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# CAPLAW

Community Action Program Legal Services, Inc.

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December 16, 2010

Office of Head Start  
1250 Maryland Avenue, SW  
Washington, D.C. 20024

Attn: Colleen Rathgeb

Re: Docket I.D.: ACF-2010-0003  
NPRM concerning Head Start Designation Renewal System, 45 C.F.R. Part 1307  
RIN 0970-AC44

Dear Ms. Rathgeb:

Community Action Program Legal Services, Inc. ("CAPLAW") submits these comments on the proposed regulations establishing a designation renewal system. CAPLAW is a nonprofit organization that provides legal assistance, education, and training to Community Action Agencies, many of which are Head Start grantees. We provide individual legal training and technical assistance to many Head Start grantees, conduct numerous training programs on Head Start topics, and post information and articles on topics relevant to Head Start grantees on our website. We are very aware of the need to ensure that Head Start grantees meet the highest standards, not only programmatically, but also in terms of financial accountability and governance.

While we agree with many of the proposed regulations in the September 22, 2010 Notice of Proposed Regulation ("NPRM"), there are a number of sections on which we have comments, which are detailed below.

Section 1307.1. Purpose and Scope.

**The designation renewal system proposed in Part 1307 should not be applied to Early Head Start grants.** Given that in the Head Start Reauthorization Act of 2007, Congress required the establishment of a new competitive designation renewal process for Head Start grantees only (*see* Section 641 of Head Start Act; 42 U.S.C. 9836), we question ACF's decision to impose this new system on Early Head Start grantees. Congress could have extended this requirement to Early Head Start, but clearly decided not to, apparently satisfied with the existing language in the Head Start Act, which requires that Early Head Start grants be awarded "on a competitive basis to applicants meeting the criteria specified in subsection (d) (giving priority to entities with a record of providing early, continuous, and comprehensive childhood development and family services)." *See* Section 645A(e) of Head Start Act; 42 U.S.C. 9840A(e).

178 Tremont Street, Boston, MA 02111-1093 • Tel (617) 357-6915 • Fax (617) 350-7899 • [www.caplaws.org](http://www.caplaws.org)

*Winston A., Ross, President • Patricia Steiger, Vice President • Gale F. Hennessy, Treasurer • Catherine Hoskins, Secretary  
Anita Lichtblau, Esq., Executive Director/General Counsel • David Bradley, Coordinator*

Section 1307.3 Basis for determining whether a Head Start agency will be subject to an open competition.

*Section 1307.3(a). Remove 25% floor.* CAPLAW strongly opposes setting a yearly 25% threshold of Head Start and Early Head Start grantees for recompetition. There is no such quota requirement in the Improving Head Start for Social Readiness Act of 2007 (“2007 Reauthorization”). Nor was this recommended in the report, “A System of Designation Renewal of Head Start Grantees,” issued by the expert panel mandated by Congress in the 2007 Reauthorization. In fact, the Report said only that that 15 – 20% of grantees would be expected (not required) to recompute and that that percentage should be expected to decline over time as program quality improves (Report, page 5). The focus in the 2007 Reauthorization, the legislative history, and the report was a system that would ensure that only “high quality” grantees, whatever that number might be, would be automatically refunded.

Instead, the NPRM pulls a percentage out of thin air that must be met, even if some of those selected for recompetition do not meet any of the seven conditions set out in the rule. The only justifications given for setting the 25% fixed percentage is that it “is appropriate to ensure the best services for Head Start children” (75 Fed. Reg. 57705) and that it supposedly “reduces the risk of unintended consequences that could jeopardize meaningful assessment of grantee performance,” neither of which is specific or substantive enough to constitute a legally-valid rationale. 75 Fed. Reg. 57706.

CAPLAW believes that this proposed floor exceeds the statutory authority of ACF and would constitute an arbitrary rule not reasonably related to the statutory purposes or requirements. Congress directed in the 2007 Reauthorization that a system be designed to require that “high quality” grantees receive continued awards without competition and that those grantees who are not delivering a high-quality program be subject to an open competition. 42 U.S.C. 9836(c)(7). Setting an arbitrary percentage, particularly combined with the vague alternative system for filling the gap if the use of the seven criteria do not reach the threshold, does not bear a reasonable relationship to the statutory purposes or requirements.

Indeed, there is a strong possibility that if the alternative system is used, some “high quality” grantees will in fact be subject to competition, contrary to the express wording of the statute. This will become an increasing problem with time because under the proposed regulation the “bottom” quarter would always have to be recompeted, even though presumably the lowest quality grantees would have been eliminated in previous years.

In addition, this constant turnover of grants could lead to high administrative costs and a logjam within ACF, less focus by ACF on improving the quality of existing grantees, and instability at the local level for communities and their families. (Establishing new grantees is very time consuming, costly and risky with the high

learning curve around a very complex set of regulations and performance standards.) This very instability may lead to both high staff turnover and failure to attract high quality applicants; the best Head Start staff or prospective Head Start staff may decide that their long-term job prospects are better served elsewhere. It is clear from the Congressional conference report, partially quoted in the NPRM preamble, that that is not what was intended by Congress:

Furthermore, the Conferees believe that the policy to limit open competition to under-performing Head Start agencies will improve overall program performance. The Conferees strongly believe the majority of Head Start programs are delivering high-quality services and therefore do not intend for this new designation system to result in competition for designation for the majority of Head Start programs. Furthermore, competing high-quality programs could undermine overall program quality. The Conferees believe that in most instances, stability and continuity within Head Start promotes better quality and greater efficiency. It helps the organization become trusted within the community it is serving, thereby creating better community relations and better outreach to eligible children and families. Continuity and stability provided by high-quality grantees helps programs to recruit and retain better teachers and to plan appropriately for professional development. Lack of continuity and stability can also have a significant impact on cost effective resource allocation by affecting a program's ability to leverage funds in its community and negotiate lower facility costs and business loans. The continuity of high-quality grantees better ensures that taxpayer monies spent on professional development and facilities are investments that have ongoing benefit to children served by Head Start.

*Section 1307.3(b). Add appeal process.* This section gives the “designated ACF official” authority to determine whether one of the seven conditions for recompetition exists in a grantee’s program, but provides no avenue for challenging or appealing such a determination, either within the Office of Head Start, or higher up the chain in the Department of Health and Human Services. The regulation should include a process to challenge and/or appeal such a determination prior to the grant being sent out for recompetition. Otherwise, it ends up being an end run around the due process accorded to grantees in the termination/suspension process. The proposed process needs to match the rhetoric of ACF in the preamble of the NPRM, i.e. “that the legal rights of current Head Start and Early Head Start grantees be fully protected.”

*Section 1307(b)(1). Use a national norm, rather than one deficiency, as trigger.* Although we agree that deficiencies are a valid trigger, one deficiency is too low a number, particularly for a large program with many centers. We recommend that ACF use deviation from a national norm of deficiencies for a given year to determine the appropriate number of deficiencies that would trigger recompetition. This is in line with the expert report, which recommends

recompetition only when a grantee has deficiencies “far more than the average grantee,” defined as having a number of deficiencies that is two standard deviations from the mean. We also recommend that the norm be scaled based on the size of the grantee so that large grantees are compared with large grantees and small grantees are compared with small grantees. This trigger should not be used until after the grantee has had an opportunity to challenge the validity of the deficiency during the triennial review process.

**Section 1307.3(b)(2)(i). Move school readiness date back to effective date of regulation.** The period for review of achieving school readiness goals should be no earlier than the effective date of the regulation, not June 12, 2009. It is unfair to require compliance retroactively, particularly where the Office of Head Start has issued no guidance or regulations on how to comply with the 2007 Act’s school readiness mandate. Moreover, the data could be significantly out of date. By the time the recompetition review takes place, which could be several years later, the concerns may no longer be relevant. This problem was recognized by the expert panel, which said:

The Secretary should further ensure that the data used in assessing Key Quality Indicators is as current as possible (no more than one year old except for special cause). Using up-to-date data will ensure that designation renewal determinations are based on data that reflects the current, and not past, performance of grantees. We considered the advantages of using multiple years of data to examine patterns of performance but decided that the simplicity gained through a single point in time system outweighed the benefits of basing decisions on multiple years of data.

Expert Report at 12.

**Section 1307.3(b)(3) Use of CLASS as a trigger for recompetition for Head Start is problematic.** The CLASS scores may not necessarily reflect the quality of the classroom, or even the relationship between the teacher and the child. For a teacher to be highly successful on the CLASS observation, they need to be very outspoken. The number of sentences and words required to score well is substantial. Yet, some of the most outstanding teachers are calm, quiet, and deliberative. Teachers who make fewer but very deliberate comments will score substantially lower. Therefore, a one-size-fits all use of CLASS, particularly when it has just begun to be used in Head Start, is problematic.

**Section 1307.3(b)(4). Use license revocation as a red flag, rather than automatic trigger, particularly when a challenge is pending.** A revocation of a license by a state or local licensing agency should not automatically trigger

recompetition, particularly where there is a pending challenge to the revocation. The standards for licensing and the expertise of licensing authorities may vary greatly across the country. Therefore, although license revocation certainly raises a red flag that should be reported to and further investigated by ACF, ACF should independently determine whether there is sufficient evidence that the license should be revoked under the applicable state licensing requirements. This is especially important when the grantee has challenged the revocation. In most circumstances, ACF should wait until the challenge has been finally determined and then, if it is upheld, make an independent determination.

*Section 1307.3(b)(5).* **Don't use suspension as a trigger until challenges have been resolved.** Grantees should be allowed to complete their challenge of suspensions, consistent with their due process rights, before the suspension is used as an automatic trigger for competition.

*Section 1307.3(b)(7).* **Use audit findings as red flags, rather than automatic triggers.** Again, since auditors from various private firms, state agencies, etc., do sometimes make mistakes, the findings should be used as a red flag, rather than an automatic trigger for recompetition. ACF should independently review the findings, as well as allow the grantee the opportunity to respond to and/or challenge the audit findings, before using them as grounds for recompetition.

*Section 1307.3(c).* **Do not create additional criteria for meeting an arbitrary threshold.** As stated above, CAPLAW strongly opposes the 25% recompetition floor. CAPLAW also has concerns about the options for additional criteria to be used to meet that floor that are described in the preamble to the NPRM. The first option has the disadvantage of creating a subjective, arbitrary rating system. How will "problematic" non-compliances be determined? And why create yet another review system, piled on top of the complicated peer review procedure already in place, particularly when there are still numerous areas of uncertainty in interpretation of the Head Start Act of 2007 that have yet to be clarified by regulations?

We oppose adding additional criteria, but if additional criteria are developed, non-compliances evidencing systemic problems, such as inadequate program governance, should be considered more problematic than more isolated non-compliances (such as a problem with a single piece of playground equipment, or improper placement of a single fire extinguisher, or perhaps a missing document from a single file). Grantees' non-compliances should be measured as a deviation from a standard norm, based on size of the grantee.

Furthermore, if ACF does develop specific additional criteria, the Administrative Procedures Act requires that the criteria are imposed through the regulatory process, with an opportunity for additional notice and comment, rather than through less formal process, such as Information Memoranda, Program Instructions, the Monitoring Protocol, or the like.

Section 1307.7

For all “triggers” under Section 1307.3, the period being reviewed should be no earlier than the effective date of this regulation, not June 2009. It is not consistent with a “fair and transparent process” for the recompetition system to in effect be imposed retroactively. For example, a grantee may decide not to challenge a finding that it disagrees with, from an audit for example, because it has decided it is not worth the time or effort or it is easier to correct as indicated. However, if it had known that would be the basis for recompetition, it would have challenged the finding. The lack of guidance from ACF on some of these issues, such as school readiness, also poses a problem. ACF has not issued a single regulation since the Reauthorization Act passed in 2007.

As discussed earlier, a review, challenge, or appeal process should be added to the recompetition determination. We also question whether the process can be completed in the time set out in the rule.

Thank you for your consideration of these comments.

Sincerely,



Anita Lichtblau  
Executive Director/General Counsel