UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE NAVAJO NATION,

Plaintiff,

v.

ALEX M. AZAR II,

Defendant.

Civil Action No. 18-0253 DLF

DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

On March 1, 2018, Plaintiff will receive access to another $15,766,194 in grant funds to operate its Head Start and Early Head Start programs, 68% of the annual funding amount sought by Plaintiff ($23,075,043). *See* Complaint, ¶ 20. Plaintiff makes no effort to establish why the amount of funding being provided (based on enrollment numbers that Plaintiff itself has provided) will not allow Plaintiff to operate at full capacity during this litigation.[1] Nor has Plaintiff offered any explanation why, if it is so in need of funding, it has not submitted the necessary information under last year's grant to draw down the over $20,000,000 available to it. *See* Declaration of Angie Godfrey ("Godfrey Decl."), ¶ 6. In any event, as reflected below, Plaintiff is mistaken in its belief that it is entitled, under the applicable regulations, to more by way of an appeals process than it received. And, by granting the interim relief sought, the Court

[1] Defendant has attempted to ascertain whether Plaintiff could agree to a briefing schedule under which the merits of the case could be combined with the motion for interim relief, *see* ECF No. 9, but Plaintiff "is not interested in establishing a briefing schedule for this matter which would allow resolution of the merits and preliminary relief at the same time." ECF No. 10 at 3, n.1.

would make unavailable over $7,000,000 in funds that another worthy Head Start program could really use.

Thus, as reflected herein, the Court should deny Plaintiff's Motion for Preliminary Injunction ("Plaintiff's Motion") because Plaintiff cannot satisfy any of the necessary four factors entitling it to that extraordinary relief. Plaintiff is not likely to prevail on the merits of its challenge. Plaintiff seeks to circumvent a statutorily mandated process that did not include further appeal once completed; a procedural reality further enshrined through notice-and-comment rulemaking. Nor will any irreparable harm befall the Navajo Nation absent a stay. Plaintiff's alleged harm is factually suspect. Moreover, the method of Head Start funding and unspent funds from the current budget period would allow Plaintiff to continue operating its Head Start program in the same manner for the duration of this case without intervention from the Court. Finally, the balance of harms and the public interest does not rest with Plaintiff. The introduction of the chronic underenrollment designation process by Congress in 2007 sought to combat the blight of underenrollment in Head Start and to free unused or underutilized funds to be redistributed to communities with the need for and programs with the ability to provide Head Start services. Plaintiff's request to force HHS to award funds in excess of Plaintiff's adjusted funded enrollment prevents those funds from being redistributed to Indian Head Start programs where there are critical needs and waiting lists of eligible Indian children, so that Plaintiff can maintain vacant slots that it has been unable to fill for decades. That position is simply not in the public interest.

This case concerns the Head Start Act's procedure for adjusting the funded enrollment of chronically underenrolled Head Start programs and the adjustment of the Navajo Nation Head Start's funded enrollment after the determination it was chronically underenrolled pursuant to the

Head Start Act, 42 U.S.C. § 9831 *et seq*. Since 1965, the federal government has provided grants to public and private organizations, including Indian tribes, that deliver comprehensive health, education, parental involvement, nutritional, social, and other services in order for low-income children to attain school readiness. Early Head Start supports children ages birth to age three and their families, in addition to pregnant women. Head Start supports children ages three to five and their families. The Navajo Nation is a long-standing Head Start and Early Head Start grantee, and its program has suffered from long-standing problems including significant underenrollment and a subsequent inability to spend the full amount of its grant. Godfrey Decl. ¶¶ 5 and 6.

In 2007, Congress amended the Head Start Act to include, among other things, a process for identifying underenrolled programs, attempting to assist those programs to reach full funded enrollment, and adjusting the funded enrollment and subsequently the grant funds of those programs that failed to reach funded enrollment and were determined to be chronically underenrolled. The highly prescriptive procedure laid out by Congress did not include the right for a chronically underenrolled program to appeal the adjustment of its funded enrollment. Indeed, there would be nothing to appeal because the Head Start Act sets a percentage and timeline that determines when a program is chronically underenrolled and the grantee itself provides the data on actual enrollment that is the basis of the determination.

Plaintiff asks this Court to set aside the Congressionally prescribed process and prevent the government from providing funds to programs prepared to deliver services to actual children. Tellingly, Plaintiff's motion does not request that this Court restore its funded enrollment level, but simply that the Court award it unneeded funds even when Plaintiff maintains significant excess funds from its last two budget periods.

STATEMENT OF FACTS

I. Head Start and Early Head Start Programs

Head Start promotes school readiness for children from low-income families nationwide by funding the provision of health, educational, nutritional, social, and other necessary services. Economic Opportunity Act of 1964, Pub. L. No. 88-452, 78 Stat. 508 (1964); see generally 42 U.S.C. § 9831 *et seq.* The program is administered by the Office of Head Start (OHS), which is a component of the Administration for Children and Families (ACF) in the US Department of Health and Human Services (HHS). OHS provides grants to local public and private organizations to provide comprehensive child development services for eligible children ages birth to five and their families. Head Start grants are given based on a five year performance period with grantees applying for refunding each yearly budget period. See 42 U.S.C. § 9833. Head Start grant agreements specify a number of children that each grantee is funded to serve during the program's budget year. See 42 U.S.C. § 9836a(h)(1)(B). Grantees are required to meet this funded enrollment and maintain waiting lists to fill vacancies as soon as possible and at most within 30 days. 42 U.S.C. § 9837(g); 45 C.F.R. § 1302.15(a).

II. 2007 Amendment of the Head Start Act and 2016 Amendment of the Head Start Performance Standards Regulations

Head Start grantees have always been required to serve the number of children for which they are funded. However, prior to 2007, there was a general acknowledgement across the federal government that some Head Start grantees were chronically underenrolled even while nationwide Head Start funding could not provide services for all eligible children. *See* Head Start: Better Data and Processes Needed to Monitor Underenrollment, GAO-04-17 (Dec. 4, 2004); S. Rep. No. 110-49, at 36 (2007). Congress responded to these concerns when it enacted the Improving Head Start for School Readiness Act of 2007, Pub. L. No. 110-134, 121 Stat. 1363

(2007) ("2007 Reauthorization"), which reauthorized and overhauled the Head Start program. Among other changes, the 2007 Reauthorization created a process to identify underenrolled programs, to attempt to improve enrollment in those programs, and to adjust funded enrollment levels in cases where programs failed to improve. *See* 42 U.S.C. § 9836a(h). Specifically, the 2007 Reauthorization required grantees to self-report their actual enrollment numbers each month. 42 U.S.C. § 9836a(h)(2). It required HHS to determine which programs had been underenrolled for at least four consecutive months and to assist such programs in developing a plan and timetable for reducing or eliminating underenrollment. 42 U.S.C. § 9836a(h)(3). The 2007 Reauthorization also required the Secretary to review an underenrolled grantee's progress 12 months after implementation of its enrollment improvement plan, and if the grantee is operating a program with an actual enrollment less than 97 percent of its funded enrollment, the Secretary may designate the agency as chronically underenrolled and recapture, withhold, or reduce the program's grant by a percentage equal to the percentage difference between funded enrollment and actual enrollment. 42 U.S.C. § 9836a(h)(5)(A). The 2007 Reauthorization allowed the Secretary to waive or reduce the amount of funds recaptured, withheld, or reduced at his discretion under specific circumstances. *See* 42 U.S.C. § 9836a(h)(5)(B) (listing reasons for waivers as enrollment shortfall because children served are highly mobile, the shortfall can reasonably be expected to be temporary, or the agencies number of slots is small enough that underenrollment does not create a significant shortfall). The 2007 Reauthorization directs the Secretary to redistribute the funds derived from adjusting funded enrollment of chronically underenrolled programs. 42 U.S.C. § 9836a(h)(6)(A). If the funds are derived from Indian Head Start programs, they must be redistributed by increasing enrollment in Indian Head Start programs. 42 U.S.C. § 9836a(h)(6)(A)(i).

The detailed process described in 42 U.S.C. § 9836a(h) did not include the ability of a program designated chronically underenrolled by the Secretary to appeal that determination, its adjusted funded enrollment, or the subsequent adjustment of its funding after the process is complete. There is no cross reference to the notice and hearing procedures required in 42 U.S.C. § 9841 when HHS terminates or partially terminates Head Start grants for uncorrected deficient activities that represent systemic or substantial failures such as threats to the health and safety of children and staff, the misuse of funds, or the loss of legal status or financial viability. *See* 42 U.S.C. § 9832(2) (defining deficiency) and 45 C.F.R. § 1304.5(a) (listing grounds for termination of financial assistance).

HHS made this interpretation of the Head Start Act's chronic underenrollment procedures clear through notice and comment rulemaking. From 2015 to 2016 HHS went through notice and comment rulemaking to overhaul the Head Start regulations and to bring them up-to-date with the requirements of the 2007 Reauthorization, among other things. In its Notice of Proposed Rulemaking (NPRM), HHS specifically proposed to exclude the chronic underenrollment procedures from regulations governing programs appeals of adverse action. 80 Fed. Reg. 35430, 35555 (June 19, 2015). It invited comment on that interpretation by noting it in the NPRM's preamble as well as including it in the proposed rule text. 80 Fed. Reg. 35430, 35499 and 35555 (June 19, 2015). After receiving no comments on the proposal, the recognition that Head Start appeal procedures do not apply to the chronic underenrollment process was codified in the final rules along with the exclusion of another process enumerated separately in the Head Start Act, the requirement for non-high performing programs to compete for continued funding, and administrative actions based on violations of Title VI of the Civil Rights Act of 1964. *See* 81 Fed. Reg. 61294, 61370 and 61444 (Sept. 6, 2016) and 45 C.F.R. § 1304.1(b).

III. The Navajo Nation Head Start Underenrollment and Secretarial Adjustment of Its Funded Enrollment Level for Chronic Underenrollment

The Navajo Nation Head Start program has reported underenrollment for years. Godfrey Decl. ¶ 5. Over the past 14 years, the Navajo Nation Head Start program's funded enrollment has been reduced by over half. *Id*. Despite these adjustments, the Navajo Nation Head Start program has never met its expected enrollment requirements. *Id.* In 2015, HHS started discussing the chronic underenrollment designation process with the Navajo Nation and began a series of meetings and technical assistance efforts to help the Navajo Nation develop a formal enrollment improvement action plan required under 42 U.S.C. § 9836a(h). *Id.* at ¶¶ 7-10. The Navajo Nation's action plan was finalized on April 14, 2016. Id. at ¶ 10. HHS provided significant technical assistance to support the Navajo Nation's implementation of its action plan. *Id.* at ¶ 11. Despite federal efforts, the Navajo Nation Head Start program was unable to meet 97 percent of its funded enrollment after 12 months. See Godfrey Decl., Ex. A. On September 26, 2017, OHS notified the Navajo Nation that its Head Start grant, Grant No. 90CI9889, had been designated chronically underenrolled. Godfrey Decl., ¶ 13. Pursuant to the Head Start Act OHS adjusted the Navajo Nation Head Start program's funded enrollment to reflect the average self-reported, actual enrollment over the past year and adjusted its funding level by an equal proportion. *Id.*, ¶ 13. The following months were filled with numerous letters and meetings to discuss the adjusted funding level and a refusal by the Navajo Nation to submit a fundable refunding application. *Id.*, ¶¶ 16-28. After formal consultation on January 18, 2018, OHS offered to restore $2 million in funding if the Navajo Nation could meet certain conditions including creating a waiting list of eligible children who could fill the restored slots. *Id.*, ¶ 27. The Navajo Nation in the end ignored that offer and initiated this suit. *See id.*, ¶ 28.

LEGAL STANDARD FOR PRELIMINARY INJUNCTION

Injunctive relief is an extraordinary remedy, and the party seeking it has a substantial burden of proof. *See American Coastal Line Joint Venture v. United States Lines, Inc.*, 580 F. Supp. 932, 935 (D.D.C. 1983). The factors that a movant must establish to support the grant of this extraordinary relief are well-established. In deciding a motion for preliminary injunction, a court must consider four factors: (1) the likelihood that the party seeking the injunction will prevail on the merits; (2) the likelihood that the moving party will be irreparably harmed without the injunction; (3) the prospect that others will be harmed if the injunction issues; and (4) the public interest. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Jones v. District of Columbia*, 2016 WL 1465326, at *2 (D.D.C. Apr. 14, 2006); *Population Institute v. McPherson*, 797 F.2d 1062, 1078 (D.C. Cir. 1986); *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 673-74 (D.C. Cir. 1985); *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921 (D.C. Cir. 1958). It is the movant's burden to establish the required elements. *Id.*

Courts have traditionally weighed those factors on a "sliding scale." *Wise v. United States*, 128 F. Supp. 3d 311, 316 (D.D.C. 2015). That balancing test has, at times, been seen as a flexible one, permitting a court to issue injunctive relief when the likelihood of success is high, although probability of irreparable harm may be low, and vice versa. *See id.; Population Institute v. McPherson*, 797 F.2d at 1078. Nevertheless, even under a flexible application of the preliminary injunction standard, both elements of likelihood to prevail and irreparable harm must be shown. *Wise*, 128 F. Supp. 3d at 316; *United Mine Workers of America v. International Union, United Mine Workers of America*, 412 F.2d 165, 167 (D.C. Cir. 1969) ("A party seeking injunctive relief must show both that it will suffer irreparable harm if an injunction is not issued

and that there is a substantial likelihood it will prevail on the merits when the case is tried.") (emphasis added).

The D.C. Circuit "has set a high standard for irreparable injury." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006); *Jones v. District of Columbia*, 2016 WL 1465326, at * 3 (D.D.C. Apr. 14, 2006); *accord Arkansas Dairy Coop., Inc. v. U.S. Department of Agriculture*, 576 F.Supp.2d 147, 160 (D.D.C. 2008), aff'd, 573 F.3d 815 (D.C. Cir. 2009), *cert. denied*, 558 U.S. 1113 (2010). "[T]he injury 'must be both certain and great; it must be actual and not theoretical.' " *Id.* (quoting *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam), *cert. denied*, 476 U.S. 1114 (1986). The injury must also be "of such *imminence* that there is a 'clear and present' need for equitable relief to prevent irreparable harm." *Wisconsin Gas Co.*, 758 F.2d at 674 (quotation omitted) (emphasis in original). Moreover, the injury must be "beyond remediation," *Chaplaincy*, 454 F.3d at 297, as it is "well settled that economic loss does not, in and of itself, constitute irreparable harm." *Wisconsin Gas Co.*, 758 F.2d at 674. Indeed, the D.C. Circuit has made clear that "[t]he key word in this consideration is *irreparable*. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date in the ordinary course of litigation weighs heavily against a claim of irreparable harm. *Chaplaincy*, 454 F.3d at 297–98 (quoting *Wisconsin Gas Co.*, 758 F.2d at 674) (emphasis in original).

More recently, the Courts have interpreted the Supreme Court's decision in *Winter v. Nat. Res. Def. Council, Inc.*, 55 U.S. 7, 20 (2008), to require each element of the preliminary injunction analysis to be independently met. *See Shirley v. Sebelus*, 644 F.3d 388, 393 (D.C. Cir. 2011) (reading *Winter* "at least to suggest if not hold" that the four factors should be treated as

independent requirements); *Achagzai v. Broadcasting Board of Governors*, Civil Action No. 14-768 RDM, 2016 WL 471274, *3 (D.D.C. Feb. 8, 2016). At a minimum, Winter calls for a showing that irreparable injury is likely, the mere possibility of irreparable harm will not suffice. *Id.*

ARGUMENT

I. Plaintiff Cannot Show It Has A Substantial Likelihood of Success on the Merits

When HHS adjusted the Navajo Nation Head Start's funded enrollment, it was not partially terminating the grant. It was following the chronic enrollment procedures set out by Congress in 42 U.S.C. § 9836a(h). Those procedures did not include an appeal of the chronic enrollment designation, the adjustment of the funded enrollment, or the subsequent recapture, withholding, or reduction of a base grant that must follow the lower funded enrollment. *See* 42 U.S.C. § 9836a(h). HHS made this understanding of the required procedures clear when through notice and comment rulemaking it laid out the appeal procedures required under 42 U.S.C. § 9841 and specifically noted that those procedures "do not apply to reductions to a grantee's financial assistance based on chronic underenrollment procedures at section 641A(h)." 45 C.F.R. § 1304.1(b).

Plaintiff argues that the adjustment falls under the adverse actions that require an appeal under 42 U.S.C. § 9841(a)(3). That assertion is incorrect. Plaintiff seems to believe because the word reduce is used both in 42 U.S.C. § 9841(a)(3) and the chronic underenrollment procedures in 42 U.S.C § 9836a(h) that the action described in those separate portions of the Head Start Act are the same. However, what HHS is tasked with under the chronic underenrollment procedures is not reducing financial assistance for its own sake but adjusting the funded enrollment, which HHS is authorized to do under 42 U.S.C. § 9836a(h)(5)(A), and the proportional reduction of the funding simply follows that adjustment, which is also statutorily prescribed at 42 U.S.C. §

9836a(h)(5)(A)(ii). In contrast, a termination, as described in 42 U.S.C. § 9841(a)(3), is a decision made on specific grounds, after the initiation of a specific correction process, and has far reaching consequences for the grantee. *See* 45 C.F.R. § 1304.5(a) (listing the grounds for termination and denials of refunding); 42 U.S.C. § 9836a(e) (describing the process for correction of deficiencies and the requirement to terminate grantees with uncorrected deficiencies); 45 C.F.R. § 1304.13 (prohibiting terminated grantees from competing for Head Start funds for five years). Although the Head Start Act distinguishes between the deficiency and termination process and the chronic underenrollment procedures, HHS recognized that the use of the term reduce, a relic of prior versions of the Head Start Act, could create confusion about when the procedures described in 42 U.S.C. § 9841(a)(3) applied. That is why it clarified its understanding of the Head Start Act through notice-and-comment rulemaking. Its interpretation deserves deference.[2]

First, if Congress wanted to require an appeal after the completion of the chronic underenrollment procedures, it could have done so by including that in 42 U.S.C. § 9838a(h) or requiring appeal procedures in 42 U.S.C. § 9841 for funded enrollment adjustments. Congress did not. Instead, the Secretary was given latitude to promulgate regulations regarding appeals and other processes in the Head Start Act. Without a specific directive from Congress to offer an appeal when a program's funded enrollment is adjusted, HHS determined that an appeal was not warranted. Based on this understanding, HHS did not provide for appeals of funded enrollment

[2] Plaintiff's motion states that HHS violated the Administrative Procedure Act pursuant to 5 U.S.C. § 706(2)(D) because HHS acted "without observance of procedure required by law." But neither Plaintiff's motion nor complaint alleges HHS did not go through notice and comment rulemaking or ignored some separate agency-specific rulemaking procedure when promulgating 45 C.F.R. § 1304.1(b). The government, therefore, is not sure on what Plaintiff's contention is based, so it will discuss other bases for deference under the APA.

adjustments or the subsequent adjustments of grant funds and explained in the preamble of the NPRM, the NPRM text, and the final rule text that this exclusion was deliberate. 80 Fed. Reg. 35430, 35499 and 35555 (June 19, 2015); 81 Fed. Reg. 61294, 61370 and 61444 (Sept. 6, 2016). The Secretary's decision is therefore entitled to *Chevron* deference, as "Congress delegated authority to the agency generally to make rules carrying the force of law, and . . . the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). Although HHS clearly explained its position and invited comment, no comments challenging this position were offered by the Navajo Nation or anyone else. 81 Fed. Reg. 61294, 61370 (Sept. 6, 2016). No comments were offered even though at the time of HHS's rulemaking the Navajo Nation Head Start program was already severely underenrolled.

Second, pursuant to the Administrative Procedure Act, this Court may overturn HHS's actions only if they were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). Under this narrow standard of review, "we insist that an agency 'examine the relevant data and articulate a satisfactory explanation for its action.'" *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009) (quoting *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43). To determine whether agency action is arbitrary or capricious, a court must consider "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989) (citation omitted). The party challenging the agency's action has the burden of showing that there was not "a rational

connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 (citation omitted). A court reviewing a challenge to an agency action under the APA begins with the "presumption to which administrative agencies are entitled – that they will act properly and according to law." *FCC v. Schreiber*, 381 U.S. 279, 296 (1965). HHS's interpretation of the Head Start Act requirements for appeal procedures as described in its regulations plainly meets these standards.

Context matters. In statutory construction, "'the presumption of consistent usage readily yields to context,' and a statutory term may mean different things in different places." *King v. Burwell*, ___U.S. ___, 135 S. Ct. 2480, 2493 n.3 (2015) (quoting *Utility Air Regulatory Group v. EPA*, ___ U.S. ___, 134 S. Ct. 2427, 2441 (2014)). In this case, the highly prescribed chronic underenrollment procedures and the termination process describe two different actions resulting from two very different procedures and creating very different consequences. The reduction described in 42 U.S.C. § 9841(a)(3) is reasonably understood as a partial termination as it is part of the same procedure that leads to terminations and denials of refunding also discussed in that provision. A termination, partial termination, or denial of refunding are adverse decisions justified when serious circumstances exist including when a grantee has lost its legal status, has failed to comply with reporting requirements, has uncorrected deficiencies, or has been debarred from receiving federal grants or contracts. 45 C.F.R. § 1304.5. The existence of these circumstances found through monitoring triggers HHS to follow a statutorily mandated procedure that is separate and apart from the chronic underenrollment procedures. *See* 42 U.S.C. § 9836a(e). In general, terminations lead to the complete exit of a grantee from the Head Start program. Indeed, a grantee whose grant has been terminated or denied for refunding, in whole or part, is barred from competing for Head Start funding for five years. 45 C.F.R. § 1304.13. At

this time, HHS is not pursuing any enforcement action against Navajo Nation Head Start based on grounds that justify termination. HHS, however, has initiated the chronic underenrollment process to deal with the Navajo Nation Head Start program's severe underenrollment problem as it is required to do under 42 U.S.C. § 9836a(h). It has followed the process through the mandated 12 months, provided the necessary technical assistance, and adjusted the enrollment pursuant to the parameters set out in the Head Start Act. Unlike a termination or partial termination of grant funds, the necessary adjustment of funds that accompany the adjustment in funded enrollment under 42 U.S.C. § 9836a(h)(5) is not a punishment for bad acts by the grantee. Instead, it is rightsizing a grant to reflect the capacity of a grantee to serve a specific number of children based on the proven actual enrollment of that grantee. Consequently, funded enrollment adjustments do not carry the severe and long-term consequences that accompany a termination or partial termination. As noted in HHS's correspondence with the Navajo Nation, the tribe is able and very welcome to compete for the $7 million derived from the adjustment to its funded enrollment when HHS redistributes the funds as expansion grants for Indian Head Start programs. Godfrey Decl., ¶ 20.

Logic also matters. At 42 U.S.C. § 9836a(h)(5)(A)(ii), the Head Start Act authorizes HHS to "recapture, withhold, or reduce" the base grant of a chronically underenrolled agency. HHS's September 26, 2017 letter did use the term reduce to describe how it would adjust Plaintiff's grant. See Exh. E to Godfrey Decl. However, HHS could have called the adjustment action a "withholding" or could have declined to wait until the new budget year and done a "recapture" in September. Plaintiff's reading of the Head Start Act suggests that if HHS had chosen to describe the adjustment of funding pursuant to 42 U.S.C. § 9836a(h) as withholding or had decided not to give the Navajo Nation five months to prepare for the adjusted funded enrollment and simply

recaptured the $7 million from the current budget immediately, then it would have no right to appeal, but because the term reduction was used, an appeal is required. Such a reading is unreasonable.

Plaintiff's suggested interpretation also logically fails because there is nothing to appeal. The statute dictates the timeframe and criteria for adjusting funded enrollment and the subsequent adjustment in grant funds. Plaintiff does not argue that HHS misread its self-reported enrollment data, that mistakenly determined that the Navajo Nation Head start program was not at 97 percent of its funded enrollment, or that its calculation of the proportional adjustment of funds is off. Instead, Plaintiff seems to suggest that it deserves an appeal because 42 U.S.C. § 9836a(h)(5) allows for some discretion to waive or reduce the adjusted funding amount under certain circumstances. Pl. Motion at 3 (asserting "under-enrollment need not result in a reduction of funding if the grantee can persuade the Secretary that there are sufficient mitigating consideration."). Plaintiff suggests that this discretion could or should be exercised through an appeal as described in 42 U.S.C. § 9841. But that is not correct. HHS has already exercised its discretion under 42 U.S.C. § 9836a(h)(5). First, it considered and denied the requested reconsideration of the adjustment in its November 22, 2017 letter. Second, in formal consultation on January 18, 2018, and by letter on January 19, 2018, it used its discretion to offer restoration of $2 million if the Navajo Nation met certain conditions that ensured funds would be used to provide services for actual children. *See* Godfrey Decl., ¶¶ 26 and 27. An appeal is not another opportunity to exercise agency discretion. Generally, the Department Appeals Board (DAB) is the entity designated to hear Head Start appeals as described in 42 U.S.C. § 9841(a)(3). 45 C.F.R. § 1304.5(c). The DAB is an entity within HHS created by regulation. It is defined in HHS regulations as "the independent office established in the Office of the Secretary with

delegated authority from the Secretary to review and decide certain disputes between recipients of HHS funds and HHS awarding agencies under 45 CFR part 16 and to perform other review, adjudication and mediation services as assigned." 45 C.F.R. § 75.2. The DAB can review the written record of an agency decision, consider the validity and quantity of evidence, consider disputes of material facts, collect documents and information, examine witnesses, and review other factual and legal judgments. *See* 45 C.F.R. §§ 16.4, 16.9, 16.11, 16.13. But it does not substitute its judgment for agency discretion. *See, e.g.*, *In the Case of Abdul Razzaque Ahmed, M.D.*, DAB Decision No. 2261, at 19 (2009), *available at* https://www.hhs.gov/sites/default/files/static/dab/decisions/board-decisions/2009/dab2261.pdf; *In the Case of Home Education Livelihood Program, Inc.*, Request for Reconsideration of DAB Decision No. 1598 (1997), *available at* https://www.hhs.gov/sites/default/files/static/dab/decisions/board-decisions/1997/ruldab1598.htm (explaining "as a preliminary matter, we believe it is important to affirm that it has always been the Board's practice … not to substitute our own judgment for that of the agency."). Here, HHS has exercised the discretion afforded it under 42 U.S.C. § 9836a(h), and the fact that the Navajo Nation is not happy with the results of that exercised discretion is not appropriate for appeal to the DAB. In its chronic underenrollment determination process, the Navajo Nation received the process it was due under the Head Start Act and HHS regulations, and it fails to allege a scenario where this Court should order HHS to provide more.

II. Plaintiff Cannot Show Irreparable Injury

Plaintiff cannot establish that it will suffer irreparable injury if interim relief is not provided. Without any intervention from the Court, Plaintiff will have at least $15,766,194 in

grant funds available as of March 1, 2018. Plaintiff has demonstrated that for the year ending February 28, 2018, Plaintiff 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. Given that Plaintiff is not expected to be able to spend $5.7 million from the $23,075,043 made available last year, it appears that last year it required approximately $17,375,043 of the larger grant amount available to it. Thus, the $15,766,194 that Plaintiff admits it will receive even without the Court's intervention (Complaint, ¶ 20) amounts to over 90% of what is estimated to have been expended by Plaintiff last year under the grant. It is hard to imagine that Plaintiff cannot get by for the few months it is likely to take fully to brief the issues in this litigation on that 90% when the grant is expected to last a whole year.

Plaintiff has the ability to seek further funds to increase that 90% figure. For instance, $2 million is also available if Plaintiff can satisfy certain conditions that the Navajo Nation could meet, including the creation of a waitlist of children who would fill the restored slots. Godfrey Decl., ¶ 27, HHS Ex. M. This alone would restore to Plaintiff over 100% of the funds it is estimated that they properly expended on Head Start programs last year.[3]

Thus, Plaintiff will not lose the ability on March 1, 2018, to fund its Head Start and Early Head Start initiatives. Plaintiff can easily survive on the $15,766,194 for a few months (if not the whole year); also, it can undertake efforts to increase attendance as outlined in the letter from Defendant dated January 19, 2018, and have another $2 million restored. Godfrey Decl., ¶ 27, HHS Ex. M.

[3] To recap, Plaintiff is slated to receive $15,766,194 already on March 1, 2018. (Complaint, ¶ 20). Adding another $2 million (*see* Godfrey Decl., ¶ 27) means that Plaintiff would have $17,766,194. This is more than the $17,375,043 that Plaintiff is expected to be able to draw down from the grant covering the year ending February 2018. Godfrey Decl., ¶ 6; Complaint, ¶ 20.

But Plaintiff has still other methods of adding to its available Head Start funding. Because Plaintiff had $6,278,218.67 left over from the grant covering the year ending February 2017, and because Plaintiff is expected to have another $5.7 million left from the available grant funds for the year soon ending, Plaintiff may seek to carryover some of those funds as well. Godfrey Decl., ¶ 6.

Plaintiff claims that "[a]pproximately 672 children and families would no longer have Head Start services provided" (Affidavit of Dr. Elvira Bitsoi, ¶ 3), but that fear is unfounded. Dr. Bitsoi's conclusory statement is apparently based on the assumption that there are 672 children out there waiting to get enrolled in its programs, yet they have not done so in the years that Plaintiff has sought funding claiming that its grant would serve much higher numbers than it actually serves. Godfrey Decl., ¶¶ 4-14. In fact, Plaintiff's self-reported enrollment numbers do not demonstrate that those vacant slots (surmised to exist by Dr. Bitsoi) have ever been filled by 672 actual children. *See* Godfrey Decl., ¶ 14, HHS Ex. A (self-reported enrollment numbers). Thus, Plaintiff is unable to establish irreparable injury.

III. The Balance of Equities and the Public Interest Weigh Against Granting Preliminary Injunctive Relief

Plaintiff, in essence, wants to tie up funding that should, under the applicable regulations, be made available to other grant applicants as well. Although the process for assessing the appropriate use will, of necessity, take some time, if those funds are awarded on an interim basis to Plaintiff as this litigation progresses, Plaintiff will be delaying the start of that process and application of the Congressionally-mandated process for seeing that such funding is made available to worthy Head Start grantees and actual children in need. Instead, the public interest is best served by allowing the efforts to find worthy grantees who need and can use those funds.

Plaintiff, of course, is free to compete for those funds as well. But Plaintiff is, in effect, asking this Court to tie up those funds as this case progresses; like Plaintiff has tied up the $6,278,218.67 that it could not spend from the grant year ending in 2017, and the approximately $5.7 million it has tied up from the grant year that ends this month. The public interest would not be served by such action. This is particularly true where Plaintiff has offered nothing to suggest that it is able to establish that any of the criteria under which it could secure a waiver under 42 U.S.C. § 9836a(h)(5)(B) has been met, and where the statute calls for redistribution where funds are available. 42 U.S.C. § 9836a(h)(6).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that service of the Defendant's Memorandum Of Points And Authorities In Opposition To Plaintiff's Motion For Preliminary Injunction, declaration and a proposed order has been made through the Court's electronic transmission facilities on the 26th day of February, 2018.

/s/

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