Requiring sponsor approval of all changes would create a cumbersome back and forth, as well as limit flexibility for host families and au pairs alike. Additionally, sponsors will likely have to engage more staff to handle review of weekly schedule changes, further adding to the new costs presented by this proposed rule.

Alliance Recommendation:

The provision should be amended to remove the requirement of reporting weekly schedule changes to sponsors. Instead, the host family and the au pair agree to a schedule that respects the needs of each party and, when possible, provides advance notice of changes. The au pair should understand how to report schedule violations and has regular check-ins with their LC.

Provision (j)(4) Weekends.

Department Proposal:

“A statement that the host family and the au pair agree that the host family will identify, before the end of each month, the weekends during the next month that the au pair need not provide child care.”

Alliance Response:

This provision restricts the flexibility that has been a longstanding and valued component of the Au Pair Program. It fails to account for day-to-day life and schedule changes that impact many host families with limited advance notice (less than a month ahead). For many host parents that are first responders or medical professionals, they often have to work on the weekends and do not always get their work schedules that far in advance. Furthermore, if they are required to commit to a schedule that far in advance, host families may be less likely to be flexible with their au pairs if their weekend availability changes with short notice.

Alliance Recommendation:

We recommend that the current regulations regarding time off on the weekends remain in place.

Provisions (j)(5) – (j)(5)(iii) Paid time off.

Department Proposal:

“A statement containing the following points:

- The au pair agrees to provide four weeks’ notice prior to taking paid time off.
- The host family may not dictate when the au pair takes paid time off.
- If the host family takes the au pair on a family vacation, they must pay all the au pair's room, board, and transportation costs and, although the schedule may vary, the au pair may only work the permissible number of hours.”

Alliance Response:

An au pair’s paid time off should be discussed and mutually agreed upon by the au pair and the host family in order to ensure that decisions made work best for everyone involved. It is unreasonable to restrict host families from having input into when an au pair can take their paid time off, especially considering existing factors that may impact flexibility, like children’s school schedules and breaks. Allowing for open communication and compromise in this situation is conducive to creating a positive host family and au pair relationship.

Alliance Recommendation:

We recommend that the current regulatory requirements remain in place allowing for the host family and the au pair to work together to find a mutually beneficial time for the au pair’s paid time off. Additionally, should the Department include any language regarding required provisions while on vacation, it must be clear that this is only if the au pair will be required to provide childcare during the vacation. As many au pairs voluntarily join their family vacations as a guest only, this provision would not apply.

Provision (j)(6) Compensation.

Department Proposal:

“A summary of the gross compensation (i.e., not net of taxes) that the host family will pay the au pair weekly. Sponsors shall require host families to identify the highest of the Federal, State, or local minimum wage on the host family application, and also require host families to notify the sponsor if there is a change to the Federal, State, or local minimum wage during the au pair's program, and if necessary, initiate an updated Host Family Agreement under the compensation paragraph.”

Alliance Response:

Requiring host families to identify and monitor federal, state, and local minimum wage laws is an undue administrative burden that will result in many families leaving the program. Families with young children who participate in and value the Au Pair Program likely do not have time to monitor minimum wage laws and if asked to do so, will seek other childcare options that are not as imposing.

In its survey, McDermott Will & Emery asked host families if requirements such as staying up to date on state and local minimum wage and overtime laws and tracking an au pair's childcare hours for purposes of knowing when to compensate him or her for overtime under state and local law would discourage them from participating in the program. **90.76% said yes, it would discourage them from participating, with another 7.64% saying probably yes.**

Furthermore, by not indicating federal preemption for the stipend and tying it to the highest minimum wage in any given locality, the NPRM regulates the Au Pair Program as a domestic labor program and not a cultural exchange program.

Alliance Recommendation:

The Department should not utilize its proposal of a four-tiered structure tied to minimum wage, or any non-uniform stipend structure tied to minimum wage. Instead, it should include a clear statement of federal preemption regarding the stipend and retain a uniform stipend structure that has served the program well for nearly 40 years. Our recommendation for an increased and uniform structure can be found earlier in this letter.

Provision (j)(7) Hours of child care.

Department Proposal:

“A statement that the au pair's obligation is limited to no more than ten hours per day and no more than 31 or 40 hours per week, depending upon whether the au pair is on a part-time or full-time program, and that overtime is not permitted except in exigent circumstances.”

Alliance Response:

As mentioned above in section (a), the introduction of a part-time and full-time program structure, as well as the reduction of the maximum number of hours in the full-time program from 45 to 40 per week, adds another difficulty for many host families. This change does not recognize that many host parents who work 40 hours per week also have commutes to and from their workplace that necessitate the additional five hours. Without those five hours, families may have to resort to overtime, which according to the NPRM would not be permitted except in limited circumstances.

The distinction between a part-time and full-time program also creates unnecessary added complexity due to the amount of additional documentation that is required between the host family and the sponsor to ensure that the hour requirements are being met each week.

Alliance Recommendation:

We recommend retaining the current structure that allows for a maximum of 45 hours per week, as well as EduCare as an option for families who need care for less than 30 hours per week.

Provision (j)(8) Excess hours.

Department Proposal:

“A statement that host families must report within five calendar days child care hours in excess of program limits with an accompanying explanation of the exigent circumstances.”

Alliance Response:

As noted above in section (i)(2)(iii), the requirement to report excess childcare hours to the sponsor within five calendar days is another example of an overreaching administrative burden on the host family, which also treats the sponsor as a joint employer.

Alliance Recommendation:

We recommend that this requirement should be removed. Sponsors can conduct monthly compliance checks and document excess hours during that time.

Provision (j)(10) Room and Board.

Department Proposal:

“Identify the number of days per week, including weekends, that the host family will provide lodging and meals.”

Alliance Response:

This tracking of room and board as privileges in a host family agreement will create a transactional employer-employee relationship between the au pair and their host family, which runs counter to the goals of the program. The au pair is entitled to room and board as a key cultural exchange component of the program and helps them feel more like a member of the family. But if these are, instead, considered privileges which are required to be tracked and only given to the au pair on certain days, it creates a transactional environment rather than a familial one. This practice also creates uncertainty around what counts as a meal vs. a snack, whether the family can invite the au pair out to dinner with them, etc. Most importantly, if room and board are not provided every day, it creates a need for au pairs to find additional lodging/food elsewhere, which could have significant repercussions on their health, safety, and welfare.

Alliance Recommendation:

Room and board should be fully provided without tracking by the family. This provision in the host family agreement should be removed and the current regulations around room and board requirements should remain in place.

Provision (j)(11) In-kind benefits.

Department Proposal:

“A list of in-kind benefits (e.g., cell phone, gym membership, car for personal use) the host family will provide the au pair, including charges for such benefits, if applicable and if the au pair wishes to avail themselves of such benefits.”

Alliance Response:

This provision provides another example of how this proposed rule is limiting flexibility in the host family and au pair relationship and wrongfully inserting the sponsor as a joint employer. The in-kind benefits that a family provides an au pair may change over time. For example, the family may gain or cancel a gym membership, but such a minimal change does not warrant revising the written Host Family Agreement and having it approved by a sponsor. If this provision is enacted, however, that type of scenario would be required by the regulations.

Alliance Recommendation:

This provision should be removed, and the current practices around in-kind benefits documentation should be maintained.

Provision (j)(14) Changes to the Host Family Agreement.

Department Proposal:

“Sponsors must approve any changes to the Host Family Agreement and maintain written documentation with both parties’ signatures to effect such changes.”

Alliance Response:

If the sponsor is required to approve all changes to many of the provisions included in this proposed Host Family Agreement, like weekly schedule, room and board days, in-kind benefits, etc., they would be acting as a joint employer. This is not the sponsor’s role and to have them act as such is inappropriate and unduly burdensome.

Alliance Recommendation:

This requirement should be removed to ensure the sponsor is not treated as a joint employer.

§62.31(k) Au pair limitations and protections

Provision (k)(1)(ii)

Department Proposal:

“[Sponsors shall require that] At a minimum, host families must give au pairs an uninterrupted eight-hour period of rest per every 24 hours to ensure adequate sleep and time away from duty.”

Alliance Response:

This provision is unclear in that it presents questions as to what the work hour limitation is for au pairs. It could easily be misinterpreted to contradict the earlier section (j)(7), as well as the current regulations, which limit the au pair to ten working hours a day.

Alliance Recommendation:

To ensure clarity and proper compliance, the current regulatory requirements limiting work hours should be maintained.

Provision (k)(1)(iv)

Department Proposal:

“At a minimum, host families must give au pairs 56 hours of paid sick leave for a 12-month program and a pro-rated number of sick leave hours for program extensions shorter than 12 months. If the need for sick leave is foreseeable, the request should be made seven days in advance. If the need for sick leave is not foreseeable, the au pair should request leave as soon as practicable after becoming aware of the need for leave.”

Alliance Response:

This proposal aids in creating a transactional employer-employee relationship between the host family and au pair, rather than a familial one that is a traditional benefit of the Au Pair Program. Under the current regulations, when au pairs are sick, they are still entitled to their full stipend, even without codified sick leave. In fact, host families are understanding and typically help take care of their au pairs when they are ill or injured as they would another member of their family. For example, during the pandemic, many host families helped take care of their au pairs while they were sick for extended periods of time. However, in introducing a strict number of paid sick leave days, host families will likely not see themselves as a caretaker/host mom or dad, but a manager, which may lead to reduced understanding or flexibility. Additionally, the proposal does not clarify whether time beyond the 56 hours taken for sick leave would be unpaid. If they are, this proposal would leave au pairs worse off in this regard and would seemingly undermine the requirement that au pairs get paid for each and every week of their active term in the United States.

Alliance Recommendation:

We recommend retaining the current regulations and practice on this topic, allowing au pairs to receive their stipend regardless of whether they are sick or not.

Provision (k)(1)(v)

Department Proposal:

“At a minimum, host families must give au pair 80 hours (e.g., the equivalent of ten working days) of paid time off prior to the completion of a 12-month program, at the au pair’s request. The host family must permit the au pair to take 40 hours of such leave in conjunction with a 36- or 48-hour weekend. Host families may not dictate when au pairs may take paid time off. If they take the au pair on a family vacation, they may not subtract any time off from the au pair’s 80 hours leave time.”

Alliance Response:

As mentioned earlier in section (j)(5) – (j)(5)(iii), it is unreasonable and unfair to not allow host families to have input into when an au pair takes their paid time off. As with other working arrangements, paid time off should be an open discussion between both the au pair and the host family to determine a decision that works best for everyone involved. This requirement could create tension between au pairs and their host families and thus, hinder the development of a positive relationship built on open communication.

Alliance Recommendation:

We recommend that the current regulatory requirements remain in place allowing for the host family and the au pair to work together to find a mutually beneficial time for the au pair's paid time off.

§62.31(l) Rematch.

Department Proposal:

“Irreconcilable differences between a host family and au pair require that the au pair be removed from the host family home. The sponsor must report these instances to the Department of State within the next business day and pursuant to reporting requirements at paragraph (r)(2) of this section.”

Alliance Response:

This provision adds an unnecessary requirement of reporting a rematch within the next business day, which is a time restriction that is unduly burdensome to the sponsor. This administrative burden will impact sponsor staff capacity and increase their costs to mitigate that challenge.

Alliance Recommendation:

The current regulations regarding reporting a rematch should be maintained. Sponsors should continue to refer to the reporting rubric regularly updated and reissued by the Department of State to confirm their reporting obligations.

Provision (l)(4)

Department Proposal:

“Au pairs that have completed 75 percent of their initial program or are on six-, nine-, or 12-month extensions may not request a rematch and are not entitled to any refund of fees paid.”

Alliance Response:

The proposed provision preventing au pairs from rematching after their ninth month or during an extension period poses a significant safety concern. By restricting their ability to seek new placements, au pairs may be discouraged from reporting problems or concerns they encounter, which could negatively impact their cultural exchange experience. In extreme cases, this disincentive to raise issues could lead to situations where au pairs endure unsafe conditions rather than risk losing their placement altogether. Such a policy not only undermines the well-being of the au pairs but also jeopardizes the overall integrity and safety of the program.

Alliance Recommendation:

Sponsors should continue to be permitted to consider and approve all rematch requests on a case-by-case basis, at any time during the program. Rematches should not be subject to, or limited by, an arbitrary timeline.

Provision (l)(5)

Department Proposal:

“If the sponsor is unable to find a suitable rematch for the au pair, the sponsor must refund the following percentages of all fees they charged the au pair to participate in the program, as well as a percentage of the return trip ticket, based on the portion of the program duration the au pair completed before leaving the host family's home: (i) Less than 25% of the initial program duration: 75%. (ii) Between 25–49% of the initial program duration: 50%. (iii) Between 50–75% of the initial program duration: 25%. (iv) Over 75% of the program duration: 0%.”

Alliance Response:

The policy underpinning this provision is incredibly subjective. Being “unable to find a suitable rematch” can be interpreted in several ways, which creates uncertainty in its application. This refund policy also does not consider the upfront costs associated with bringing an au pair into the program, such as medical insurance, costs to the LC for in-person meetings, etc. There are also many au pairs that do not pay for their return airline ticket because either the sponsor or the host family provides it. In those cases, it is not fair if they are able to recoup part of that expense when they return home early.

Alliance Recommendation:

We recommend that this provision be removed. Instead, sponsors should have the discretion to set their own refund policies and outline them clearly to potential au pairs. Au pairs can then choose to participate with the sponsor that best suits their interests.

§62.31(m) Hours.

Provision (m)(1)(i)

Department Proposal:

“Either be identified as a part time program providing 24–31 hours of child care per week, or identified as a full-time program providing 32–40 hours of child care per week;”

Alliance Response:

As discussed earlier in this letter (pg. 14-15), the part-time and full-time program structure, instead of a maximum number of permitted hours, limits flexibility, increases administrative

complexity, and helps to transform a cultural exchange program into a labor program. Additionally, reducing the maximum number of hours to 40 will negatively impact host parents who work outside the home and need the extra five hours of commute time.

Alliance Recommendation:

We recommend retaining the current structure that allows for a maximum of 45 hours per week, as well as EduCare as an option for families who need care for less than 30 hours per week.

Provision (m)(2)(iii)

Department Proposal:

“[Hours providing child care is defined as follows...] Time spent at the required family day conference.”

Alliance Response:

This proposal adds another burden on the host family and in turn, may potentially discourage attendance at the family day conference.

Alliance Recommendation:

We recommend that time spent at the family day conference should not be categorized as hours providing childcare, as in the current regulations.

Provisions (m)(4) - (m)(4)(i)

Department Proposal:

“When an au pair is required to work overnight hours: The au pairs’ regular work schedules may not include providing child care between 11 p.m. and 5 a.m., unless exigent circumstances arise, in which case the au pair may work these hours for no more than three consecutive nights;”

Alliance Response:

This restriction would exclude many essential workers on shift schedules, like those in healthcare and first responders, from participating as host families. Many of these host families value the Au Pair Program for this reason, as it can be difficult to find overnight childcare arrangements. Au pairs also value these types of work schedule arrangements as most responsibilities during this window are limited to being present in case of emergency and it leaves the daytime hours free, which they can use for a variety of pursuits including fulfilling the educational component.

Alliance Recommendation:

This provision should be removed and au pairs should continue to be permitted to engage in overnight work, as appropriately agreed upon with the host family and within the existing daily and weekly hours maximum.

Provision (m)(5)

Department Proposal:

“If the host family and au pair agree to change the number or schedule of child-care hours due to extenuating circumstances (e.g., a reduction or change in hours to facilitate the au pair's pursuit of the educational component), sponsors must ensure that they modify and re-execute the Host Family Agreement.”

Alliance Response:

Sponsors should not have to approve a new host family agreement due to a change in hours and/or schedule, which host families and au pairs have successfully managed for the history of the program. Doing so will be unduly burdensome on staff capacity and create a cumbersome back and forth, while instituting a precedent of sponsors as joint employers, which is not accurate or appropriate.

Alliance Recommendation:

This provision should be removed.

Provisions (m)(6) – (m)(6)(ii)

Department Proposal:

“Sponsors shall develop and implement written standard operational procedures to track and document the weekly compensation in conformance with paragraphs (n)(1) and (2) of this section, and to ensure that: Host families create a written weekly document signed by the host family and the au pair (in wet ink or using electronic signature) detailing the number of hours and days of provided child care that week, the number of hours used as the required time off, the total amount of compensation paid to the au pair for that week, any room and board deductions taken, any paid time off or sick leave used, if applicable; and Host families provide copies of the signed document to the au pair each week, and sponsors must collect and review the documents each month.”

Alliance Response:

This provision is not only burdensome to all parties involved, but also incorrectly assigns the sponsor as a joint employer due to their new responsibility over the process host families use to track compensation. Additionally, this stringent tracking of hours, room and board deductions,

sick leave, etc., will create an environment more like a work site than a home and thus, a more transactional employer-employee relationship between the au pair and their host family.

Alliance Recommendation:

We recommend that this provision be removed, as it runs counter to the goals of the program.

§62.31(n) Compensation.

Sponsors must ensure that:

Provision (n)(1)

Department Proposal:

“Host families compensate au pairs on a weekly basis based on the maximum number of child care hours of the au pair program and for any hours worked in excess of that maximum number and keep a document as set forth in paragraph (m)(6) of this section. Weekly payments shall be deposited directly into a bank account held in the au pair's name.”

Alliance Response:

This provision is problematic in that it requires host families to compensate their au pair for the maximum number of hours depending on their program type, regardless of actual hours worked. If host families are required to pay the maximum number of hours regardless, then it is arbitrary to change the program from a maximum number of hours with a uniform stipend to a part-time vs. full-time program structure with an hourly pay rate. In fact, this situation offers an incentive for families who require between 30-35 hours of childcare per week to sign up for a part-time program and use overtime pay to compensate the au pair for hours actually worked, which is counter to the Department’s aim of lessening the use of overtime. Additionally, as discussed above, sponsors should not have to collect and review the time sheets referenced in this section and (m)(6), as they are not a joint employer.

Alliance Recommendation:

We recommend retaining a uniform stipend structure rather than the proposed structure tied to an hourly rate. Please see pgs. 13-14 of this comment letter for more details on our recommended stipend formula.

Provision (n)(2)

Department Proposal:

“Host families are permitted to deduct room and board expenses as set forth under the Fair Labor Standards Act and agreed upon in the Host Family Agreement. Credits for room and board may be taken only when the employee actually receives the lodging and meals. The following

amounts are permissible credits under the FLSA towards an au pair's wages for meals actually provided: \$2.72 for a breakfast, \$3.63 for a lunch, and \$4.53 for a dinner (or \$10.88 per day if all meals are provided). The following amount is a permissible credit under the FLSA towards an au pair's wages for lodging actually provided: \$54.38 per week. The total permissible credit towards an au pair's wages per week for a full seven days of room and board actually provided is \$130.54 (7 times \$10.88 equals \$76.16 for a full week of meals plus \$54.38 for a full week of lodging). The permissible credit does not change based on the tier wage level at which the au pair is compensated.”

Alliance Response:

This proposal is extremely problematic for a variety of reasons:

First, this proposal—without explanation—sets a nationwide limit to host families’ room-and-board deductions based on the federal minimum wage (i.e., “the permissible credit does not change based on the tier wage level”), even though most host families would calculate their au pair’s stipend based on much higher minimum wage rates. The Department is giving no consideration to cost-of-living differences among host families. The deduction does not remotely account for cost of living where au pairs are most common, such as in California and New York.

Second, the stipulation that deductions for room and board may be taken only when the “employee actually receives the lodging and meals” ignores the cultural exchange hosting aspect of this program and treats the au pairs purely as employees. This provision’s use of the term “employee” instead of “participant” or “au pair” highlights that the proposed regulations would have the negative effect of shifting the Au Pair Program from a cultural exchange to a domestic labor program.

Third, related to the above, the idea that deductions for food only apply to meals actually received creates two problems: one, it sets up an ongoing issue of determining what exactly is “a meal” (Does it include the cup of coffee drank in the morning? The snack grabbed at midday?) and two, it creates an unintended incentive for au pairs to skip meals. This approach not only neglects a vital cultural component of the au pair program, where shared meals can foster familial bonds and cultural exchange, but it also risks incentivizing unhealthy eating habits. By providing a monetary benefit for au pairs to forgo meals to avoid deductions, the provision inadvertently undermines their health and well-being. This oversight could lead to negative health outcomes and detract from the enriching experience the program is meant to offer.

Fourth, and similar to the issue of meals, au pairs could seek to avoid the housing deduction by removing themselves from the home for extended periods of time to live with friends or acquaintances. This also undermines the hosting aspect of the cultural exchange program and decreases the safety of the participant.

And finally, it is important to note that host families bear the majority of au pairs' expenses that are subject to cost-of-living differences, including room, board, and other benefits like transportation, insurance, and mobile phones. However, unlike the au pairs' stipend calculation, that cost differential is not reflected in the nationwide limit to host families' deduction, which is based on federal minimum wage. This will limit the number of extras that host families can provide to the au pair, like bonuses, inclusion on vacations, car for personal use, etc., or make the program unaffordable altogether.

Alliance Recommendation:

This provision should be removed entirely and the current 40% standard deduction should be retained.

Provision (n)(3)

Department Proposal:

“Host families are permitted to deduct from au pair’s pay any cost of in-kind benefits that are agreed upon in the Host Family Agreement. The host family may charge the au pair for such benefits if the au pair agrees to the charge and the host family does not profit from the amount charged. The host family may not, however, deduct from the au pair's wages items that are primarily for the benefit or convenience of the host family or sponsor, nor may the host family require the au pair to reimburse the host family in cash for the cost of such items in lieu of deducting the cost from the au pair's wages. The host family may charge the au pair for such benefits only if the in-kind benefit is truly for the benefit of the au pair, the au pair agrees to the charge, and the host family does not profit from the amount charged. Sponsors must ensure that the host family does not charge the au pair if the host family requires the au pair to accept any of the benefits (such as a cell phone so that the family may reach the au pair);”

Alliance Response:

The in-kind benefits referenced in this provision are considered cultural exchange elements, which host families provide by choice. To include these as deductions from the au pair’s pay would diminish the role of the au pair from a member of the family to a domestic worker, as well as reorient the host family’s motivation in providing these extras from an act of generosity or welcoming to a self-serving deduction. This will lead to a more transactional employer-employee relationship, countering the goals of the Au Pair Program. Additionally, these types of in-kind benefits are not tracked or overseen by the sponsor as they are not joint employers, which the provision’s language about “convenience of the host family or sponsor” seems to suggest.

Alliance Recommendation:

This provision should be removed and the current practice regarding in-kind benefits should be maintained.

Provisions (n)(4) – (n)(4)(iv)

Department Proposal:

“The hourly rate of compensation is based on a multi-tiered system. The sponsor must first identify the highest of the Federal, State, or local minimum wage rate that applies to the jurisdiction in which the host family’s primary residence is located; The sponsor then determines the hourly rate the host family must pay the au pair based on the tier in which the rate identified falls in the following table:

Table 1—Proposed Compensation Tiered Chart

	Based upon the host family city, the highest of federal, state, or local minimum wage	Au pair receives
Tier 1	\$7.25–\$8.00 per hour	\$8 per hour.
Tier 2	\$8.01–\$12.00 per hour	\$12 per hour.
Tier 3	\$12.01–\$15.00 per hour	\$15 per hour.
Tier 4	\$15.01–\$18.00 per hour	\$18 per hour.*
* Or the applicable federal, state, or local minimum hourly wage, if higher.		

The au pair receives the maximum amount of the identified tier, or the highest of the applicable Federal, State, or local minimum wage if higher. When part-time au pairs work more than 31 hours in a week regardless of the reason but not more than 40 hours, they shall be compensated for those excess hours at the hourly rate of the applicable tier identified in paragraph (n)(4)(ii) of this section or the highest of the applicable Federal, State, or local minimum wage if higher. When part-time or full-time au pairs work over 40 hours in a week regardless of the reason, they shall be compensated for those excess hours at the hourly rate of the applicable tier identified in paragraph (n)(4)(ii) of this section or the highest of the applicable Federal, State, or local minimum wage if higher, and they must also be paid any overtime premium due under applicable Federal, State, or local law. In addition, au pairs must be paid any other overtime premiums due under applicable Federal, State, or local law for other hours worked.”

Alliance Response:

As discussed earlier in this comment, while we believe that the stipend for au pairs should be increased in a uniform and reasonable manner, this proposal to adjust the au pair stipend

according to a four-tier system based on state and local minimum wage laws will make the program prohibitively expensive for most host families and significantly reduce participation by host families, which will consequently shrink the program for au pairs as well. For details and data on the costs and their impact, see pgs. 7-8 of this letter. Additionally, this tier system creates an incentive for au pairs to only want to be placed in a limited number of states/localities where the stipend would be the greatest. To this point, this pay structure would disproportionately disincentivize au pairs from matching with host families in Tier I locations as the stipend would be lower than it is currently in those areas. The proposed tiered compensation structure negatively impacts the diversity of the program and au pairs' diversity of cultural experiences, while reducing the benefits of having an au pair for American families in the lower tiers.

Alliance Recommendation:

The Department should not utilize its proposal of a four-tiered structure, or any non-uniform stipend structure. Instead, it should retain the current uniform stipend structure that has been a hallmark of the program and served it well for nearly 40 years. Our detailed recommendation for an increased and uniform structure can be found earlier on pgs. 13-14 of this letter.

Provision (n)(4)(v)

Department Proposal:

“The Department of State will periodically, but no less than every three years (or at any shorter interval that is desirable and feasible), update the hourly pay rates in the chart in paragraph (n)(4)(ii) of this section via Notice, in the Federal Register, in response to changes in economic conditions. The required change will be accomplished by adjusting the upper range of each tier by an identical amount each update cycle. Although the Department of State will strive to increase the hourly pay rates in the chart to keep up with the highest applicable minimum wage, if an au pair resides in a jurisdiction that has a minimum wage that is higher than the upper range of Tier 4, the au pair shall be paid at that higher minimum wage rate regardless of the rate in Tier 4.”

Alliance Response:

This provision demonstrates that instituting a tiered stipend structure that is tied to different minimum wage rates around the country is unnecessarily complicated. The Department indicates that it will attempt to keep up with the highest minimum wage, but if there is any jurisdiction that exceeds the highest tier, the au pair should be paid the higher wage rate regardless of the Tier IV rate. This is overly burdensome for a host family, not only in that it will be prohibitively expensive for many, but also in the sense of the administrative responsibility put on families to monitor changes with the minimum wage rate in any given locality, which may be different from the state minimum wage or even a neighboring municipality.

Alliance Recommendation:

We recommend that the Department maintains a minimum uniform stipend amount and that it be raised to keep pace with inflation via the same calculation we outlined earlier (pgs. 13-14) every three years.

§62.31(o) Educational component.

“A sponsor must ensure that au pairs complete one of the following four educational component options during an initial, extended, or rematched program:”

Provision (o)(1)(i)

Department Proposal:

“For the initial twelve-month program and for a nine- or twelve-month extension, an au pair must pass or formally audit academic coursework equivalent to three semester classes (nine semester hours or their equivalent).”

Alliance Response:

The expanded coursework requirement of nine semester hours will increase the educational burden on au pairs, which may make it difficult for them to balance all their obligations and pursuits, including their work schedule, time spent with their host family, classes and schoolwork, and free time for personal endeavors.

Alliance Recommendation:

We recommend retaining the current regulations’ requirement of six semester hours for the academic coursework option.

Provision (o)(1)(i)(B)

Department Proposal:

“This coursework must be spread over two semesters or equivalent.”

Alliance Response:

Au pairs should have discretion over when they take the credits for their educational component, provided that it is within their initial period of program participation. This requirement limits the flexibility of the program for au pairs.

Alliance Recommendation:

We recommend that instead of requiring the coursework to be spread over two semesters, the regulations should allow for the au pair to complete the required credits by the end of the program year as in the current regulations.

Provision (o)(5) Incomplete Educational Component.

Department Proposal:

“Au pairs that do not successfully complete the educational component of an initial placement are not eligible for an extension or to repeat the program.”

Alliance Response:

This provision does not recognize that au pairs who are non-native English speakers may face challenges when taking a class at a U.S. college or university that could impact their ability to fully complete the educational component by the end of their program year. With that in mind, as long as these au pairs have attended courses and have made an effort to complete the educational component, they should not be penalized and automatically rendered ineligible for the extension program.

Alliance Recommendation:

We recommend that an au pair’s incomplete educational component be reviewed on a case-by-case basis when determining their eligibility for an extension.

Provision (o)(6) Education allowance.

Department Proposal:

“Sponsors must ensure that host families pay directly to the au pair or the academic or continuing education institutions and present evidence of payment to their local coordinator and the au pair, towards actual and documentable course-related or community service costs necessary for the au pair to fulfill the program's educational requirements, up to \$1,200 for a twelve-month program and an additional \$1,200 for a nine or 12-month program extension, or up to an additional \$600 for a six month program extension.”

Alliance Response:

As discussed earlier in this letter on pgs. 14-15, we support raising the host family educational allowance contribution. However, given the increase in the other costs mentioned in this proposed rule for host families, this proposed allowance of \$1,200 will be another factor in making the program inaccessible to many American families.

Alliance Recommendation:

We recommend increasing the host family educational allowance contribution by 50%, up to \$750 for a 12-month placement and an additional \$750 for a year-long extension, or up to an additional \$375 for a six-month program extension.

§62.31(q) Duration and extensions.

Provision (q)(2)

Department Proposal:

“The Department of State, in its sole discretion, may approve a one-time extension to stay with the current host family for a duration of six, nine, or 12 months for an au pair beyond the initial program period if the au pair still meets all eligibility requirements. Sponsors must submit applications and supporting materials for such extensions no less than 30 calendar days prior to the program end date listed on the au pair's Form DS-2019.”

Alliance Response:

Approximately 30% of au pairs choose to match with a new family during their extension year. This may be to experience a new part of the U.S. and a different aspect of American culture or may be due to the host family's decision to leave the program. There is nothing inherently problematic with extending with a new host family, so prohibiting this option seems arbitrary. Additionally, not allowing au pairs who wish to stay for a second year to extend with a new family or to rematch during their extension year speaks to many of the same safety concerns referenced above in section (l)(4).

Alliance Recommendation:

The extension process should remain as it is in the current regulations in which an au pair can extend with their current host family or a new family.

§62.31(r) Reporting requirements.

Provision (r)(2)

Department Proposal:

“In addition to § 62.13(d), report within the next business day to the Department of State any incident or allegation involving the actual or alleged sexual harassment, exploitation or any other form of abuse, or rematch of an au pair;”

Alliance Response:

As discussed in section (l), the requirement for sponsors to report a rematch within the next business day is an undue administrative burden. SEVIS requires that sponsors update the physical site of activity within ten days, which should be a sufficient amount of time for rematch reporting as well.

Alliance Recommendation:

We recommend keeping the current regulations on reporting a rematch.

§62.31(t) Relationship to state and local laws.

Provisions (t)(1) – (t)(2)

Department Proposal:

“In order to ensure nationwide consistency and coherent implementation of the Au pair category of the Exchange Visitor Program, the regulations in this section provide the exclusive requirements applicable to sponsors, host families and au pairs on the matters, and may not be supplemented by state or local law except as provided in paragraph (t)(3) of this section: Au pair selection. Au pair placement. Hours and compensation. Unemployment insurance taxes and employment training taxes. Minimum time off and paid time off and sick leave; and Educational component. In addition to the matters listed in paragraph (t)(1) of this section, the regulatory framework provided under this section shall preempt any state or local law that, in the Department of State's view, otherwise poses an obstacle to the realization of the objectives of the Au pair category of the Exchange Visitor Program except as provided in paragraph (t)(3) of this section. Sexual harassment and retaliation laws shall not be deemed to pose an obstacle to the realization of the objectives of the Au pair category.”

Alliance Response:

As discussed earlier in our comment (pgs. 5-6), this section does not clearly or sufficiently provide a statement of preemption that reiterates and clarifies that the Department has exclusive regulatory authority over the program's terms and conditions. It suggests but does not expressly state that the current federal regulations preempt state and local labor laws as to the program's terms and conditions, and then specifies a complex partial preemption approach prospectively after an implementation period. But this prospective preemption language is inconsistent and incomplete, confirming the preemptive scope of the federal regulations in some but not all-important programmatic areas. In particular, this proposal does not state that the Department's regulations preempt state law that would treat au pairs as “employees” or sponsors as “employers,” including local wage and hour laws as to an au pair's compensation; in fact, it does the opposite.

Alliance Recommendation:

It is necessary that the proposed rule be amended to include an express, clarifying statement of federal preemption as to the program's terms and conditions, including those related to wage and hour laws that would otherwise seek to regulate au pair compensation.

Provision (t)(3)

Department Proposal:

“Notwithstanding the foregoing, state and local minimum wage and overtime pay requirements shall apply to au pairs where applicable and shall not be deemed to be an obstacle to the realization of the objectives of the Au pair category of the Exchange Visitor Program.”

Alliance Response:

Rather than clarifying the impact (or lack thereof) of federal preemption on state and local minimum wage laws, this provision adds even more confusion for sponsors and host families when interpreting an already convoluted proposed tiered compensation system. By noting that these laws are not to be preempted by federal regulations and shall apply to au pairs **where applicable**, this raises compensation questions for host families living in states where state and local minimum wage laws have special considerations, like those for small employers in New Jersey, Michigan, and Ohio. This language also seems to contradict provision (n)(4)(i) where it is outlined that the highest minimum wage rate must be applied in all cases. In addition to increasing uncertainty, this partial preemption strategy that excludes state and local minimum wage laws will greatly increase the costs and administrative burden for host families. This in turn will force many to leave the Au Pair Program and harm the public diplomacy objectives of the program, which directly counters the final assertion in this provision.

Alliance Recommendation:

Please see recommendation regarding section (t)(1) – (t)(2) above.

VI. Conclusion

We welcome strong federal regulations, as they have been a foundation of the Au Pair Program’s success for nearly 40 years. We further welcome an update to the current regulations that is narrowly tailored and focuses on the core issues of federal preemption, a reasonable increase to the federally uniform stipend, and an update to the educational component.

As demonstrated throughout this letter, if enacted, this NPRM would turn an international educational and cultural exchange program with nearly 40 years of success into a domestic labor program, dramatically damaging and leading to the functional end of the Au Pair Program in its current form.

We urge the Department to not finalize this proposed rule, but instead to work with the au pair exchange community to revise the current and successful regulations for the good of the program. We hope to work closely with the Department on this effort in order to keep the Au Pair Program



strong and allow it to continue as a key component of U.S. foreign policy for another 40 years and more.

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark Overmann", with a long, sweeping horizontal line extending to the right.

Mark Overmann
Executive Director
movermann@alliance-exchange.org