

## Highlighting Changes to the Head Start Program Performance Standards: Program Governance

*By Christopher Logue, Esq.  
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On September 1, 2016, the U.S. Department of Health and Human Services (HHS) issued the much-anticipated final Head Start Program Performance Standards (“the Performance Standards” or “the standards”). The final Performance Standards update the federal regulations governing the practices and policies of Head Start and Early Head Start programs to align with the federal Head Start Act<sup>1</sup> (“the Act”), and to revise and raise educational standards, as required by the Act.

CAPLAW is publishing a series of articles that take a closer look at the implications of the new standards, section by section. In the first installment of this series, we discuss noteworthy changes to the Program Governance section ([45 C.F.R. Part 1301](#)). Specifically, we address the following issues: requirements on composition of the “governing body” (for nonprofit grantees, the board of directors); governing body duties and responsibilities; creation of advisory committees; the roles of the policy council, policy council, and Parent Committee in program governance; required training for the governing body; significant changes to the rules around impasse procedures; and a summary of the governance requirements found in other sections of the Performance Standards.

### **Governing Body (Section 1301.2)**

#### **Composition ([§ 1301.2\(a\)](#))**

The new standards address governing body composition, but only by stating that the governing body must be composed in accordance with the requirements of the Head Start Act at [42 U.S.C. section 9837\(c\)\(1\)\(B\)](#). Thus, no new rules or requirements are created by this provision, although Head Start grantees (referred to in the standards<sup>2</sup> and in this article as Head Start “agencies”) may consider this an opportunity to review their governing body’s compliance with this section of the Act.

Similarly, the new standards remind agencies that they must ensure the governing body complies with the conflict of interest provisions at [42 U.S.C. section 9837\(c\)\(1\)\(C\)](#), but do not add any new rules or guidance. The preamble to the final Performance Standards, however, offers some indication of how HHS interprets these provisions. After noting that “[m]any commenters stated the proposed rule was



unclear about conflicts of interest...[and] requested clarification about this provision and recommended adding language that mirrors the IRS Form 1023 Instructions, Appendix A, Sample Conflicts of Interest Policy,” HHS offered the following response:

We did not make changes to this language. There is guidance in the nonprofit community about the various ways to structure and apply a conflict of interest policy. If an agency wants to adopt the IRS rules, that would be one option, but it might not be the right option for all programs. Additionally, the governing body is required to develop a written conflict of interest policy, which can provide greater clarity than the overarching federal requirements.<sup>3</sup>

HHS appears to be suggesting several options for Head Start agencies to comply with the conflict of interest provisions in the Head Start Act: adopt the [IRS’s Sample Conflict of Interest Policy in Appendix A to the Instructions for Form 1023](#); adopt a policy that complies with the “IRS Rules,” which

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presumably refers to the intermediate sanctions rules in Section 4958 of the Internal Revenue Code; or adopt some other policy appropriate for

nonprofit organizations. Regardless of which options an agency chooses, it is important to note that a CAA’s conflict of interest policy must address grant- and state-specific conflict of interest requirements and, therefore, any sample or model policy should not be adopted without careful review. CAPLAW guidance and model policies on this topic are currently being updated. For immediate questions, please [contact CAPLAW](#).

Finally, the new standards remove language from the prior standards stating that the governing body, the policy council, or policy committee cannot have

identical memberships and functions<sup>4</sup>, and instead defer to the composition requirements in the Act.

### **Duties and Responsibilities ([§ 1301.2\(b\)](#))**

In addition to the duties and responsibilities of the governing body found in the Act (42 USC 9837(c)(1)(E) and 42 U.S.C. 9837(d)(2)), the standards now require the governing body to use ongoing monitoring results, data on school readiness goals, and other information found in the Management System section of the new standards to conduct its responsibilities.

### **Advisory Committees ([§ 1301.2\(c\)](#))**

A new standard establishes rules on the creation of advisory committees to the governing body. This standard allows the governing body to create one or more advisory committee as it deems necessary to oversee key responsibilities related to program governance and requires the governing body to maintain legal and fiscal responsibility for the Head Start agency. The governing body must also notify the responsible Department of Health and Human Services (HHS) official of its intent to establish any such advisory committees.

The ability of a Head Start agency to establish advisory committees to the governing body is not new. Since 2007, the Head Start Act has specifically allowed the governing body to establish advisory committees “to oversee key responsibilities related to program governance and improvement of the Head Start program involved.”<sup>5</sup> Even without the express authority to create advisory committees found in both the Head Start Act and the new standards, boards of nonprofit organizations are typically permitted under state nonprofit corporation laws to create advisory committees to the board. While the new standard and the Act require that governing bodies maintain legal and fiscal responsibility for the Head Start agency, it is not clear that a nonprofit board of directors would ever be able to abdicate legal and fiscal responsibility for



the agency, given that state nonprofit corporation laws vest nonprofit corporation boards of directors with broad oversight powers and the directors themselves with fiduciary duties to the corporation.

What is new, however, is the provision in this standard that requires the governing body to notify HHS of its intent to establish an advisory committee to oversee key responsibilities related to program governance. This provision raises the question of how “advisory committee to oversee key responsibilities related to program governance” is defined—is it every committee with such responsibilities or is an “advisory committee” a particular kind of governing body committee, such as a committee composed entirely, or primarily, or non-board members? Also, what exactly are “key responsibilities related to program governance”? Unfortunately, neither the Head Start Act nor the new standards answer these questions. Unless and until further guidance is released, the safest and easiest option is for Head Start agencies to notify HHS of all of its existing governing body committees and, going forward, to plan to notify HHS of its intent to establish any board committee with duties related to oversight of the entire organization and/or to Head Start program governance.

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### Policy Council and Policy Committee (§ 1301.3)

This new section of the standards largely references the Act to define the roles and responsibilities of the policy council at the agency (i.e., grantee) level and the policy committee at the delegate level. The old standards were very prescriptive, describing numerous roles and responsibilities of the policy council, while the new standards largely defer to the responsibilities described in the Act, which are more general and allow more flexibility to define the roles and responsibilities of the policy council.

One notable aspect of this change is regarding the role of the policy council in personnel matters. Under the old regulations and guidance the policy council was required to approve both the hiring and firing of all staff members who work primarily for the Head Start program. Now that the new standards have removed the provisions prescribing such policy council involvement<sup>6</sup>, Head Start programs are left to rely only on the language in the Act, which states: “The policy council [or policy committee, as applicable] shall approve and submit to the governing body decisions about each of the following activities: [...] (vi) Program personnel policies and decisions regarding the employment of program staff, consistent with” the governing body’s responsibility to approve personnel policies and procedures, “including standards of conduct for program staff, contractors, and volunteers and criteria for the employment and dismissal of program staff.”<sup>7</sup> Although the Office of Head Start (OHS) has not issued formal guidance on how to interpret this language, OHS appears to be interpreting the Act to say that the governing body and policy council could jointly decide the level of involvement the policy council will have with respect to hiring and firing decisions. In a webinar about the new standards, OHS stated that the role of the policy council in hiring and firing of Head Start staff depends on the agency’s policies and procedures, which both the governing body and policy council must approve. Those policies and procedures could require the policy council to approve the hiring and firing of all program staff or it could have the policy council completely uninvolved in any hiring or firing decisions.<sup>8</sup>

This section of the standards also extends policy council term limits. Previously, policy council members served one year terms for a maximum of three terms. Policy council terms are still one year, but policy council members may now serve up to five one-year terms.<sup>9</sup>



## Parent Committees (§ 1301.4)

In the [Notice of Proposed Rulemaking](#) (NPRM), OHS proposed to remove the requirement for parent committees. OHS received many comments in opposition to this change and, in response, the final standards restored the requirement for parent committees.<sup>10</sup> Two notable additions to the parent committee rules are that programs must now ensure that parents of currently enrolled children understand the process for elections to the policy council and other leadership opportunities,<sup>11</sup> and parent committees must have a process for communication with the policy council.<sup>12</sup>

## Training (§ 1301.5)

This standard mostly reflects the Act’s requirement that Head Start agencies provide appropriate training and technical assistance (T/TA) to the governing body and policy council to ensure that the members of these bodies understand the information they receive and can effectively oversee and participate in the agency’s programs.<sup>13</sup> The new standard includes the option to provide orientation, rather than T/TA, to meet the requirement and requires advisory committees to also receive this training. The training must cover program performance standards and specific eligibility as described in section 1302.12(m).

## Impasse Procedures (§ 1301.6)

Significant changes have been made to the rules on resolving disputes between the governing body and the policy council. The old standards only required that a grantee/delegate agency and policy council/committee jointly establish written procedures (including impasse procedures) for resolving internal disputes.<sup>14</sup> While the new standard only applies to the governing body and the policy council—and not to delegate agencies and their policy committees—

the standard is much more prescriptive, stating that the impasse procedures must:

1. Demonstrate that the governing body considers proposed decisions from the policy council and that the policy council considers proposed decisions from the governing body;
2. If there is a disagreement, require both the governing body and the policy council to notify the other in writing why it does not accept a decision; and,
3. Describe a decision-making process and a timeline to resolve disputes and reach decisions that are not arbitrary, capricious, or illegal.

Additionally, in the event that the agency’s decision-making process does not result in a resolution, the governing body and policy council must engage in a process of formal mediation to resolve the dispute. Mediation processes generally entail a neutral mediator attempting to bring the disputing parties to a mutually agreeable decision. Mediators often have no authority to bind either party to a particular resolution and, therefore, there is no guarantee that the dispute will be resolved.

If no resolution is reached through the mediation process, the rules further require that the governing body and policy council select a mutually agreeable arbitrator whose decision will be final. Arbitration typically operates similar to a court, where each side is allowed to present its case and a final, binding decision is made.

Both the processes of mediation and arbitration may be time consuming and costly for the agency. An argument may be made, however, that not all impasse procedures must include options for mediation and arbitration. Because the governing body and policy council are only required to engage



in mediation “[i]f the agency’s decision-making process does not result in a resolution and an impasse continues...,” it may be possible for the governing body and policy council to agree on a set of procedures where, after the governing body and policy council have made an attempt to resolve a dispute and failed to come to a resolution, the governing body has the authority to make the final decision. In this case, no impasse would be reached and there would be no need to consider mediation or arbitration. It is not clear, however, if OHS would agree with this interpretation of this standard and, until OHS issues further guidance, a more conservative approach is for the governing body and policy council to develop impasse procedures that incorporate both the mediation and arbitration requirements of this standard.

To avoid meditation and arbitration, agencies should consider ways to mitigate the likelihood for conflict between the governing body and the policy council. For example, agencies can help the governing body and policy council understand the essential but differing roles each has in agency governance by:

- Scheduling governing body and policy council meetings back-to-back with some overlapping time—e.g., the governing body meets from 5:00 p.m. to 7:00 p.m. and the policy council meets from 6:30 p.m. to 8:30 p.m. This way, the governing body and policy council are each exposed to a short portion of each other’s meetings.
- Jointly training the governing body and policy council in essential governance matters, including roles and responsibilities of the governing body and policy council.
- Including policy council members on the agency’s board of directors.
- Selecting one member of the governing body to serve as liaison to the policy council. Tasks of the policy council liaison can include providing general updates to the policy council on governing body activities; relaying concerns of the policy council to the governing body; and facilitating joint decision-making between the governing body and policy council.
- Having the executive director attend all policy council meetings.

### Governing body and policy council requirements not found in the Governance section:

While this article focuses on the requirements of the governing body and policy council found in Part 1301 – Program Governance, additional responsibilities of the governing body and policy council are located in other sections of the new standards. Below is a summary of the obligations and responsibilities of the governing body and policy council that are not found in Part 1301.

Subpart	Citation	Summary
Eligibility, Recruitment, Selection, Enrollment, and Attendance	45 C.F.R. § 1302.12(e)(3)	The Eligibility, Recruitment, Selection, Enrollment, and Attendance (ERSEA) provisions include a governance requirement relating to Indian tribes. If a tribal program meets requirements for additional enrollment allowances, the policy council must annually approve enrollment criteria for selecting over-income pregnant women or children.



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Subpart	Citation	Summary
Eligibility, Recruitment, Selection, Enrollment, and Attendance	45 C.F.R. § 1302.12(m)	As part of the ERSEA requirements of the new standards, all members of the governing body and policy council who determine eligibility must be trained on applicable federal regulations and program policies and procedures. Content of the training is specified in the standard and the training must be offered to the governing body and policy council within 180 days of the beginning of the term of a new governing body or policy council.
Program Structure	45 C.F.R. § 1302.20(c)(2)	Any agency proposing a conversion of Head Start services to Early Head Start services must obtain policy council and governing body approval and submit the request to their regional office.
Human Resources Management	45 C.F.R. § 1302.90(a)	Programs must establish written personnel policies and procedures that are approved by the governing body and policy council or policy committee and that are available to all staff.
Program Management and Quality Improvement	45 C.F.R. § 1302.101(b)(4)	Programs must establish procedures on data management that have been approved by the governing body and policy council.
Achieving Program Goals	45 C.F.R. § 1302.102	The standard about achieving program goals, implicates the governing body and policy council in several ways: programs must, in collaboration with the governing body and policy council, establish goals and measurable objectives (including a number of goals and objectives specified in the standard); programs must work with the governing body and the policy council to address issues during the ongoing oversight and correction process and during federal oversight; programs must communicate and collaborate with the governing body and policy council when conducting the annual self-assessment; and programs must submit status reports, determined by ongoing oversight data, to the governing body and policy council, at least semi-annually.



Subpart	Citation	Summary
<p>Protections for the Privacy of Child Records</p>	<p>45 C.F.R. § 1303.22(d)</p>	<p>If a program enters into a written agreement with a third party and that third party violates the agreed upon procedures to protect personally identifiable information (PII), one of the program’s options is to prohibit the third party’s access to records for a set period of time as established by the governing body and policy council.</p>
<p>Facilities</p>	<p>45 C.F.R. § 1303.47</p>	<p>This standard sets the requirements for the contents of notices of federal interest and requires that a notice of federal interest for a facility, other than a modular unit, and real property the agency owns or will own, must include a statement that confirms that the agency’s governing body received a copy of the notice of federal interest prior to filing and the date the governing body was provided with a copy. Additionally, a notice of federal interest on a modular unit the agency purchased or renovated must be visible and clearly posted on the exterior of and inside the modular unit and must include a statement that confirms that the agency’s governing body has received a copy of the filed notice of federal interest and the date the governing body was provided with a copy.</p>



## End Notes

<sup>1</sup> [42 U.S.C. § 9831 et seq.](#)

<sup>2</sup> [45 C.F.R. § 1305.2](#)

<sup>3</sup> [81 Fed. Reg. 61294, 61308 \(Sep. 6, 2016\)](#)

<sup>4</sup> [80 Fed. Reg. 35430, 35458 \(June 19, 2015\)](#)

<sup>5</sup> [42 U.S.C. § 9837\(c\)\(1\)\(E\)\(iv\)\(XI\)](#)

<sup>6</sup> 45 C.F.R. § 1304.50(d)(1)(x) – (xi) (prior standard)

<sup>7</sup> [42 U.S.C. § 9837\(c\)\(2\)\(D\)\(vi\)](#)

<sup>8</sup> [Head Start Program Performance Standards – OHS and Community Action Webinar 1](#); (beginning at 0:22:07); September 27, 2016

<sup>9</sup> [45 C.F.R. § 1301.3\(d\)](#)

<sup>10</sup> [81 Fed. Reg. 61294, 61309 \(Sep. 6, 2016\)](#)

<sup>11</sup> [45 C.F.R. § 1301.4\(a\)](#)

<sup>12</sup> [45 C.F.R. § 1301.2\(b\)\(2\)](#)

<sup>13</sup> [42 U.S.C. § 9837\(d\)\(3\)](#)

<sup>14</sup> 45 C.F.R. § 1304.50(h) (prior standard)

