

# CAPLAW

## Legal Update

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## Head Start Reauthorization Brings Major Changes for Grantees

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On December 12, 2007, the "Improving Head Start for School Readiness Act of 2007," became law. The 2007 Act (formally Public Law 110-134) is the first reauthorization and revision of the Head Start Act since 1998. Although the new 2007 Act either retains or slightly rewords many provisions from the prior version of the law, the new Act also contains significant changes from the old Head Start Act. Among the major changes are new provisions affecting grantee recompetition, program governance, eligibility and enrollment, monitoring and corrective actions, staff credentials, salary limits, and political activities (including voter registration). This article provides an overview of these major changes and offers suggestions for grantees to implement the new Head Start Act. For a more comprehensive discussion of the new Act, please visit CAPLAW's website.

### Recompetition

One of the most significant changes found in the 2007 Act concerns grant recompetition. The new Act establishes a "designation renewal" system that provides for a five-year redesignation of grantees "delivering a high-quality and comprehensive Head Start program." Grantees not eligible for "designation renewal" are subject to open recompetition. However, the new Act provides a transition period, and grantees will not be subject to the new system before June 2009.<sup>1</sup>

### Program Governance

The new Act also revises the program governance requirements and contains specific provisions concerning composition, conflicts of interest, and governance responsibilities, for both governing bodies (boards of directors) and Policy Councils. The application of the new governance provisions concerning the division of responsibilities between these bodies, however, is not always clear in the new law and will require further elaboration from

HHS. The revised governance provisions also require the sharing of information about program operations with the board and Policy Council.

Under the new law, for the first time, the Head Start Act addresses qualifications for board members.<sup>2</sup> It now requires that:

- One member have expertise and a background in finance or accounting;
- One member have expertise and a background in early childhood education and development; and,
- One member be a licensed attorney "familiar with issues that come before the governing body."

If persons with the required qualification are not available, the grantee may use consultants or other individuals with the necessary expertise to work directly with the board. In addition, the board must include members reflective of the community, including current or former Head Start parents, and members selected "for their expertise in education, business administration, or community affairs." These requirements do not apply to public grantees. The new Act continues the current composition requirements for the Policy Council, but requires election of all Policy Council members by parents.<sup>3</sup>

The new Act also contains conflict of interest provisions for board members and similar provisions for Policy Council members. For board members, the new Act prohibits:

- Any financial conflict of interest with the grantee or delegate agency;
- Compensation for serving on the board or providing services to the grantee; and
- Employment of board members or their immediate families by the grantee or delegate agency.

However, the new Act makes exceptions to the compensation and employment prohibitions for public grantees.<sup>4</sup>

The new Act has similar, but not identical, conflict of interest provisions for the Policy

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Council, as well. For the Policy Council, the new Act prohibits:

- Conflicts of interest with the grantee or any delegate agency; and,
- Receiving compensation for serving on the Policy Council or for providing services to the grantee.

Grantees should note that the general conflict of interest prohibition for Policy Council members is broader than the corresponding prohibition for board members. It is not limited to financial conflicts of interest and includes positional conflicts (such as service on the board of another organization that has taken actions adverse to the grantee's interests).<sup>5</sup>

### **POLICY COUNCIL RESPONSIBILITIES**

- Approve and submit to board decisions about activities to support active parent involvement in supporting program operations, including responsiveness to community needs
- Approve and submit to board decisions about Policy Council bylaws
- Approve and submit to board decisions on recommendations for selection of delegate agencies and their service areas
- Approve and submit to board decisions about program recruitment, selection, and enrollment priorities
- Approve and submit to board decisions about applications for program funding and amendments, prior to submission
- Approve and submit to board decisions about budget planning for program expenditures, including policies for reimbursement and participation in Policy Council activities
- Approve and submit to board decisions about program personnel policies and decisions regarding selection of program staff (consistent with board's authority regarding Executive Director, Head Start Director, Human Resources Director, Fiscal Officer, and equivalent agency positions), including standards of conduct and criteria for employment and dismissal of program staff
- Approve and submit to board decisions about developing procedures for Policy Council elections

In addition, the new Act describes the responsibilities of both the board and the Policy Council; the exact division of responsibilities is not well-defined, but a shift away from previous "shared governance" structure seems likely. Under the new Act, the governing body has general legal and fiscal responsibility for the grantee organization,<sup>6</sup> and the Policy Council has general responsibility for "program direction," but the Policy Council's specific responsibilities appear much narrower than suggested by the description of its general responsibilities.<sup>7</sup> Comments from Head Start officials at recent conferences suggest that the board will have greater authority under the new Act than under the prior shared governance structure. The basis for this expanded board authority and the move away from the previous shared governance model can be seen in the descriptions of the specific duties assigned to the board in the new Act. The board's defined duties include responsibility for administering and overseeing the program and safeguarding federal funds; adopting "active, independent and informed" governance practices; and ensuring compliance with federal, state, and local laws and regulations.<sup>8</sup> The board's defined duties also include apparent final authority for hiring of the Head Start Director and other high-ranking agency management and greater authority over budgeting, both of which seem to signal a shift away from the prior shared governance model. Please see the sidebars for a complete list of the governing body's and the Policy Council's specific responsibilities under the new Act.

To assist the board and Policy Council in fulfilling these governance responsibilities, the new Act requires grantees to adopt and implement a policy for sharing information with both the board and the Policy Council.<sup>9</sup> The following information must be shared:

- Monthly financial statements (with credit card usage);
- Monthly program information summaries;
- Enrollment reports;
- Monthly USDA meal and snack reports;
- Financial audit;
- Annual self-assessment, including any findings;
- Community needs assessment;
- "Communication and guidance" from HHS; and
- Program Information Reports.

This is one new requirement that can easily be implemented now without waiting for additional guidance from HHS. The 2007 Act also requires appropriate training and technical assistance to the members of the board and the Policy Council to assist them in understanding the information provided.

### **GOVERNING BODY RESPONSIBILITIES**

- Legally and financially responsible for administering and overseeing Head Start programs, including safeguarding federal funds
- Adopt practices that assure active, independent and informed governance of grantee
- Fully participate in development, planning, and evaluation of Head Start program
- Ensure compliance with federal, and applicable state and local, laws and regulations
- Select delegate agencies and their service areas
- Establish procedures and guidelines for accessing and collecting information required to be shared with board and Policy Council
- Establish procedures and criteria for recruitment, selection, and enrollment
- Review applications for Head Start funding and amendments
- Approve financial management, accounting, and reporting policies, and comply with laws regarding financial statements, including:
  - Approve all major financial expenditures of grantee
  - Annually approve grantee's operating budget
  - Select auditor
  - Monitor correction of audit findings and other necessary actions to comply with laws about financial statements and accounting practices
- Review and approve all major grantee policies, including:
  - Annual self-assessment
  - Financial audits
  - Agency progress in carrying out programmatic and fiscal provisions in the funding application, including any corrective action
  - Personnel policies (hiring, compensation, evaluation, and termination) for grantee employees
  - Approve personnel policies and procedures, including those for hiring, evaluation, compensation, and termination of Executive Director, Head Start Director, Human Resources Director, Fiscal Officer, and equivalent positions
  - Develop selection procedures for Policy Council members
  - Review federal monitoring results and follow-up activities
  - Adopt and periodically update written conflict of interest policies
- Establish advisory committees to oversee responsibilities about program governance and improvement, where appropriate

### Eligibility and Enrollment

The significant changes found in the new Act are not limited to recompetition and governance but affect program eligibility and enrollment, too. The 2007 Act expands the categories of children eligible to participate in Head Start by expressly including homeless children as automatically eligible and by creating a new category of extended income eligibility. Grantees may fill up to 35% of their spaces with children from families with incomes between 100% and 130% of the poverty line.<sup>10</sup> Although the 2007 Act requires HHS to issue implementing regulations for the revised eligibility requirements, the Office of Head Start has issued an Information Memorandum (ACF-IM-HS-08-03) allowing grantees to begin serving the 35% of extended income eligibility children immediately provided that needs of children from families below 100% of poverty, families eligible for public assistance, and homeless families are met first. The new Act also changes enrollment standards for children with disabilities to require that 10% of children actually enrolled be children with disabilities by the 2009 fiscal year.<sup>11</sup> In addition, the new Act allows the recapture or reduction of funding for grantees with chronic underenrollment.<sup>12</sup> Finally, the new Act also contains provisions for the conversion of part-day sessions to full-day sessions and the reallocation of funding to Early Head Start services.<sup>13</sup>

### Monitoring and Corrective Action

Further changes in the new Act affect grantee monitoring and corrective actions. The new Act retains first-year and triennial reviews but adds provisions for “unannounced site inspections of Head Start centers” and allows for other reviews “as appropriate.” The new Act also specifies that follow-up reviews of programs with deficiencies are to be conducted within six months of the deficiency notice, unless additional time for correction is granted; but, the follow-up review is to be conducted no later than twelve months after the deficiency notice. In addition, the new Act contains detailed requirements for the conduct of monitoring reviews and the design of the review instrument.<sup>14</sup>

The new Act largely retains the existing structure for corrective action, but now includes a definition of “deficiency.” The statutory definition of deficiency is reminiscent of the current regulatory definition at 45 C.F.R. section 1304.3(a)(6).<sup>15</sup> Under the new Act, a deficiency is a “systemic or substantial material failure” related to performance in one or more areas that correspond closely to the areas currently listed in section 1304.3(a)(6). The new Act also defines a deficiency as a “systemic or material failure of the governing body” to exercise its legal and fiduciary responsibilities or “an unresolved area of noncompliance.” In turn, the new Act defines “unresolved area of noncompliance” to mean an item of noncompliance that remains uncorrected after 120 days or such additional time as allowed by HHS.<sup>16</sup>

**The new Act opens the door to some voter registration activity in connection with the Head Start program by expressly allowing nonpartisan groups to use Head Start facilities during program hours to increase voter registration for Federal elections.**

### Staff Credentials and Salary Limits

The new Head Start Act contains several significant changes that affect program and agency employees. The new Act contains revised credentialing requirements for Head Start classroom teachers, teaching assistants, and education coordinators.<sup>17</sup> Beginning in 2011, each center-based classroom must have a teacher with at least an associate’s degree; and beginning in 2013, teaching assistants must have, at a minimum, a child development associate (CDA) credential or be enrolled in a CDA program. Additionally, beginning in 2013, at least 50% of center-based teachers nationwide must have a bachelor’s degree. The details are as follows:

- Starting October 1, 2011, each center-based classroom must have at least one teacher with:
  - An associate’s degree in early childhood education;
  - An associate’s degree in a related field with coursework equivalent to a major relating to early childhood education and experience teaching preschool-age children;
  - A bachelor’s or advanced degree in early childhood education;
  - A bachelor’s or advanced degree and coursework equivalent to a major relating to early childhood education and experience teaching preschool-age children; or
  - A bachelor’s degree, admission into Teach for America, passage of a content area exam, and Teach for America training and support.
- By September 30, 2013, at least 50% of Head Start classroom teachers at center-based programs nationwide must have at least a bachelor’s degree.
- By September 30, 2013, all teaching assistants in center-based Head Start programs must have at least a CDA credential, be enrolled in an associate’s or bachelor’s degree program, or be enrolled in a CDA program to be completed in no more than two years.
- By September 30, 2013, all education coordinators in center-based Head Start programs must have at least a bachelor’s degree.

Although the new Act requires grantees to describe progress toward the staff credential goals, including the 50% goal for teachers with bachelor’s degree, HHS may not impose any penalties or sanctions on individual Head Start programs that do not meet this goal. The new Act does provide for limited waivers for grantees unable to recruit staff with the necessary credentials.

The new Act also contains a modified salary cap.<sup>18</sup> The new statutory salary cap prohibits the use of *any federal funds to pay any portion of compensation to an employee of a Head Start agency above Executive Level II*, which is \$172,200 as of January 2008. Compensation is defined to include salary, bonus, and leave, but excludes health and other insurance and retirement benefits. However, the recent appropriations act (Public Law 110-161) passed on December 26, 2007, after the new Head Start Act, retains the compensation cap language from the past several appropriations acts, which prohibits the use of *Head Start funds, as either direct or indirect costs, for compensation, including salary and benefits, over Executive Level II*. Therefore, this appropriations act language, rather than the modified compensation cap language from the new Head Start Act, will probably apply until at least the start of the Federal government’s 2009 fiscal year.

### Political Activities

Finally, the new Act contains changes affecting political activities.<sup>19</sup> First, the new Act strikes the prior broad and somewhat vague language prohibiting the use of Head Start funds, the provision of services, or the employment of personnel “resulting in the identification of such [Head Start] programs” with political activity, any candidate or faction, voter transportation, or voter registration (although this

language remains in the Community Services Block Grant Act). The new language narrows the restrictions on such activities to apply to Head Start personnel during working hours. However, the Hatch Act restrictions on Head Start employees (which apply not just during work hours, but all the time) remain. The Hatch Act restrictions address running for office in a partisan election, using one's official position to influence an election, and political fundraising from other employees covered by the Hatch Act. Also of particular note is that the new Act opens the door to some voter registration activity in connection with the Head Start program by expressly allowing nonpartisan groups to use Head Start facilities during program hours to increase voter registration for Federal elections.

### Suggestions for Action

Many provisions of the new Head Start Act have delayed effective dates, but many other provisions (including those without specific effective dates) became effective when the new Act was signed into law on December 12, 2007. However, immediate compliance with the new Act is complicated by the lack of implementing regulations and guidance. Nevertheless, the Office of Head Start has issued Information Memorandum ACF-IM-HS-08-04 advising that “[g]rantees are expected to carefully review the new Head Start Act and move forward expeditiously to take those steps necessary to achieve full compliance with these new requirements.” Despite the lack of certainty concerning many parts of the new Act, grantees can and should take steps to start implementing the new Act.

The most productive step that grantees can take is to begin reviewing key agency and program documents to identify those areas that will need to be changed. Grantees should review:

- Articles and bylaws with special attention to board composition and qualifications;
- Current composition of the board and Policy Council;
- Conflict of interest policies and codes of conduct with special attention to the new governance standards;
- Information gathering and reporting policies and procedures; and
- Eligibility criteria and recruitment plans.

*The most productive step that grantees can take is to begin reviewing key agency and program documents to identify those areas that will need to be changed.*

In addition, the date is not too early for grantees to review staff credentials and, if needed, make plans for staff to obtain the necessary credentials or to recruit additional staff with the requisite credentials. Now is also an excellent time for grantees to start working with an attorney or other consultant well-versed in Head Start to develop

plans for implementing the requirements of the new Head Start Act and the eventual revised program regulations and policies. For more information and resources on compliance (including sample policies, links to the Head Start Act and HHS materials, answers to frequently asked questions, and timetables) stay tuned to [www.caplaw.org](http://www.caplaw.org).

### Conclusion

The “Improving Head Start for School Readiness Act of 2007,” contains numerous changes to many important areas of the Head Start program ranging from governance to eligibility and enrollment. The full extent of these changes will not be known for several months until provisions with delayed effective dates come into force and HHS

issues implementing regulations and revised policies and procedures. Grantees, however, should not wait to take steps to implement the new Act. Grantees can and should take steps now to understand the new Act and begin meeting its requirements.

- 1 See 42 U.S.C. § 9836.
- 2 See 42 U.S.C. § 9837(c)(1)(B).
- 3 See 42 U.S.C. § 9837(c)(2)(B).
- 4 See 42 U.S.C. §§ 9837(c)(1)(C), (D).
- 5 See 42 U.S.C. § 9837(c)(2)(C).
- 6 See 42 U.S.C. § 9837(c)(1)(A).
- 7 See 42 U.S.C. §§ 9837(c)(2)(A), (D).
- 8 See 42 U.S.C. § 9837(c)(1)(E).
- 9 See 42 U.S.C. §§ 9837(d)(2), (3).
- 10 See 42 U.S.C. § 9840(a)(1)(B).
- 11 See 42 U.S.C. § 9835(d).
- 12 See 42 U.S.C. § 9836A(h).
- 13 See 42 U.S.C. §§ 9840(a)(4), (5).
- 14 See 42 U.S.C. § 9836A(c).
- 15 See 42 U.S.C. § 9832(2).
- 16 See 42 U.S.C. § 9832(26).
- 17 See 42 U.S.C. § 9843a(a).
- 18 See 42 U.S.C. § 9848(b).
- 19 See 42 U.S.C. § 9851(b).