



Community Action Program Legal Services, Inc.

Court Upholds HHS Designation Renewal System

By Riley Lovendale, CAPLAW, July 2012 e-News Bulletin

On July 9, 2012, the United States District Court for the District of Columbia issued its opinion in [Ohio Head Start Ass'n v. United States HHS](#) upholding the Designation Renewal System (DRS) regulations adopted by the Secretary of HHS pursuant to the 2007 Reauthorization of the Head Start program. The 2007 Reauthorization requires Head Start grantees that are not deemed to be delivering a high quality and comprehensive program to compete for new five-year grants, rather than receive an automatic renewal of funding. The DRS designed by HHS requires grantees to compete for funding if, among other reasons, they receive one or more “deficiency” findings. The Ohio Head Start Association, the Ohio Association of Community Action Agencies, and the Massachusetts Association for Community Action, all of which have some members who were designated early in 2012 to compete for continued funding because of at least one deficiency finding, sued HHS to block implementation of the DRS. Their claim alleges the DRS regulations are invalid because they are impermissibly retroactive, deprive Head Start grantees of protected property and liberty interests without due process, and are arbitrary and capricious.

Retroactivity

First, the plaintiffs argued the DRS is impermissibly retroactive because it attaches new legal consequences to deficiency findings going back as far as June 2009. In rejecting the plaintiffs’ argument, the court drew upon a line of cases which say that a regulation is not retroactive simply because it draws upon past events for its operation. Because the DRS only denies the Head Start agencies the benefit of automatic grant renewal, but does not terminate their current grants or attach new civil liability for their prior deficiencies, the court found the DRS was not impermissibly retroactive.

Violation of Due Process Rights

Second, the plaintiffs argued that the DRS is unconstitutional because it deprives them of due process. To establish their due process claim, the court held that the plaintiffs had to show: (1) they have a protected property or liberty interest in the automatic renewal of their Head Start grants; and (2) the HHS regulations do not provide sufficient due process before requiring the agencies to compete for further grant funding.

A protected property interest may be established from a statute or regulation that substantively limits official discretion such that, once requirements in a statute are met, a particular outcome must follow. The plaintiffs argued that the Head Start Act gave an agency a protected property interest in the automatic renewal of a Head Start grant once it (1) satisfied its obligations under the Head Start rules and regulations; and (2) provided “high quality and comprehensive” Head Start services. However, the court rejected this argument, finding that Congress explicitly delegated to the Secretary of HHS the authority to exercise a substantial amount of discretion when determining what constituted “high quality and comprehensive” Head Start services.

A protected liberty interest may be established when a right or status previously recognized by a party is distinctly altered or destroyed. Here, the plaintiffs argued that the DRS regulations threaten a protected liberty interest in automatic grant renewal because being deemed a grantee that was not “high quality” stigmatized their agencies and impaired their ability to pursue other funding opportunities and business transactions. The court rejected this argument by distinguishing what it described as the plaintiffs’

“speculative” reputational harm from cases where the alleged reputational harm completely destroyed an organization’s property values or drove it out of business.

Even if the plaintiffs had shown a protected property or liberty interest, to succeed on a due process claim they needed to also show that they did not receive adequate procedural protection before being deprived of that interest. The plaintiffs argued that HHS’ procedural protection is lacking because there is no way to seek review of deficiency determinations within HHS and HHS does not provide a process for appealing designation renewal determinations. The court addressed this argument by finding adequate the procedures already available to Head Start agencies *before* a deficiency determination is made, including notification of potential issues found during their on-site review and, according to the court, opportunities for the agencies to provide additional information to the experts responsible for issuing deficiency determinations. However, with respect to this last conclusion of the court, the record on which the court bases its statement actually says that the agency has an opportunity to present additional information to the on-site review team; it does not say that the agency has an opportunity to provide additional information to the officials who issue the deficiency determinations, who are the HHS officials in Washington.

Arbitrary and Capricious

Finally, the plaintiffs argued that the single deficiency trigger in the DRS rule is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law” in that it fails to take into consideration the statutorily-mandated input of the expert panel and contravenes the plain language of the Head Start Act. Congress, in the Head Start Act, required the Secretary to convene an Advisory Committee composed of various experts to make recommendations regarding the design of the DRS. Though the Advisory Committee suggested a more lenient system for deficiency findings required for recompetition, the court found that the Secretary only had to consider their suggestion, not adopt it verbatim. Thus, the court found that the DRS was reasonable in light of Congress’s intent and that the Secretary provided a clear rationale for departing from the Committee’s suggestion. The Secretary had stated that the single deficiency trigger (1) is simple, transparent, and fair; and (2) can be applied uniformly to each grantee.

Next Steps

The plaintiffs are considering appeal options at this time. In the meantime, HHS’s timeline for continuation of funding and application deadlines stands. [See the Office of Head Start Designation Renewal webpage](#) for more information. We recommend CAAs receiving Head Start funding continue to be vigilant in their efforts to comply with Head Start requirements.