**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| THE NAVAJO NATION, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | Civil Action No. 1:18-cv-00253-DLF |
| | ) | |
| ALEX M. AZAR II, | ) | |
| | ) | |
| Defendant. | ) | |
| | ) | |

**REPLY IN SUPPORT OF**
**MOTION FOR PRELIMINARY INJUNCTION**

Defendant (the "Agency") accuses plaintiff Navajo Nation of asking "this Court to set aside the Congressionally prescribed process" for reducing the annual grant funding for the Navajo Head Start program based on alleged chronic under-enrollment. (Def. Opp. at 3) To the contrary, it is the Agency who seeks to set aside the congressionally prescribed process for reducing the Navajo Nation's funding by 32% ($7,308,849) without first providing the Nation the procedural protections to which it is entitled by the Head Start Act: an opportunity to appeal the decision and a full and fair hearing of the appeal. *See* 42 U.S.C. § 9841(a)(3).

**A. The Navajo Nation Is Likely To Succeed On The Merits**

The Agency makes a series of baseless and disingenuous arguments about why the procedural protections provided by Section 646 of the Head Start Act, 42 U.S.C. § 9841(a)(3), do not apply to reductions of funding for alleged chronic under-enrollment pursuant to Section 641a(h)(5)(A) of the Act, 42 U.S.C. § 9836a(h)(5). None of these arguments withstands the slightest scrutiny.

As the Agency notes, Congress made various amendments to the Head Start Act in 2007

when it enacted the Improving Head Start for School Readiness Act of 2007, Pub.L.No. 110-134, 121 Stat. 1363 ("2007 Reauthorization"). Subsection 8(h) of the 2007 Reauthorization amended § 641a of the Act by adding new provisions covering "Reduction of Grants and Redistribution of Funds in Cases of Underenrollment." Within that subsection, paragraph (h)(5) provides that:

> (5) SECRETARIAL REVIEW AND ADJUSTMENT FOR CHRONIC UNDERENROLLMENT-
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> (A) IN GENERAL- If, after receiving technical assistance and developing and implementing the plan as described in paragraphs (3) and (4) for 12 months, a Head Start agency is operating a program with an actual enrollment that is less than 97 percent of its funded enrollment, the Secretary may--
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> (i) designate such agency as chronically underenrolled; and
>
> (ii) recapture, withhold, or reduce the base grant for the program by a percentage equal to the percentage difference between funded enrollment and actual enrollment for the program for the most recent year for which the agency is determined to be underenrolled under paragraph (3)(A).
>
> (B) WAIVER OR LIMITATION OF REDUCTIONS- The Secretary may, as appropriate, waive or reduce the percentage recapturing, withholding, or reduction otherwise required by subparagraph (A), if, after the implementation of the plan described in paragraph (3)(B), the Secretary finds that--
>
> (i) the causes of the enrollment shortfall, or a portion of the shortfall, are related to the agency's serving significant numbers of highly mobile children, or are other significant causes as determined by the Secretary;
>
> (ii) the shortfall can reasonably be expected to be temporary; or
>
> (iii) the number of slots allotted to the agency is small enough that underenrollment does not create a significant shortfall.

42 U.S.C. § 9836a(h)(5) (emphasis added). Thus, while the Secretary may reduce base funding for chronic under-enrollment, that result is discretionary. A reduction of funding can be waived or reduced if the grantee can persuade the Secretary that there are sufficient mitigating considerations.

Section 646 of the Act, 42 U.S.C. § 9841, provides grantees with procedural safeguards against termination or reduction of grant funds. Prior to the enactment of the 2007 Reauthorization, Section 646(a)(3) provided that "financial assistance under this subchapter shall not be terminated or reduced, an application for refunding shall not be denied, and a suspension of

financial assistance shall not be continued for longer than 30 days, unless the recipient has been afforded reasonable notice and opportunity for a full and fair hearing." 42 U.S.C. § 9842(a)(3) (2006). Section 16 of the 2007 Reauthorization – which addresses "Appeals, Notice and Hearing" -- amended this provision to specify certain procedural safeguards, *i.e.* that "financial assistance under this subchapter may be terminated or reduced, and an application for refunding may be denied, after the recipient has been afforded reasonable notice and opportunity for a full and fair hearing, including—(A) a right to file a notice of appeal of a decision not later than 30 days after notice of the decision from the Secretary; and (B) access to a full and fair hearing of the appeal, not later than 120 days after receipt by the Secretary of the notice of appeal." 121 Stat. 1422 (now 42 U.S.C. § 9841(a)(3)).

The Agency contends that "the detailed process [for reducing a grant for under-enrollment] described in 42 U.S.C. § 9836(a)(h) did not include the ability … to appeal." (Def. Opp. at 6) But the statute provides otherwise. The appeal, notice and hearing requirements of 42 U.S.C. § 9841(a)(3) apply to any termination or reduction of financial assistance "under this subchapter." The referenced subchapter is Subchapter II of Chapter 105 of Title 42. Subchapter II covers Head Start Programs and includes Sections 9831–9852a. Therefore, by its terms, the appeal, notice, and hearing requirements of Section 9841(a)(3) apply to reductions of funding for under-enrollment pursuant to Section 9836(a)(h).

The Agency next argues that the appeal procedures in Section 9841(a)(3) do not apply to reductions to a grantee's financial assistance based on chronic under-enrollment because it said so when it promulgated its most recent regulations to implement the Act. (Def. Opp. at 10) But agencies may not "edit a statute" when they engage in rulemaking. *Levine v. Apker*, 455 F.3d 71, 85 (2d Cir. 2006). "An agency has no power to 'tailor' legislation to bureaucratic policy goals by

rewriting unambiguous statutory terms." *Utility Air Regulatory Group v. E.P.A.*, --- U.S. ---, 134 S.Ct. 2427, 2445 (2014). "[F]ederal agencies may not ignore statutory mandates or prohibitions merely because of policy disagreement with Congress." *In re Aiken County*, 725 F.3d 255, 260 (D.C. Cir. 2013).

Next the Agency contends that what is at issue here is really an "adjustment" rather than a "reduction" to the Navajo Nation's Head Start funding. (Def. Opp. at 10) The Agency accuses the Nation of having the misguided belief that the procedural protections of Section 9841(a)(3) apply to funding reductions for chronic under-enrollment pursuant to Section 9836a(h)(5)(a) because both provisions use the word "reduce." (*Id.*) Indeed, the Nation does have that belief, but it is not misguided. The Agency attempts to "construe" the "reduction" described by Section 9841(a)(3) as being different from a "reduction" under Section 9836a(h)(5). But its argument is pettifoggery.

The Agency argues that, if it had termed its action a "withholding" or a "recapture," rather than a "reduction," then the Navajo Nation would have no right to appeal, and so it is "unreasonable" to require an appeal "because the term reduction was used." (Def. Opp. at 15) The premise of this argument is fallacious. Subsection 9836a(h) is entitled "Reduction of Grants and Redistribution of Funds in Cases of Underenrollment" and subparagraph (h)(5)(A)(ii) provides that the Secretary may "recapture, withhold, or reduce" the base grant under defined circumstances. Contrary to the Agency's argument that the "appeal, notice, and hearing" rights established by Section 9841(a)(3) should not be construed to apply to any of these adverse actions, the natural construction is that those due process rights apply to all of these adverse actions because they all result in a reduction of funding. A reduction by any other name is still a reduction, or as Gertrude Stein put it, "A rose is a rose is a rose is a rose."

The Agency contends that, once a decision to reduce funding based on chronic under-enrollment is made, there is nothing to appeal. (Def. Opp. at 15) However, an appeal always presupposes an initial agency decision that purportedly was based on the applicable statutory or regulatory requirements. The entire point of an appeal right is that this initial decision may have been incorrect or inappropriate and might be reversed or revised upon further review. Decisions based on under-enrollment are no different than other decisions made by the agency and there is no sound reason for them to be immune from appeal.

In sum, the Agency's strained arguments all fail. Because Congress has spoken directly to the question of when Head Start grantees are entitled to appeal, notice, and hearing rights, that is "the end of the matter" because this Court—and the agency—"must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). For these reasons, the Navajo Nation is likely to succeed on the merits.

**B. The Navajo Nation And Its Children Face Irreparable Harm**

"[A] preliminary injunction requires only a likelihood of irreparable injury." *League of Women Voters of United States v. Newby*, 838 F.3d 1, 8-9 (D.C. Cir. 2016). Here, irreparable harm is not only likely but certain. The Navajo Nation has previously shown that the Navajo Head Start program will suffer irreparable harm from a $7,308,849 reduction in funding under the Grant. This reduction would force the Navajo Nation to lay off approximately 147 employees, and to reduce the hours of another 40 employees. The Nation will be forced to close at least 34 Head Start facilities. As a result, approximately 672 children and families will no longer be provided services by the Navajo Head Start program, including children with disabilities and mental health issues.

The Agency denies that the Navajo Nation will suffer any injury and implies that the Nation

is awash in unused Head Start funding that it could apply to forestall the layoffs and facility closures. This is not true. The Agency's factual arguments are as disingenuous and unpersuasive as its legal arguments.

The Agency asserts that, "[w]ithout any intervention from the Court, Plaintiff will have at least $15,766,194 in grant funds available as of March 1, 2018." (Def. Opp. at 16-17) Not so. The Navajo Nation submitted an application for funding the Grant for Fiscal Year ("FY") 2018 (which runs from March 1, 2018 to February 28, 2019) in the amount of $23,075,043. That application has been denied by the Agency and no funding amount has yet been approved for FY 2018. *See* supplemental affidavit of Dr. Elvira Bitsoi, the Acting Assistant Superintendent for Navajo Head Start (Exhibit 1).

The Agency next asserts that, for FY 2017, the Navajo Nation "has managed to provide services to all of the children under its care but drawing, as yet, only $3,261,739 out of the available $23,075,043 for the year." (Def. Opp. at 17) This is grossly misleading. In fact, prior to FY 2017, the full amount of federal funding under the Head Start grant was provided to the Navajo Nation in advance twice a year and the Nation drew down those funds as it incurred expenses. In July 2017, the Agency, without any advance notice, unilaterally changed the funding method and instead began to require the Navajo Nation to pay for Head Start program expenses and then submit a claim for reimbursement from the Agency on a monthly basis. The Agency, however, has not yet approved any of the Navajo Nation's submissions for FY 2017 reimbursement. *See* Exhibit 1, attached.

The Agency also asserts that, once the Navajo Nation is reimbursed for all its expenditures for FY 2017, it expects that the total spent for the year will be approximately $17,375,043, and there will be about $5.7 million left over from the grant amount of $23,075,043. (Def. Opp. at 17)

The Navajo Nation does not agree that this estimate is correct. But, even assuming that it is, the upshot would be that the Nation spent $17,375,043 on its Head Start program in FY 2017 and the Agency seeks to cut funding to $15,766,194 for FY 2018. This would be a reduction of more than $1.5 million. The Agency does not explain how the Navajo Nation could afford to provide the same level of staffing and services in FY 2018 if it is receiving $1.5 million less in funding. Clearly, cutbacks would be required.

The Agency additionally asserts that the Navajo Nation has $6,278,218.67 in accumulated leftover funding from previous grant years. (Def. Opp. at 18) The Agency controls whether the Navajo Nation can carry over any unexpended funds from previous grant years and it controls the purposes for which those carryover funds can be spent. Currently, $5.1 million of the carryover funds have been approved by the Agency for the Navajo Nation's use on projects involving physical infrastructure for the Head Start program. The Navajo Nation cannot expend these funds for personnel expenses. *See* Exhibit 1, attached. And any suggestion that the Nation could seek to reprogram these funds would be nothing more than an argument that it should "rob Peter to pay Paul."

The bottom line is that the proposed reduction in funding for the Navajo Head Start program would inevitably require cutbacks to the program that would cause irreparable harm to affected students and employees. The Agency cannot gainsay this. Dr. Elvira Bitsoi, the Acting Assistant Superintendent for Navajo Head Start, has provided a supplemental affidavit in which she states that, if a loss of funding occurs on March 1, 2018, she will immediately begin identifying personnel to be laid off and facilities that must be closed. She anticipates that layoffs would begin within a couple of weeks thereafter. *See* Exhibit 1, attached.

Thus, both the Navajo Nation and the children currently served by the Navajo Head Start

program will suffer irreparable harm if the Agency is allowed to reduce the grant funding without affording the Nation the appeal rights to which it is entitled. Furthermore, the Agency emphasizes that it wants to redistribute to other grantees the $7,308,849 in funding that it takes away from the Navajo Nation. Were this to happen, it is not clear whether the Agency would be in a position to restore those funds to the Navajo Nation if this case results in a final judgment in favor of the Nation.

### C. The Balance Of Equities Favors The Navajo Nation And The Public Interest Favors Injunctive Relief

Assessing the balance of harms and weighing the public interest merge in this case. *See Nken v. Holder*, 556 U.S. 418, 435 (2009). The balance of equities favors a preliminary injunction because it will "serve[] only to preserve the relative positions of the parties until a trial on the merits can be held." *Texas Children's Hospital v. Burwell*, 76 F.Supp.3d 224, 245 (D.D.C. 2014) (internal quotation marks and citations omitted). The Agency "cannot be said to be burdened by a requirement that it comply with the law." *Electronic Privacy Info. Cntr. v. Dep't. of Justice*, 416 F. Supp. 2d 30, 41 (D.D.C. 2006) (internal quotation marks and citation omitted). Here, a preliminary injunction will simply preserve the Head Start funding at the existing level until the Navajo Nation is afforded the appeal rights to which it is entitled.

Furthermore, the Navajo Nation's "extremely high likelihood of success on the merits is a strong indicator that a preliminary injunction would serve the public interest." *League of Women Voters*, 838 F.3d at 12. "[T]here is an overriding public interest ... in the general importance of an agency's faithful adherence to its statutory mandate." *Jacksonville Port Auth. v. Adams*, 556 F.2d 52, 59 (D.C. Cir. 1977). "There is generally no public interest in the perpetuation of unlawful agency action. To the contrary, there is a substantial public interest in having governmental

agencies abide by the federal laws that govern their existence and operations." *League of Women Voters*, 838 F.3d at 12 (internal quotation marks and citations omitted).

**CONCLUSION**

WHEREFORE, the Navajo Nation respectfully requests that this Court grant a preliminary injunction before March 1, 2018, enjoining the Defendant from reducing the funding under the Grant pending the final resolution of this case.

Dated this 27th day of February, 2018.

Respectfully submitted,

HOLLAND & KNIGHT LLP

By: /s/

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 27th day of February, 2018, the Reply in Support of Motion for Preliminary Injunction was served via the Court's ECF system, which will cause an electronic copy to be sent to all counsel of record in the case.

/s/ Steven D. Gordon
Steven D. Gordon