Independent® Women's Forum

Department of State
Attention: Karen Ward
2200 C Street NW
Washington, DC 20522

Re: Independent Women's Forum Comments on Proposed Rule Concerning Au Pair Program (RIN 1400-AF12)

Dear Ms. Ward,

IWF appreciates the opportunity to comment on the Department of State's proposed rulemaking to amend its regulations concerning the Exchange Visitor Program for au pairs. IWF is the leading national women's organization dedicated to developing and advancing policies that are more than just well-intended, but enhance people's freedom, opportunities, and well-being. As a 501(c)(3) non-profit organization, IWF works every day to engage and inform women about how policy issues impact them and their loved ones.

IWF is committed to advancing realistic, common-sense policy solutions that support women. As it currently exists, the au pair program is precisely such a solution. Over 20,000 American families host a foreign au pair each year, and the program is a win-win for all involved: Families receive flexible, in-home childcare and au pairs have a unique and valuable opportunity to experience American culture and improve their English. For many of these families, particularly those with multiple children, the au pair program is the most affordable childcare option available.

Unfortunately, the proposed regulations would devastate this popular program. As the NPRM acknowledges, the proposed regulations would increase the average host family's costs by *approximately $10,700 per year*. In return, host families would receive less childcare coverage, less flexibility, and onerous paperwork burdens.

IWF understands that the Department may not care about the harms its proposed rule would inflict on American families—the NPRM repeatedly emphasizes that the Department's focus is on diplomacy and not on helping American families—but the Department fails to recognize that in this case the two aims go hand in hand. By rendering the au pair program a substantially less attractive childcare option, far fewer families would agree to host au pairs. Indeed, as discussed below, when a watered-down version of the proposed rule was mandated in Massachusetts by a judicial decision, program participation plummeted approximately 70%.

If the proposed rule is adopted, the au pair program would no longer be a "world class U.S. public diplomacy initiative," but a hollow shell of its former self, to the detriment of American families and the au pairs who would be denied this valuable experience. IWF strongly encourages the Department to abandon the components of the proposed regulations that would impose additional costs and burdens on American families.

I. The Proposed Rule Entails Substantial Costs and Only Speculative Benefits

The Department's current au pair program is, in general, working wonderfully.1 As the NPRM acknowledges, "[b]oth Department of State and sponsor surveys indicate broad satisfaction with the au pair program among current au pairs and alumni. Most au pairs return home with positive memories and long-lasting friendships." 88 Fed. Reg. 74071, 74076 (Oct. 30, 2023). By endeavoring to fix something that is not broken, the proposed rule would impose substantial costs on American families and offer at best only minimal and speculative benefits.

A. The Substantial Costs the Proposed Rule Imposes on American Families

The proposed rule engages in a wholesale rewriting of a beloved federal program. It is difficult to catalog all of the problems that will be caused by the Department's upending of decades of practice with scant thought to the consequences, but below IWF identifies some of the most significant harms.

1. The proposed rule would eliminate an affordable childcare option for tens of thousands of families

The NPRM admits that the proposed rule would make it substantially more expensive for American families to host an au pair. The proposed rule would increase the cost of the educational stipend from $500 to $1,200 per year. More significantly, the proposed rule would increase the weekly stipend from $195 per week to up to approximately $680 per week, depending on location. Based on the Department's own figures, the proposed rule would require the average host family to pay approximately ***$10,700 more per*** year to host an au pair, and it would cost some unfortunate families over ***$20,000 more per year***.

The Department admits that this cost increase would make the au pair program unaffordable for many American families. The NPRM repeatedly notes:

- "[M]ore Americans and potential au pairs may forego the cultural exchange opportunities available through the au pair program." 88 Fed. Reg. at 74077.
- "[S]ome host families may not be able to afford an au pair and may be priced out of the program." *Id.* at 74078.
- "[T]his rulemaking may decrease the number of au pairs participating in sponsor programs." *Id.* at 74083.
- "The effects on host families will include paying more than twice as much in au pair compensation as they currently do in some localities." *Id.* at 74083.

1 The NPRM identifies one area in which the current regulations might be improved: the regulations would benefit from a provision expressly preempting state and local laws. The possibility of enacting a final rule that adopts only an express preemption provision is discussed below.

- "Some host families may choose not to extend their au pair's program as a result." *Id.*
- "[T]he increased costs and transfers, especially associated with compensation and educational expenses, could result in a decline in host families in the au pair program. Host families in regions with higher minimum wage rates may seek alternative child care options if the compensation costs outweigh the benefit of a cultural exchange program for their family. This may also result in a reduction of au pairs annually coming to the United States on a J visa." *Id.* at 74088.

The harm to American families entailed by the proposed rule is so obvious that little more needs to be said. But four additional points bear noting.

First, the NPRM states that "[t]he number of families interested in the au pair program may decline as families may turn to other child care options." 88 Fed. Reg. at 74077. But the NPRM fails to recognize that for many families the au pair program *is* the most affordable childcare option. The current average monthly cost to host an au pair is about $1,800 per month, plus incidental expenses such as car insurance, cell phone coverage, and food. Even factoring in those additional expenses, a nanny costs significantly more than an au pair. And, depending on a family's location and number of children, daycare also can cost significantly more. *See* Cultural Care Au Pair, *Au pair vs. nanny vs. daycare*, https://culturalcare.com/au-pair-vs-nanny-vs-daycare/ (last visited Nov. 17, 2023). The NPRM wholly fails to consider that these families have no other affordable childcare option to "turn to."

Second, the Department's proposed four-tiered compensation formula for the weekly stipend will create significant variation in stipend amount between geographic areas. The Department admits that "[p]rospective au pairs may only be interested in going to destinations in the United States with higher minimum wages, contributing to diminished diversity and equity in the program." 88 Fed. Reg. at 74078.2 The Department also fails to consider that families living in areas with higher minimum wages are the most likely ones to drop out of the program due to increased costs. What is more, localities with high minimum wages tend to be large metropolitan areas like New York, Washington, D.C., Los Angeles, and San Francisco, which are the most popular and sought-after cities for au pairs. It is difficult to envision any geographic area of the country in which the au pair program thrives following implementation of the proposed rule.

Third, IWF notes that "[t]he Department of State requests comment on the extent to which these increased costs and transfers may deter host families from participating in the au pair program." *Id.* at 74088. This request for comment is absurd on two levels. To start with, it is obvious that the increased costs will substantially depress participation in the program. Scholarship shows that, after a federal court required Massachusetts families to pay au pairs the state minimum wage, the number of host families participating in the au pair program in the state dropped by approximately 70%. *See* Alex Nowrasteh & Vanesa Brown Calder, Cato Working Paper No. 73, *The Minimum Wage Undermined the Au Pair Program in Massachusetts* (Mar. 17, 2023), *available at* https://www.cato.org/sites/cato.org/files/2023-03/working-paper-73.pdf. The depressive effect of the proposed rule

2 This depressive effect on participation in rural areas will be compounded by the rule's requirement that host families live within a one-hour drive of a local coordinator. Moreover, as participation drops due to the proposed rule, sponsor organizations will be required to scale back operations, leading to fewer local coordinators and thus fewer families who live within a one-hour drive from a local coordinator. In other words, the proposed rule risks a death spiral.

likely would be even worse, as it would require many families to pay wages higher than the state and local minimum wage and it would impose other costs and burdens on families beyond the wage hike.

More fundamentally, it is *the Department's burden* to analyze the impact of its proposed rule on participation, not simply to invite others to do its work. The extent to which the proposed rule would reduce participation is inextricably intertwined with the program's diplomatic mission. Without host families participating in the program, the program cannot further foreign affairs and diplomacy. The Department therefore cannot adopt a proposed rule without itself fully analyzing the magnitude of the proposed rule's depressive effect on participation and the diplomatic fallout of that effect.

Fourth, because of the vital importance of affordable, high-quality child care to our country, President Biden recently declared that "[i]t is the policy of my Administration to enable families—including our military and veteran families—to have access to affordable, high-quality care and to have support and resources as caregivers themselves," and he directed "agencies to make all efforts to improve jobs and support for caregivers, increase access to affordable care for families, and provide more care options for families." Executive Order No. 14095 of Apr. 18, 2023 (Increasing Access to High-Quality Care and Supporting Caregivers). By destroying an affordable and flexible childcare option beloved by many American families, the proposed rule would flout this Administration's stated policies.

2. *In return for increased costs, the proposed rule would offer families less childcare hours and less flexibility*

While substantially increasing the cost of hosting an au pair, the proposed rule would offer families less childcare coverage and less flexibility.

As to childcare coverage, the proposed regulations would decrease the maximum number of childcare hours an au pair can provide from 45 to 40 hours per week. This reduction is impactful not just because of the significance of the reduction—over 10%—but also because of its impact on the workability of the program for many families. The current 45-hour maximum means that the program can provide coverage for families who work 40 hours per week and commute the national average of 26 minutes each way to work. *See* Mike Schneider, Associated Press, *Commuting makes a comeback as employers try to put the pandemic in the rearview*, https://apnews.com/article/commuting-american-community-survey-census-bureau-2e09fb79db6a5a23c3e16c735cf43f2f (last visited Nov. 17, 2023).

Decreasing the maximum weekly hours to 40 means that the au pair program would no longer provide adequate childcare coverage for the typical American worker. Without any analysis or citation to authority, the NPRM dismisses this possibility, asserting that "[m]ore host families are now able to work remotely or have flexible schedules, which may reduce the time they need au pairs to provide child care." 88 Fed. Reg. at 74077. The Department's *ipse dixit* is at odds with actual data released by the Census Bureau on workers' post-pandemic schedules. *See* Schneider, *supra*. Moreover, the Department fails to consider the impact on diversity and equity that the proposed hours reduction would entail, given that remote workers with flexible schedules tend to be more privileged. *See* Greg Iacurci, CNBC, Why labor economists say the remote work 'revolution' is here to stay (Dec. 1, 2022), *available at* https://www.cnbc.com/2022/12/01/why-labor-economists-say-the-remote-work-revolution-is-here-to-stay.html. The proposed rule also would prohibit families

from regularly paying overtime to their au pair, so families needing those five extra hours would have to hire a part-time babysitter in addition to an au pair, a financial and logistical nightmare.

The proposed rule additionally would prohibit au pairs from working overnight hours, between 11pm and 5am, absent limited exigent circumstances. This means that the au pair program would be unworkable for families regularly needing overnight care, such as an ER doctor or nurse or a night manager. The NPRM offers no explanation for this change. Presumably, the Department believes that an au pair's experience would be negatively impacted by having to work overnight, but the NPRM offers no analysis or evidence to support this unstated assumption. In IWF's experience, very few if any parents who work overnight actually shift their children's schedules. In other words, a typical overnight shift for an au pair is watching children *while they are sleeping*, and the au pair can sleep as well. This counts as work hours under current regulations only because the au pair is the responsible adult in the house should an emergency arise, not because the au pair is actually actively working during the night.

The NPRM admits that "[s]ome host families (or potential host families) may require more child care hours than the new regulations would allow" and may drop out of the au pair program as a result. 88 Fed. Reg. at 74077. But, as with the increased costs imposed by the proposed regulations, the NPRM makes no attempt to estimate the magnitude of this effect and the ongoing viability of the program as a diplomatic tool in light of the proposed regulation's depressive effect on participation.

3. The proposed rule imposes onerous paperwork burdens on families

The proposed rule would impose substantial paperwork burdens on families. Among other things, the proposed rule would require families to create "Host Family Agreements" satisfying detailed requirements, and to submit revised agreements to their sponsor organization for review and pre-approval before making any changes. For example, if a family so much as wanted to shift (with the au pair's consent) an au pair's regular start time from 8:30am to 8:45am, the family would have to create and submit an amended plan for pre-approval.

The proposed rule additionally would require host families to research and identify applicable state and local minimum wage laws on their host family application and to notify their sponsor organization throughout the year of any changes in applicable law. Families also would have to maintain a weekly timesheet documenting the au pair's exact hours.

Finally, the proposed rule would require host families to keep track not only of the number of meals their au pair receives from the family each week, but also the precise cost of each meal. This is so because the proposed rule only permits host families to deduct up to $76.16 per week from the weekly stipend for meals "actually provided," and sets maximum deductions per meal (e.g., $2.72 for breakfast). How much does 1/8 of that yogurt container cost? Did the au pair put 10 or 20 raspberries on top of her yogurt for breakfast, and what percentage of the raspberry container was that (oh, and does anyone remember if those raspberries were on sale this week)? Does the 11am granola bar the au pair ate count towards the $2.72 breakfast credit, or is it an uncreditable snack? Host families will have to ask and keep track of the answer to questions like these, three times per day. This tracking is not only very burdensome for host families, it requires incredibly invasive monitoring of an au pair's eating habits, which is often a sensitive issue for the mostly young and female au pair population.

To simply explain the proposed rule's onerous paperwork requirements is to refute them. The NPRM estimates that the timesheet requirement alone will require about 13 hours per year of work, representing an economic cost of over $400 for each family. *See* 88 Fed. Reg. at 74090. And the NPRM doesn't even begin to assess the costs of the other burdens addressed in this section, notwithstanding the Department's duty to evaluate those costs. The NPRM further fails to identify any benefit to imposing these requirements. Are there widespread violations of the hours requirements under the current program? Is there any realistic chance that the cost of providing food for an au pair over the course of a week doesn't add up to $76? The paperwork requirements appear to be solutions in want of a problem.

Moreover, requiring such bean-counting threatens to undermine the familial relationship between host families and au pairs. For example, by requiring host families to assess the exact cost of each meal, and to deduct only an (absurdly low) maximum amount for each meal, the rule encourages host families to focus on the costs of an au pair's food in a way that is entirely foreign to families under the current program. If a host family is only allowed a $4.53 credit for dinner, for example, how many families will start offering their au pair chicken while they eat steak? How many fewer families will invite their au pair to join them for a family meal at a restaurant? Even more fundamentally, this mindset shift threatens to undermine the au pair's cultural experience and the diplomatic mission of the program. In IWF's experience, au pairs enjoy being treated as members of the family and do not want to be seen as mere employees. This familial integration is critical to the cultural engagement that fuels the program.

4. The negative effects of the proposed rule will hit working moms the hardest

As HHS recently recognized, "[a]ccess to affordable high-quality child care has numerous benefits for children, families, and society as a whole, supporting child and family wellbeing in the short-term and across the lifespan in a manner that fuels prosperity and strengthens communities and the economy." 88 Fed. Reg. 45022, 45023 (Jul. 13, 2023). By decreasing the options for affordable, high-quality childcare, the proposed rule would harm not just American families, but our communities and economy. It bears emphasizing that these negative effects will hit working mothers the hardest.

HHS explained that "[m]aternal employment increases in response to more available and more affordable child care, and conversely, maternal employment rates drop when child care becomes more expensive for families." *Id.* (footnotes omitted). Compounding this effect, affordable childcare "supports parents' educational attainment" in addition to their "labor force participation" and "full-time employment." *Id.* Even as to women who would not drop out of the labor force or skip that earnings-boosting degree as a result of the proposed rule, they still likely would be the parent who adjusts their work schedule to account for any childcare deficiencies–such as the reduced hours limitation–to the detriment of their career and earnings potential. *See* Linda K. Smith, *et al.*, Bipartisan Policy Center, *When Childcare Burdens Harm Business, Who Picks Up the Pieces?* (Mar. 24, 2023), *available at* https://bipartisanpolicy.org/blog/child-care-burdens-impact-business/.

5. The proposed rule harms au pairs too

While the foregoing analysis focuses on the negative impact the proposed rule would have on American families and consequently on the program's diplomatic mission, IWF notes that the

proposed regulations also would harm au pairs. Every host family that drops out of the au pair program represents a would-be au pair who no longer has the opportunity to experience living in the United States.

Compared to other available opportunities, the experience of being an au pair in the United States offers a variety of valuable benefits. Many au pairs choose to come to the United States to improve their English, and they also gain a cultural fluency which helps them understand and interact with Americans. These are very marketable skills in the business and hospitality industries, among others, upon return to their home country. While many foreigners might gain these skills by attending college in the United States, the opportunity to acquire them in the au pair program is unique in that foreigners earn money—instead of going into debt to pay college tuition—in the au pair program, and not every foreigner has the academic credentials or desire to attend a United States college.

The opportunities in an au pair's home country may be deficient in other respects. The current au pair stipend exceeds the wages that many au pairs would earn in their home country. The standard of living for au pairs in the United States also frequently exceeds their standard of living at home. The proposed rule repeatedly invokes the need to "protect" au pairs, but there is nothing protective about eviscerating a program that provides au pairs with invaluable opportunities they would not otherwise receive.

In fact, details in its proposed rule could actually trap au pairs in unsafe or abusive situations. Currently, au pairs are allowed to request a rematch at any time. Under the proposed rule, "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." 88 Fed. Reg. at 74076. The Department offers no justification for this proposed change, which would result in au pairs that have "completed 75 percent of their initial program or are on six-, nine-, or 12-month extensions" getting financially punished and sent home for requesting a rematch, even if the host family is at fault for the rematch request. And because some au pairs may be desperate to remain in the United States for their program's full term, this could have the unintended consequence of trapping au pairs in abusive, unsafe, or otherwise harmful living or working conditions. Host families could essentially hold hostage any au pairs who have completed 75 percent of their initial program or who are on an extension, because any request for a rematch would result in au pairs being sent home, rather than au pairs having the chance to be placed with another family.

The NPRM shockingly does not even acknowledge or attempt to assess the magnitude of these risks and opportunity costs for au pairs.

* * *

These are just a few of the significant costs and burdens imposed by the proposed rule. Cataloging all of them would require a book: requiring au pairs to be paid during training; requiring Family Day to count as working hours; the added paid and sick leave provisions; the payment of a stipend even for weeks not worked; and requiring families to pay for precisely 31 or 40 hours, regardless of need. The proposed rule also is so sloppily worded that it could be read to require that host families

provide au pairs a private bathroom, shared by no other member of the family, although IWF cannot imagine that even the Department intends to require something that absurd.

B. The Minimal and Speculative Benefits of the Proposed Rule

With all of these significant and obvious costs, the benefits of the proposed rule would need to be overwhelming in order to justify it. But even a cursory review of the NPRM reveals that the potential benefits are weak and speculative at best.

1. Reducing "Dissatisfaction" and "Confusion"

The NPRM states that "[o]ver the past few years, au pair and interest group confusion over and dissatisfaction with the current compensation framework has resulted in nation-wide litigation." 88 Fed. Reg. 74077. The NPRM offers no support for this statement, and this assertion is in conflict with the Department's own surveys that show "broad satisfaction" with the program. The proof, moreover, is in the pudding: If being an au pair in the United States was a bad deal, there would not be tens of thousands of individuals each year desperately hoping for an opportunity to come here as an au pair.

The Department's statement concerning au pair and interest group dissatisfaction as reflected in litigation appears to be a reference to lawsuits like *Posada v. Cultural Care, Inc.*, 66 F.4th 348 (1st Cir. 2023), a lawsuit brought on behalf of just *four named plaintiff au pairs*—out of tens of thousands of potential plaintiffs. The four named plaintiffs are represented by Towards Justice, an advocacy group backed by progressive dark money. Towards Justice has filed similar lawsuits in Colorado and California, again with only a handful of named plaintiffs signing on. *See Beltran v. InterExchange, Inc.*, 176 F. Supp. 3d 1066 (D. Colo. 2016); *Merante v. Am. Inst. for Foreign Study, Inc.*, No. 21-CV-03234-EMC, 2022 WL 2918896 (N.D. Cal. July 25, 2022). Absolutely nothing about the Towards Justice lawsuits is representative of the au pair program.

Moreover, the purported dissatisfaction of "interest groups" like Towards Justice is irrelevant. What is relevant are the experiences of host families and au pairs who actually participate in and report "broad satisfaction" with the current program. It is worrisome that the Department appears to be issuing a rule that is unwanted by host families or au pairs due to political pressure from dark-money interest groups.

The NPRM states that "the Department believes that the benefits of reducing confusion about the relationship between the Federal au pair regulations and state and local law will help to increase participation." 88 Fed. Reg. at 74083. But this only justifies the proposed regulation expressly preempting state and local laws; it does not nothing to justify the bulk of the proposed regulations. *See* pp. 13–14, *supra* (proposing as an alternative that the Department limit the final rule to an express preemption provision). As noted above and below, the remainder of the proposed regulations considerably *increase* confusion about the au pair program.

2. "Greater Protections for Au Pairs and Host Families"

The NPRM states that "[t]he Department of State … believes the benefits of greater protections for au pairs and host families will lead to an improvement in the public diplomacy benefits of the

program." 88 Fed. Reg. at 74083. This unsupported, cursory statement does nothing to justify the burdens entailed by the proposed rule.

As an initial matter, the NPRM fails to identify any "protections" that are provided to host families by the proposed rule. A review of every variation of the word "protect" in the NPRM reveals no provisions that are intended to protect host families. To the contrary, at every turn the ethos of the proposed rule seems to be choosing the option that inflicts the most harm on American families.

The NPRM repeatedly refers to the need to protect the "health, safety, and welfare" of au pairs. IWF agrees that the health, safety, and welfare of au pairs is important. But the Department offers no analysis or evidence explaining why the current regulations are inadequate, or that the significant burdens entailed by the proposed rule are necessary, in this respect. As explained above, the idea that au pairs are ill-served by the current regulations is belied by the overwhelming number of au pairs who desire to come here and their widespread satisfaction with the program. Indeed, the United States is the most popular and desirable country for au pairs. *See Favorite Au Pair Destination Results,* https://www.aupair.net/favorite-au-pair-destination-results/ (last visited Nov. 17, 2023).

3. More "Leisure" Time for Au Pairs

The NPRM states that "[r]educing the weekly working hours from 45 to 40 can help to ensure that au pairs have adequate time for fulfilling the education requirement, experience socializing in the community, and time for rest and leisure, which is important for their physical and mental well-being." 88 Fed. Reg. at 74076. The NPRM offers no analysis or evidence suggesting that the current 45-hour limit negatively affects au pairs' "physical and mental well-being," nor that the reduced hours limit is necessary to improve cultural engagement. The NPRM also never considers the negative impact the hours limit will have on host families' physical and mental well-being or the impact that added stress on host families will have on cultural engagement.

The NPRM's skimpy analysis on this point is emblematic of the deficiencies in the NPRM's justification for the proposed rule overall. Not only is the Department endeavoring to fix something before determining that it is even broken, the Department ignores the fact that the burdens imposed by the proposed rule will have counterproductive consequences. For example, the NPRM hypothesizes that the reduced hours limit will lead to greater cultural engagement, but the NPRM fails to consider the detrimental impact it will have on cultural engagement by decreasing participation in the program: If the rule reduces the size of the au pair program by 70%, the negative effect from decreased participation on cultural engagement will substantially outweigh any minimal benefit to the reduced hours limit.

II. The Proposed Rule is Irrational in Many Other Respects

In addition to the Department's insufficient analysis of the burdens and benefits of the proposed rule, there are several aspects of the rule that are illogical, poorly thought out, and internally contradictory.

A. The Confusing "Four-Tiered Compensation Formula" Is Neither Singular Nor Simple

The NPRM states that the current formula for weekly stipends "was established in the mid-1990s" and is no longer appropriate" today. 88 Fed. Reg. at 74077. Putting aside the fact that the "mid-1990s" is hardly ancient times, the current regulations peg the au pair stipend to the federal minimum wage, which was increased in 2009, not the 1990s. The stipend under the current formula automatically will be adjusted based on any future increases in the federal minimum wage. One could argue that the au pair stipend should receive a modest adjustment each year to account for inflation, but this is not what the NPRM suggests. Instead, the formula in the proposed rule is as dependent on adjustments to state and local minimum wage laws as the current regulations are dependent on adjustments to the federal minimum wage. There is thus nothing more modern about the formula in the proposed rule.

To replace the current formula—which has served the program well for decades—the NPRM proposes a confusing "four-tiered compensation formula" that begins with "the highest of federal, state, or local minimum wage" rates in a given locality, which would be used to assign families to one of four "tiers," which would then dictate the au pair's minimum wage by requiring the entire "tier" to pay the highest possible minimum wage that would fall within that tier.

The NPRM explains that it proposes this formula because "[s]ome stakeholders may prefer a single compensation formula" and the Department therefore "is seeking to simplify the administration of the compensation structure." 88 Fed. Reg. at 74078. The suggestion that the foregoing "four-tiered compensation formula" is either singular or simple is laughable. To start with, the NPRM states that the formula would not "preempt state and local minimum wage and overtime pay laws," so the compensation formula fails in being singular. It is not a national formula independent of state and local law, because its starting point is state and local law. Nor is it a formula that only applies state and local law, as it inexplicably adds a "tiered" compensation structure that would require, in many if not most cases, higher wages as a matter of federal law.

Beyond confusing, the tiered structure is irrational for other reasons. Take Virginia, for example, where the current minimum wage is $12 per hour. This would make Virginia a "Tier 2" state and require Virginia host families to pay au pairs $12 per hour. But in 2025, Virginia's minimum wage will increase to $13.50 an hour, which would bump Virginia to "Tier 3" and require families to pay not $13.50, but $15 per hour. The effect of the tiered system will be felt even worse by families living in areas whose minimum wage is just barely above the top of the preceding tier: That small increase will cost them over $6,000 per year as a result of the tiered system. There is no rational reason to require a family living in a locality whose minimum wage is $8 per hour to pay $8 per hour, but to require a family living in a locality whose minimum wage is $8.01 per hour to pay $12 per hour.

B. An Au Pair's Weekly Stipend Is Not Appropriately Assessed Under a Traditional Cost of Living Analysis

The NPRM states that "the federal minimum wage no longer provides sufficient compensation to au pairs placed in geographic areas in which a growing number of states and localities have adopted state or local minimum wages that exceed the federal minimum wage." 88 Fed. Reg. at 74077. The NPRM offers no analysis or evidence to support this assertion.

As an initial matter, there is no reason to think that a high state or local minimum wage rate means that the current au pair stipend is insufficient in that area. State and local minimum wage laws are more reflective of the politics of the state or locality than the actual compensation that is required to live there. For example, Denver, Colorado has one of the highest minimum wages in the country, even though the cost of living in Denver is substantially lower than in many other cities.

Even if state and local minimum wage laws were reflective of an area's relative cost of living, it is inappropriate to analyze the adequacy of the au pair stipend by applying a traditional cost of living analysis. This is so because an au pair's living expenses are *paid for by the host family*. Au pair's receive free room and board; families also customarily cover an au pair's cell phone plan, car insurance, and provide access to a car. And an au pair's healthcare is paid for out of fees paid by the host family to the sponsor.

With au pairs' living expenses covered, the au pair weekly stipend funds only their discretionary spending, primarily entertainment, eating out with friends, fashion, and travel. In other words, it's "pocket money," which is a phrase au pairs frequently use to describe the stipend. The au pair stipend is about $850 per month. The NPRM never offers any analysis or evidence that this amount is insufficient to fund an au pair's discretionary expenses.

Once this purpose of the weekly stipend is understood, the illogic of endeavoring to account for geographic variation in cost of living is evident. While expenses for room and board may vary greatly by locality, au pairs' discretionary expenses do not necessarily increase simply because they are in an area with a high cost of living. Discretionary expenses like clothing are often uniform nationwide. And to the extent that some discretionary expenses tend to increase in areas with a high cost of living—*e.g.*, movie theater tickets are more expensive in New York City—that increase is offset by an abundance of (often free) cultural and entertainment opportunities provided in those areas. Indeed, the United States cities that are the most desirable for au pairs, like New York, Washington D.C., Los Angeles, and San Francisco, generally have the highest cost of living in the country. The idea that au pairs flocking to these cities are being under-served by the current program cannot be squared with the facts.

C. The Proposed Rule Makes Up the Maximum Room and Board Credits With No Basis in State or Local or Federal Law

The proposed rule would authorize host families to deduct from the weekly stipend up to $76.16 per week for meals and up to $54.38 for lodging. In adopting these unrealistically low maximums, the NPRM purports to apply the permissible room and board credit under the Fair Labor Standard Act ("FLSA"). This aspect of the proposed rule is irrational in several respects.

First, it makes no sense for the proposed rule to blindly apply the FLSA to determine the permissible room and board credit when the proposed rule rejects applying the FLSA minimum wage to determine the stipend amount. By (sort of) applying state and local law with respect to an au pair's minimum wage but applying the FLSA with respect to the room and board credit, the proposed rule risks a mismatch between the size of the stipend and the size of the room and board credit. For example, a high cost of living area with a high minimum wage

might also authorize a larger room and board credit on the theory that the minimum wage is higher and the value of the room and board is higher.

Second, if, as the NPRM states, it is important to account for geographic variation with respect to the cost of living, then the room and board credit should similarly account for geographic variation. Host families providing room and board in high cost of living areas should get to deduct the actual value of those benefits, rather than the absurdly low nationwide maximums set out in the proposed rule.

Third, without acknowledging it or offering any justification, the proposed rule actually does not even apply the FLSA. The FLSA authorizes employers to deduct the "reasonable cost" or "fair value" of the room and board provided, whichever is lower. *See* 29 C.F.R. § 531.3. The NPRM cites 29 C.F.R. § 552.100, which sets out how the FLSA applies to domestic workers. That regulation provides that "[f]or enforcement purposes, the Administrator will accept a credit" based on a certain percentage of the federal minimum wage for room and board, such as a credit of up to 7.5 times the federal minimum wage for lodging. *Id.* at § 552.100(c)–(d). The NPRM calculates the proposed maximum lodging credit by multiplying the federal minimum wage of $7.25 by 7.5, and performs similar calculations for the maximum meals credits.

The NPRM ignores the fact that section 552.100 merely sets out these permissible credits effectively as a safe harbor—*i.e.*, an employer whose lodging credit is no more than $54.38 need not worry about an inquiry into its calculations. The regulations specifically note that "*[n]othing herein shall prevent employers from crediting themselves with the actual cost or fair value of furnishing lodging*, whichever is less." *Id.* (emphasis added). Deviating from the FLSA without explanation, the proposed rule uses section 552.100's safe harbor figures as maximums. It is stunning that the NPRM misrepresents the FLSA regulations. If the Department wants to reject applying state and local law, the FLSA, or an actual cost of living analysis in favor of its own invented method to determine the permissible room and board credits, the onus is on the Department to openly acknowledge that fact and explain why.3

Under the current regulations, the room and board credit is 40% of the au pair stipend. An obvious alternative to the NPRM is giving families a credit of 40% of whatever stipend is required by the final rule. The 40% credit has worked well in practice and is easy for host families and sponsor organizations to implement. It also is more than fair for au pairs, as the standard rule of thumb is that 50% of one's income is spent on room and board–expenses that au pairs do not have.

D. The Proposed Rule's Deduction Provision Fails to Consider Additional Benefits Provided by Host Families to Au Pairs

The proposed rule additionally offers families no credit for other benefits they provide to au pairs. This includes program fees of over $10,000 per year to the sponsor organization, which funds

3 To the extent that the Department intends the figures listed as "permissible credits" in subsection (n)(2) of the proposed regulation to reflect only a safe harbor, similar to section 552.100, subsection (n)(2) needs to include the specific provisos contained in section 552.100 making clear that the "permissible credits" are not maximum credits. Subsection (n)(2) also would benefit from repeating the formulas contained in section 552.100 (*e.g.*, 7.5 times the federal minimum wage) rather than the outputs of those formulas (*e.g.*, $54.30) so the provision does not become outdated if the federal minimum wage is raised.

benefits for au pairs including health insurance, their airfare to and from the United States, and cultural activities organized by the sponsor organization. Families also provide the au pairs with a $500 educational credit (which the proposed rule would increase to $1,200). And they provide incidental benefits like transportation, car insurance, and cell phone coverage.4 This is all effectively invisible income to the au pair, in addition to the benefit of free room and board discussed above.

The fact that host families provide these benefits to au pairs further underscores the incoherence of the Department's proposal to treat families like traditional employers. But if the Department is going to require host families to pay their au pairs a stipend equal to or greater than state and local minimum wage law, the Department at a minimum should give host families a credit for providing these concrete and valuable benefits to their au pairs. The NPRM never even addresses this issue, either in considering the applicability of state and local minimum wage laws to the weekly stipend or in considering host families' permissible credits for benefits provided to their au pairs.

E. The Proposed Rule Incorrectly Assumes an Au Pair's Educational Expenses are Equivalent to a Traditional Student's

The proposed rule would increase the educational stipend from $500 to $1,200. The NPRM bases the $1,200 figure on a "review of several two-year or community colleges." 88 Fed. Reg. at 74080. Putting aside the underwhelming nature of a review of tuition at "several" community colleges, the NPRM offers no analysis or evidence explaining why it is appropriate to benchmark the educational stipend off of tuition at two-year or community colleges. As the NPRM admits, many if not most au pairs fulfill their educational hours by enrolling in classes that are specially tailored for au pairs or by volunteering, not by enrolling at a typical college or university. The Department therefore should base the educational stipend on a review of the cost of classes and volunteer activities in which au pairs actually partake (and hopefully more than just "several").

Moreover, in IWF's experience, many if not most of the classes designed for au pairs are, simply put, fun. For example, "Au Pair Weekend" markets weekend classes in exotic locales like Hawaii and Miami, the price of which includes admission to museums, performances, and other cultural excursions. *See* Au Pair Weekend, https://www.aupairclasses.org/ (last visited Dec. 15, 2023). To be clear, IWF supports the NPRM's decision to accept these classes for purposes of the educational credit requirements–these are valuable educational and cultural experiences in keeping with the diplomatic purpose of the program. But given that a significant amount of the fees associated with the classes are attributable to vacation-like expenses, the fact that the educational stipend does not cover 100% of the cost of the class is not unfair.

III. The Department Should Limit the Final Rule to an Express Preemption Provision

The only genuine problem identified by the NPRM is the potential harm to the au pair program from the lawsuits brought by Towards Justice seeking to apply state and local wage laws. *See* pp. 8, *supra*.

4 It appears that the proposed rule would not permit most host families to deduct these benefits on the theory that access to a car and a cell phone "are primarily for the benefit or convenience of the host family." 88 Fed. Reg. at 74095. This appraisal is unrealistic. In IWF's experience, for example, even if the family desires the au pair to have a cell phone for communication, au pairs also desire a cell phone for personal use and generally use host-family provided cell-phone coverage overwhelmingly for personal use.

These lawsuits threaten to undermine the integrity of the program for reasons similar to those discussed above. Indeed, as discussed above, they have already decimated the program in Massachusetts. Fortunately, the Department can limit its final rulemaking to an express preemption provision. IWF therefore strongly encourages the Department to adopt the proposed express preemption provision in the final rule, but also to expand it to expressly preempt state and local minimum wage laws.

IWF notes that there are certain minor housekeeping provisions in the proposed regulations that do not appear concerning, such as the proposed regulations relating to the requirement for sponsor organizations to have in place rematch protocols. IWF understands that sponsor organizations already have such protocols, such that there is no need for the Department to require them; but to the extent they do not, it would appear to make sense to adopt them. Such minor adjustments to the current regulations can be made without rewriting the entire program.

* * *

The current au pair program is the perfect example of a government program that is actually working for Americans. The program is a win for host families, who receive affordable, flexible in-home childcare in return for welcoming an au pair into their family. The program is a win for au pairs, who have all their living expenses covered and receive a weekly stipend for discretionary spending, among other benefits, to fund their yearslong engagement with American culture and language. And the program is a win for the United States, because the popularity of the program provides a powerful diplomatic tool for the country. It beggars belief that the Department of State would want to destroy this program, but that is precisely what the proposed rule would do.

Sincerely,

Kristin A. Shapiro
Kristin A. Shapiro
Senior Fellow, IWF

Kelsey Bolar
Kelsey Bolar
Director of Storytelling &
Senior Policy Analyst, IWF

Carrie Lukas
Carrie Lukas
President, IWF