

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

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

**PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT**

Plaintiff Navajo Nation (“Nation”), pursuant to Fed.R.Civ.P. 56, moves for summary judgment on its claims that defendant has violated the Head Start Act, 42 U.S.C. § 9841(a)(3), and the Administrative Procedure Act, 5 U.S.C. § 706(2), by denying the Nation’s funding application for the Navajo Head Start program for Fiscal Year (“FY”) 2018 and reducing the grant funding without first providing the Nation the procedural protections to which the Nation is entitled by the Head Start Act: an opportunity to appeal the decision and a full and fair hearing of the appeal. The basis for this motion is more fully set forth in the accompanying memorandum of points and authorities.

WHEREFORE, the Navajo Nation respectfully submits that this Court should grant summary judgment in its favor on Counts One and Two, and (1) declare that defendant’s reduction of grant funding for FY 2018 is not in accordance with the requirements of the Head Start Act; (2) set aside defendant’s reduction of grant funding for FY 2018; and (3) declare that defendant cannot reduce the Nation’s Head Start funding unless and until it is afforded all of the notice and appeal rights to which it is entitled pursuant to the Head Start Act, 42 U.S.C. § 9841(a)(3).

Dated this 9th day of March, 2018.

Respectfully submitted,

HOLLAND & KNIGHT LLP

By:                                 /s/                                  
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Defendant.	)	
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**MEMORANDUM IN SUPPORT OF  
PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT**

Plaintiff Navajo Nation moves for summary judgment on its claims that defendant Secretary of the U.S. Department of Health and Human Services (“HHS” or “the Agency”) has violated the Head Start Act, 42 U.S.C. § 9841(a)(3), and the Administrative Procedure Act (“APA”), 5 U.S.C. § 706(2), by denying the Navajo Nation’s application to continue its Head Start grant funding at \$23,075,043 for Fiscal Year (“FY”) 2018 and, instead, reducing that funding by \$7,308,849, without first providing the Navajo 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.

**FACTUAL BACKGROUND**

Under the Head Start Act (“Act”), 42 U.S.C. § 9801 *et seq.*, HHS administers grants to private nonprofit, tribal and public agencies that implement Head Start and Early Head Start programs to provide comprehensive child development services. Once an organization qualifies as a Head Start Agency, it is eligible to receive federal financial assistance for up to 80% of any Head Start project costs, with the other 20% acquired from nonfederal sources. 42 U.S.C. §

9835(b).

The Navajo Nation operates Head Start and Early Head Start programs that are funded primarily by a federal grant, No. 90C19889 (“Grant”), administered by the Administration for Children and Families (“ACF”) within HHS. Pursuant to the Grant, a total of \$23,075,043 has been provided to the Navajo Nation annually for these programs. The Grant has one-year budget periods (fiscal years) that start on March 1<sup>st</sup> and run through February of the next year.

By a letter dated September 6, 2017, ACF advised the Navajo Nation of its projected funding for the Grant for FY 2018, which runs from March 1, 2018 to February 28, 2019. This letter advised the Navajo Nation that the funding level would remain at \$23,075,043, the same annual amount that the Nation had been and was currently receiving.

Several weeks later, by a letter dated September 26, 2017, ACF advised the Navajo Nation that it would reduce the Grant funding for FY 2018, from \$23,075,043 to \$15,766,194, because ACF had decided that the Nation was unable to achieve or maintain its funded enrollment of 2,068 children in the Head Start Program. The letter stated that the reduced funding level was based on an enrollment level of 1,396 children.

ACF reiterated that the new funding level for FY 2018 would be \$15,766,194 in letters to the Navajo Nation dated November 22, 2017, and December 4, 2017. The December 4 letter added that, if the Navajo Nation submitted a funding application for FY 2018 for a higher figure, ACF would “return the application as unfundable and request a revised application for the correct funding and enrollment levels. ... If [ACF] does not receive a fundable application within 45 days of receipt of this letter, funding a new grant by March 1, 2018 could be in jeopardy.”

On January 12, 2018, the Navajo Nation submitted an application for funding the Grant for FY 2018, which sought \$23,075,043. By a letter dated January 19, 2018, ACF advised the Navajo

Nation that the Grant funding for FY 2018 is \$15,766,194 and that funding was being reduced because of alleged chronic and severe under-enrollment in the Navajo Head Start program. The letter did not notify the Navajo Nation of any appeal rights with respect to the denial of its funding application and the reduction of funding.

On March 1, 2018, HHS approved Grant funding for FY 2018 in the amount of \$15,766,194.

HHS has not notified the Navajo Nation of any appeal rights with respect to the denial of the Nation's funding application and reduction of Grant funding for FY 2018, nor has HHS afforded the Nation an opportunity to appeal this action.

### **LEGAL BACKGROUND**

Section 641a(h) of the Act, "Reduction of Grants and Redistribution of Funds in Cases of Underenrollment," authorizes the HHS Secretary to reduce the base grant for a Head Start program because of chronic under-enrollment, but permits the Secretary to waive or reduce the reduction if the causes of the enrollment shortfall are significant causes as determined by the Secretary. 42 U.S.C. § 9836A(h)(5). This section was added to the Act by the Improving Head Start for School Readiness Act of 2007, Pub.L.No. 110-134, 121 Stat. 1363 ("2007 Reauthorization").

Section 646 of the Act, 42 U.S.C. § 9841, provides Head Start 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 "[t]he Secretary shall prescribe procedures to assure 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). The 2007 Reauthorization

amended this provision to specify the procedural safeguards in more detail, *i.e.* “[t]he Secretary shall prescribe procedures to assure that financial assistance under this subchapter<sup>1</sup> 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)).

These added procedural safeguards originated in legislation drafted by the Senate, S. 556. The Senate Report explained that “Section 646(a) is amended to include timelines and procedures for termination, reduction or suspension of financial assistance, including clarified terms for filing an appeal and for a full and fair hearing of such appeal.” S. Rep. No. 110-49, at 52 (2007).

Pursuant to its obligations under Section 646(a)(3) of the Act, HHS has promulgated regulations that prescribe procedures for notice and appeal of certain actions that suspend financial assistance to a grantee, deny a grantee's application for refunding, terminate, or reduce a grantee's assistance under the Act. 45 C.F.R., Subpart A. But these regulations “do[] not apply to reductions to a grantee's financial assistance based on chronic under-enrollment” pursuant to Section 641a(h) of the Act. 45 C.F.R. § 1304.1(b). HHS has not promulgated any regulations that provide for notice of appeal rights and an opportunity for a full and fair hearing of the appeal, as required by Section 646 of the Act, with respect to ACF decisions to reduce a grantee's funding because of under-enrollment.

## **ARGUMENT**

Summary judgment is appropriate if the record shows that “there is no genuine issue as to

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<sup>1</sup> The referenced subchapter is Subchapter II of Chapter 105 of Title 42. Subchapter II covers Head Start Programs and includes Sections 9831–9852a.

any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed.R.Civ.P. 56(c).

The Agency has violated Section 646 of the Act and the APA by (1) failing to promulgate regulations that provide for appeal rights (including notice and an opportunity for a full and fair hearing) with respect to ACF decisions to reduce a grantee’s funding because of under-enrollment, and (2) failing to provide the Navajo Nation with an opportunity to appeal the reduction of Grant funding for FY 2018 because of alleged under-enrollment.

Section 646(a)(3) of the Act provides categorically that the Agency shall provide “procedures to assure that financial assistance under this subchapter may be terminated or reduced, and an application for refunding may be denied” only after the grantee has an opportunity to appeal. By its explicit terms, this provision applies to all reductions of funding and denials of refunding applications under Subchapter II of Chapter 105 of Title 42, which includes Section 641a(h). Nonetheless, when HHS created appeal procedures to implement the command of Section 646(a)(3), its regulations deliberately omitted funding reductions based on under-enrollment pursuant to Section 641a(h). This carve-out is unlawful. “What agencies may not do, however, is edit a statute.” *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). “As the Supreme Court has repeatedly explained, ... neither courts nor federal agencies can rewrite a statute’s plain text to correspond to its supposed purposes.” *Landstar Exp. America, Inc. v. Federal Maritime Com’n*, 569 F.3d 493, 498 (D.C. Cir. 2009).

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” 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). The Agency has failed to do so. The Agency’s failure to promulgate appeal regulations that cover grant reductions based on under-enrollment is not in accordance with law. And the Agency’s reduction of the Grant while depriving the Navajo Nation of its appeal rights is “without observance of procedure required by law.”

The APA provides that the reviewing court shall “hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law ... [or] without observance of procedure required by law.” 5 U.S.C. § 706(2); *see Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413-14 (1971) (“In all cases agency action must be set aside if the action was ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law’ or if the action failed to meet statutory, procedural, or constitutional requirements.”). Accordingly, the Agency’s denial of the Navajo Nation’s funding application and its reduction of the Grant funding must be set aside.

The APA authorizes a federal court to invalidate an agency decision disallowing payment under a federal grant-in-aid program and to direct that required funding be paid. *See Bowen v. Massachusetts*, 487 U.S. 879, 909-11 (1988); *see also America’s Community Bankers v. F.D.I.C.*, 200 F.3d 822, 829 (D.C. Cir. 2000) (“Where a plaintiff seeks an award of funds to which it claims entitlement under a statute, the plaintiff seeks specific relief [under the APA], not damages.”).

Further, the Agency should be enjoined from taking any further action to reduce the Navajo Nation’s funding under the Grant unless and until the Nation is afforded all of the notice and appeal rights to which it is entitled pursuant to Section 646(a)(3) of the Act. This Court previously has





**CERTIFICATE OF SERVICE**

I hereby certify that on this 9th day of March, 2018, this Memorandum in Support of Motion for Summary Judgment 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

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ALEX M. AZAR II,	)	
	)	
Defendant.	)	
	)	

**STATEMENT OF MATERIAL FACTS IN SUPPORT OF  
PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT**

Plaintiff Navajo Nation, pursuant to Local Rule 7(h), respectfully submits the following statement of material facts as to which it contends there is no genuine issue.

1. The Navajo Nation operates Head Start and Early Head Start programs that are funded primarily by a federal grant, No. 90C19889 (“Grant”), administered by the Administration for Children and Families (“ACF”) within the U.S. Department of Health and Human Services (“HHS”). (Doc. 1, ¶¶ 1-2)

2. The Grant has one-year budget periods (fiscal years) that start on March 1<sup>st</sup> and run through February of the next year. (Doc. 1, ¶¶ 3, 17)

3. By a letter dated September 6, 2017, ACF advised the Navajo Nation of its projected funding for the Grant for FY 2018, which runs from March 1, 2018 to February 28, 2019. This letter advised the Navajo Nation that the funding level would remain at \$23,075,043, the same annual amount that the Nation had been and was currently receiving. (Doc. 1, ¶ 19)

4. Several weeks later, by a letter dated September 26, 2017, ACF advised the Navajo Nation that it would reduce the Grant funding for FY 2018, from \$23,075,043 to \$15,766,194,

because ACF had decided that the Nation was unable to achieve or maintain its funded enrollment of 2,068 children in the Head Start Program. The letter stated that the reduced funding level was based on an enrollment level of 1,396 children. (Doc. 1, ¶ 20)

5. ACF reiterated that the new funding level for FY 2018 would be \$15,766,194 in letters to the Navajo Nation dated November 22, 2017, and December 4, 2017. The December 4 letter added that, if the Navajo Nation submitted a funding application for FY 2018 for a higher figure, ACF would “return the application as unfundable and request a revised application for the correct funding and enrollment levels.” (Doc. 1, ¶ 21-22)

6. On January 12, 2018, the Navajo Nation submitted an application for funding the Grant for FY 2018, which sought \$23,075,043. (Doc. 1, ¶ 24)

7. By a letter dated January 19, 2018, ACF advised the Navajo Nation that the Grant funding for FY 2018 is \$15,766,194 and that funding was being reduced because of alleged chronic and severe under-enrollment in the Navajo Head Start program. The letter did not notify the Navajo Nation of any appeal rights with respect to this denial of the Nation’s funding application and reduction of funding. (Doc. 1, ¶ 25)

8. On March 1, 2018, HHS approved Grant funding for FY 2018 in the amount of \$15,766,194.

9. To date, HHS has not notified the Navajo Nation of any appeal rights with respect to the denial of the Nation’s funding application and reduction of Grant funding for FY 2018, nor has HHS afforded the Nation an opportunity to appeal this action. (Doc. 1, ¶ 26)

Respectfully submitted,

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