UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

MEMORANDUM IN SUPPORT OF
MOTION FOR PRELIMINARY INJUNCTION

Plaintiff Navajo Nation seeks a preliminary injunction to prevent defendant Secretary of the U.S. Department of Health and Human Services ("HHS") from reducing the annual grant funding for the Navajo Head Start program by $7,308,849 for Fiscal Year ("FY") 2018 – a 32% reduction -- 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. *See* 42 U.S.C. § 9841(a)(3).

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, with an emphasis on enabling preschool children to develop skills necessary to succeed in school. 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 in March and run through February of the next year.

By a letter dated September 6, 2017, ACF advised the Navajo Nation of the 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 that Navajo Nation that it had decided to reduce the Grant funding for FY 2018, from $23,075,043 to $15,766,194, because the Nation was allegedly 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 this reduction of funding.

To date, HHS has not notified the Navajo Nation of any appeal rights with respect to the reduction of funding for FY 2018, nor has HHS afforded the Nation an opportunity to appeal the reduction.

LEGAL BACKGROUND

Section 641A(h) of the Act 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). Thus, under-enrollment need not result in a reduction of funding if the grantee can persuade the Secretary that there are sufficient mitigating considerations.

Section 646 of the Act provides grantees with procedural safeguards against termination or reduction of grant funds by requiring the HHS Secretary to prescribe procedures to assure that funding will not be terminated or reduced unless 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. 42 U.S.C. § 9841(a)(3).

Pursuant to its obligations under Section 646 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 decisions to reduce a grantee's funding because of under-enrollment.

ARGUMENT

"A party seeking a preliminary injunction must make a clear showing that four factors, taken together, warrant relief: likely success on the merits, likely irreparable harm in the absence of preliminary relief, a balance of the equities in its favor, and accord with the public interest." *League of Women Voters of United States v. Newby*, 838 F.3d 1, 6 (D.C. Cir. 2016) (internal quotation marks and citation omitted). In this case, all of these factors support the grant of injunctive relief to the Navajo Nation.

A. The Navajo Nation Is Likely To Succeed On The Merits

The Navajo Nation is highly likely to succeed on its claims that HHS's failure to provide it with an opportunity to appeal the decision to reduce Grant funding because of alleged under-enrollment – including notice of appeal rights and an opportunity for a full and fair hearing of the appeal – violates Section 646 of the Act and the Administrative Procedure Act ("APA").

Section 646 of the Act provides categorically that the Secretary shall provide "procedures to assure that financial assistance under this subchapter may be terminated or reduced" only after the grantee has an opportunity to appeal. 42 U.S.C. § 9841(a)(3). Nonetheless, when HHS created appeal procedures to implement this statutory command, its regulations deliberately did not cover funding reductions based on under-enrollment. This carve-out is unlawful. "What agencies may not do, however, is edit a statute. Categorical rulemaking, like all forms of agency regulation, must be consistent with unambiguous Congressional instructions." *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).

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 attempt to reduce the Grant without providing the Navajo Nation with statutorily mandated appeal rights is "without observance of procedure required by law." Accordingly, the agency's action is invalid and must be set aside. 5 U.S.C. § 706(2).

This Court previously has enjoined the HHS Secretary from taking action against a Head Start grantee until HHS complied with the Act's due process provisions in 42 U.S.C. § 9841(a)(3). *See Meriden Community Action Agency v. Shalala*, 827 F.Supp. 54 (D.D.C. 1993). Similarly, the Fourth Circuit enjoined the U.S. Department of Education from withholding special education funding for a state without first affording it notice and a hearing that were mandated by statute. *See Virginia Dept. of Educ. v. Riley*, 23 F.3d 80, 84-85, 87 (4th Cir. 1994).

B. The Navajo Nation And Its Children Face Irreparable Harm

"[A] preliminary injunction requires only a likelihood of irreparable injury." *League of Women Voters*, 838 F.3d at 8-9. Here, irreparable harm is not only likely but certain. And the harm is imminent, starting on March 1. Both the Navajo Nation and the children that it serves through its Navajo Head Start program will suffer irreparable harm from a 32% reduction in funding under the Grant. As shown in the attached affidavit of Dr. Elvira Bitsoi, the Acting Assistant Superintendent for Navajo Head Start (Exhibit A), this reduction would force the Navajo

Nation to lay off approximately 147 employees, and to reduce the hours of another 40 employees. The Nation will be forced to close at least 34 Head Start facilities. As a result, approximately 672 children and families will no longer be provided services by the Navajo Head Start program, including children with disabilities and mental health issues.

These injuries constitute irreparable harm that supports the grant of injunctive relief. The Fourth Circuit has ruled that the denial of $50 million in federal funding allocated to Virginia's special education program would cause irreparable harm where it would force schools to lay off teachers and discontinue primary education services in order to operate within their appropriated funds. *See Virginia Dept. of Educ. v. Riley*, 23 F.3d at 84. Similarly, the Seventh Circuit held that the loss of Medicaid funding would cause a provider immediate irreparable harm where the provider would have to lay off dozens of workers, close multiple clinics, and stop serving a significant number of its patients. *See Planned Parenthood of Indiana, Inc. v. Comm'r of Indiana State Dept. of Health*, 699 F.3d 962, 980 (7th Cir. 2012); *see also Temple University v. White*, 941 F.2d 201, 214-15 (3d Cir. 1991).

Courts have found that reductions in Medicaid funding would also cause irreparable injury to patients who face a reduction in the quality of services they receive or a loss of services. *See Planned Parenthood of Gulf Coast, Inc. v. Gee*, 837 F.3d 477, 501 (5th Cir. 2016); *Nebraska Health Care Ass'n v. Dunning*, 578 F.Supp. 543, 545 (D. Neb. 1983). Likewise, the major funding reduction at issue here would harm the needy children being served by the Navajo Head Start program by causing a loss of services or a reduction in the quality of services being provided. *See Morse v. North Coast Opportunities, Inc.*, 118 F.3d 1338, 1339 (9th Cir. 1997) ("The Head Start program is devoted to providing quality pre-school education to needy children.").

Therefore, both the Navajo Nation and the children currently served by the Navajo Head Start program will suffer irreparable harm starting on March 1, 2018, if HHS is allowed to reduce the Grant without affording the Nation the appeal rights to which it is entitled.

C. The Balance Of Equities Favors The Navajo Nation And The Public Interest Favors Injunctive Relief

In cases like this one, where the U.S. Government is the opposing party, the final two factors -- assessing the balance of harms and weighing the public interest -- merge. *See Nken v. Holder*, 556 U.S. 418, 435 (2009). Both of these factors support a grant of injunctive relief in this case.

The balance of the equities tips in the Navajo Nation's favor "because a preliminary injunction will 'not substantially injure other interested parties.'" *League of Women Voters*, 838 F.3d at 12 (citing *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006)). "[T]he balance of equities may favor a preliminary injunction that serves only to preserve the relative positions of the parties until a trial on the merits can be held." *Texas Children's Hospital v. Burwell*, 76 F.Supp.3d 224, 245 (D.D.C. 2014) (internal quotation marks and citations omitted). Here, a preliminary injunction will simply preserve Grant funding at the level that has been in place for a number of years. HHS cannot contend that it will be substantially injured by continuing to fund the Grant at this same level until the Navajo Nation is afforded the appeal rights to which it is entitled.

Furthermore, the Navajo Nation's high likelihood of success on the merits "is a strong indicator that a preliminary injunction would serve the public interest. There is generally no public interest in the perpetuation of unlawful agency action." *League of Women Voters*, 838 F.3d at 12 (citing *Pursuing Am.'s Greatness v. FEC* , 831 F.3d 500, 511-12 (D.C. Cir. 2016); *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013)). "To the contrary, there is a substantial public interest

'in having governmental agencies abide by the federal laws that govern their existence and operations.'" *Id.* (citing *Washington v. Reno*, 35 F.3d 1093, 1103 (6th Cir. 1994)).

CONCLUSION

WHEREFORE, the Navajo Nation respectfully requests that this Court grant a preliminary injunction before March 1, 2018, enjoining the Defendant from reducing the funding under the Grant pending the final resolution of this case.

Dated this 2nd day of February, 2018.

Respectfully submitted,

HOLLAND & KNIGHT LLP

By: /s/

Steven D. Gordon (D.C. Bar No. 219287)
Philip Baker-Shenk (D.C. Bar No. 386662)
800 17th Street, N.W., Suite 1100
Washington, D.C. 20006
Tel: (202) 955-3000
Fax: (202) 955-5564

Attorneys for Plaintiff the Navajo Nation

#55201987_v1