

Head Start Reauthorization

ACTION ALERT NO. 1



CHANGES TO GOVERNANCE

This Action Alert, the first in a series, has been generously funded by the Kaplan Early Learning Company and published by the National Head Start Association.

The successful functioning of a Head Start agency¹ and, ultimately, the achievement of the Head Start program's mission to promote school readiness, depends largely on the effectiveness of the Head Start agency's governance. Head Start requires a unique governance system consisting of a Governing Body (meaning a Board of Directors) and a Policy Council. These two groups are distinct from one another, yet function collectively to provide leadership and oversight to a Head Start agency. Grantee and delegate agencies must establish and maintain this formal governance structure to comply with the requirements in the Head Start Act and the Head Start Program Performance Standards, the implementing regulations for the Head Start Act.

The *Improving Head Start for School Readiness Act*, which reauthorized the Head Start program, was signed into law by President Bush on December 12, 2007 ("Reauthorization" or "new Head Start Act"). It contains significant changes that affect Head Start governance, including the roles and responsibilities of Governing Boards and Policy Councils. It is imperative that you become familiar with these changes and bring your Head Start agency into compliance with these new requirements.

This Action Alert describes the changes from the older Head Start program requirements, specifically highlighting new composition requirements, Governing Board and Policy Council roles and responsibilities, conflicts of interests, impasse procedures, and information sharing requirements. This Action Alert then provides information on key legal issues of which you need to be aware, and includes a section on "Useful Tools and Tips," including a list of policies and procedures that will need to be reviewed in light of the changes in the law and a checklist of governance changes that will need to be included in your bylaws.

WHAT'S CHANGED?

Reauthorization has placed a host of new requirements on Head Start agencies. This section includes information on the Governing Body and Policy Council requirements.

Governing Body ("Board")

Composition

For the first time, the new Head Start Act provides specific requirements for the composition of the Board.

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Board Composition Requirements

The new Head Start Act requires that not less than one member of the Governing Board must:*

- Have a background and expertise in fiscal management or accounting;
- Have a background and expertise in early childhood education and development; and
- Be a licensed attorney familiar with issues that come before the Governing Body.

Additional members must reflect the community to be served and include:

- Parents of children who are currently, or were formerly, enrolled in Head Start programs; and
- Individuals with expertise in education, business administration, or community affairs.

* There are exceptions, however, and agencies can use consultants in certain circumstances.

If Head Start agencies are unable to recruit individuals to serve on the Board that fall into the first three categories (that is, have financial management or accounting, early childhood education and development, and licensed attorney qualifications), then the Board must use consultants, or other individuals with relevant expertise, to work directly with the Board in an advisory capacity.

Also for the first time, it is clear that Head Start parents must serve on the Board. In the past, when agencies have included parents on the Board, parent members have typically been individuals from the Policy Council, creating an important link between the two groups. However, Boards have the opportunity to determine the process by which parents should be included on the Board and the new Act expressly permits parents of children formerly enrolled in Head Start to fill this Board composition requirement, in addition to parents of currently enrolled children.

Further, the new Governing Board composition requirements have an important exception—they do not apply to members that oversee public entities (*e.g.*, School Boards that oversee School Districts) that are selected to their positions with the public entity by public election or political appointment.

Conflict of Interest

Under the new Head Start Act, members of the Board must comply with strict new conflict of interest requirements as well.

In addition, Board members' immediate family members are prohibited from being employed by the Head Start agency.

Board Conflicts of Interest

Board members are prohibited from:

- Having a financial conflict of interest with the Head Start agency;
- Receiving compensation for serving on the Board or providing services to the Head Start agency; and
- Being employed by the Head Start agency.

Board members must:

- Operate as an entity independent of staff employed at the Head Start agency.

Although the conflict of interest provision is very broad, it has a key exception, similar to the one for Board composition. The rules about compensation and family employment do not apply to publicly elected or politically appointed individuals if as a part of their job duties, they are required to sit on the Governing Board of the local Head Start program. If a Head Start agency has this type of appointed or elected official on the Board, the Head Start agency must report this role to the U.S. Department of Health and Human Services (“HHS”) Administration for Children and Families (“ACF”). All such reporting to ACF should be in writing and kept in a file, so that your program has documentation to demonstrate to ACF that you followed the requirements of the new law (*e.g.*, during on-site monitoring).

Responsibilities

For the first time, the Governing Board has explicit and comprehensive fiscal and legal responsibility for administering and overseeing the Head Start agency and for safeguarding Federal funds. The new law enumerates a long list of responsibilities with which Boards must now comply. There are no exceptions to the requirements in the list of responsibilities. In effect, the Board must now be actively involved in the oversight of the agency's Head Start program.

Many of the Board's responsibilities mirror the subjects listed in Appendix A to 45 C.F.R. §1304.50 of the Head Start regulations, but some are new or are differently defined. For example, the Board is now specifically responsible for approving personnel policies and procedures relating to the hiring, evaluation, compensation, and termination of the Executive Director, Head Start Director, Director of Human Resources, Chief Financial Officer, and others with equivalent positions within the agency.

Board Responsibilities

Under the new Head Start Act, the Board must:

- Assume legal and fiscal responsibilities for administering and overseeing all programs under its authority, including the safeguarding of Federal funds;
- Adopt practices that assure active, independent, and informed governance of the corporation, including the resolution of internal disputes and the facilitation of meaningful consultation and collaboration about decisions of the Board of Directors and Policy Council, and fully participate in the development, planning, and evaluation of the Head Start program;
- Be responsible for ensuring compliance with applicable Federal, State, and local laws and regulations; and
- Be responsible for other activities, including:
 - Selecting delegate agencies and their service area, as appropriate;
 - Establishing procedures and criteria for recruitment, selection, and enrollment of children;
 - Reviewing all applications for Head Start funding and amendment to such applications;
 - Establishing procedures and guidelines for accessing and collecting accurate and regular information for use by the Board of Directors and the Policy Council about program planning, policies, and Head Start agency operations;
 - Reviewing and approving all major policies of the agency, including but not limited to the annual self-assessment; financial audit; progress in carrying out the programmatic and fiscal provisions in the corporation's Head Start applications, including implementing any corrective actions, as applicable; and personnel policies regarding hiring, evaluation, termination and compensation;
- Developing procedures for how members of the Policy Council are selected;
- Approving financial management, accounting, and reporting policies, and compliance with laws and regulations relating to financial statements, including the approval of all major financial expenditures of the agency; annual approval of the operating budget of the agency; selection of independent financial auditors who shall report all critical accounting policies and practices to the Board of Directors; and monitoring the corporation's actions to correct any audit findings and of other action necessary to comply with applicable laws and regulations governing financial statement and accounting practices;
- Reviewing results from monitoring conducted under section 641A(c) of the Head Start Act, including appropriate follow up activities;
- Approving personnel policies and procedures, including those regarding the hiring, evaluation, and compensation and termination of the Executive Director, Head Start Director, Director of Human Resources, Chief Financial Officer; and any other person in an equivalent position within the agency;
- Establishing, adopting, and periodically updating written standards of conduct that establish standards and formal procedures for disclosing, addressing and resolving any conflicts of interest or appearance of conflicts of interest by Directors, Officers and employees of the corporation, and consultants and agents who provide services or furnish goods to the corporation; and complaints, including investigations, as appropriate; and
- As practicable and appropriate, establishing advisory committees to oversee key responsibilities related to Head Start program governance and improvement.

Policy Council

Composition

Under the new Head Start Act, parents of children currently enrolled in the Head Start program will continue to make up at least a majority (51%) of the Policy Council, with the remaining members serving as community representatives. Parents of children formerly enrolled in the Head Start program may still serve as community representatives.

While the Policy Council composition virtually stays the same as under the Head Start Program Performance Standards, one major difference is that community representatives now have to be elected by parents of children currently enrolled instead of selected by a locally determined process. The new Act does not specify what expertise community members must have, nor does it provide information about election process or term limits. Absent further guidance from ACF, the regulatory requirements regarding Policy Council community members' expertise and term limits still apply to Head Start agencies because they do not conflict with the language of the new Act.²

Conflict of Interest

Like the Board, members of the Policy Council are also prohibited from having a conflict of interest with the Head Start agency. They are not allowed to receive compensation for serving on the Policy Council or from providing services to the Head Start agency.

According to the current Head Start Program Performance Standards, parents who occasionally substitute for regular Head Start staff are permitted to serve on the Policy Council.³ That regulation appears to directly conflict with the conflict of interest provisions of the new Act, which prohibit Policy Council members from receiving compensation for providing services to the agency. In this type of conflict between the new Act and the regulations, the new Act provisions trump. Absent any new guidance from ACF, such parents would not be permitted to serve on the Policy Council. Therefore, until further notice from ACF, agencies should not have Policy Council members substituting with pay for Head Start staff.

Policy Council Responsibilities

Under the new Head Start law, the Policy Council must *approve and submit* to the Governing Body decisions about each of the following activities:

- Activities to support the active involvement of parents in supporting program operations, including policies to ensure that the Head Start agency is responsive to community and parent needs;
- Program recruitment, selection, and enrollment priorities;
- Applications for Head Start funding and amendments to such applications, prior to submission of applications;
- Budget planning for program expenditures, including policies for reimbursement and participation in Policy Council activities;
- Bylaws for operation of the Policy Council;
- Program personnel policies and decisions regarding the employment of program staff consistent with the Governing Body's responsibilities in this area, including standards of conduct for program staff, contractors, and volunteers and criteria for the employment and dismissal of program staff; and
- Developing procedures for how members of the Policy Council will be elected.

Policy Council Responsibilities

Under the new Act, the Policy Council continues to be responsible for the direction of the Head Start program, including program design and operation, and long and short-term planning goals and objectives, taking into account the actual annual communitywide strategic planning, needs assessment and self-assessment.⁴ However, the Policy Council's role has changed. The Policy Council was previously responsible for developing, reviewing, and approving a variety of program-oriented policies without regard to "who goes first." Now, the Policy Council must "approve and submit" decisions to the Board on a host of topics prior to Board action.

At this time, a lot of uncertainty exists regarding the extent to which the new law vests authority and defines responsibilities of the Policy Council. For example, the new law specifies that the Policy Council develops the criteria for the

employment and dismissal of program staff, but does not state that the Policy Council still has authority to approve or disapprove the hiring or termination of the Head Start Director, or any other person who works primarily for the Head Start program. In fact, the Board's list of responsibilities now touches upon this issue, and we believe that Congressional intent was to remove the hiring and firing decisions of high level and non-programmatic personnel from the Policy Council, while leaving decisions regarding program staff who work directly with children. As such, the extent to which the Policy Council can be involved with oversight of hiring and firing of key personnel is not in the new Act, but may be further defined in regulations.

Impasse Procedures

Under the new Act, the Secretary, not the Head Start agency itself, is to develop policies, procedures, and guidance for Head Start agencies concerning the resolution of internal disputes, including any impasse in the governance of Head Start programs, and concerning the facilitation of meaningful consultation and collaboration about decisions of the Board and Policy Council. The involvement of the Secretary in impasse procedures is a significant change from the Head Start Program Performance Standards, in which grantees and Policy Councils jointly establish for themselves written procedures for dispute resolution, including impasse procedures.⁵

New Information Sharing Requirements and Training

Under the new Act, each Head Start agency must share “accurate and regular information” with both the Board and the Policy Council. Specifically, the agency must share information about program planning, policies, and Head Start agency operations. The new Act lists the types of information that must be shared.

In addition, under the new Act, “appropriate training and technical assistance” must be provided to the members of the Governing Body and the Policy Council to ensure that they understand the information they receive and can effectively oversee and participate in the programs of the Head Start agency.

Information sharing must include:

- Monthly financial statements, including credit card expenditures;
- Monthly program information summaries;
- Program enrollment reports, including attendance reports for children whose care is partially subsidized by another public agency;
- Monthly reports of meals and snacks provided through programs of the Department of Agriculture;
- Financial audits;
- Annual self-assessment, including any findings related to such assessment;
- Communitywide strategic planning and needs assessment of the Head Start agency;
- Communication and guidance from the Secretary; and
- Program information reports.

WHAT DO YOU NEED TO KNOW?

Effective Date

Importantly, unlike most statutes, the new Act does not include a provision specifying its effective date. Therefore, the new Act became effective on December 12, 2007 when the President signed it into law. There may be some debate among lawyers about exactly when it applies to your agency,⁶ but what is crystal clear is that when you get your new grant award (and every agency will within twelve months of December 12, 2007), then it will apply to your agency. Given the extensive nature of the governance changes, every agency should be working on incorporating these changes as soon as possible.

To that end, in a recent Information Memorandum, ACF-IM-HS-08-04, ACF explicitly stated that most provisions in the new law took effect on December 12, 2007 and that programs should start to comply with the many requirements. Statements by ACF personnel at a recent NHSA conference confirmed that the Office of Head Start expects agencies to begin to comply as soon as possible, and certainly over the next year.

Bylaws and Other Policies/Procedures

Your Board's bylaws and other operating procedures will need to be revised as soon as possible, as will your Policy Council bylaws and procedures. Both sets of documents will need to comply with the applicable new composition requirements, conflict of interest provisions, and responsibilities.

Board Bylaws and Operating Procedures

When revising your Board bylaws, you need to consider what type of agency you are (e.g., early childhood education agency, community action agency, school system or local government) and whether there are other composition and responsibility requirements that you will need to comply with as well. For example, if your agency is a community action agency, you will need to comply with the tripartite board requirement under the Community Services Block Grant Act as well as the new Head Start composition requirements. Both sets of requirements will need to be included in your bylaws.

As a practical matter, in order to effectively address and satisfy these multiple composition requirements, a staff member should be assigned to track and monitor these requirements. That person should chart out exactly which requirements the Board will need to meet, analyze who currently sits on your Board, and determine where the gaps are in Board membership.

It will be impossible to comply with everything unless some individuals meet both sets of criteria. For example, a person could fill a parent slot for the Head Start requirements while simultaneously filling one of the consumer slots for the community action requirements.

In addition, in order to ensure the maximum flexibility provided for under the new Act, your Board bylaws should include a clause allowing use of consultants if Board members cannot be recruited with the backgrounds required by Head Start (financial/accounting, licensed attorney, and early childhood education expertise).

Policy Council Bylaws

Your Policy Council bylaws will also need to be revised to reflect the new requirements. As noted above, the new requirements for the Policy Council differ from the Head Start Program Performance Standards, and therefore will require new regulations and guidance from ACF to clarify what is meant by the new language and new role of the Policy Council, especially as it relates to hiring and firing of key employees. Nonetheless, because it is not clear when such regulations will be issued by ACF, the Policy Council bylaws should be reviewed and revised as soon as possible to reflect the new requirements as explained above.

Policies and Procedures

In addition to bylaws, your other governance policies and procedures will also need to be carefully reviewed and revised if they do not contain the specific items required in the new Act. For example, your conflict of interest policy will need to clearly define what a conflict of interest is, consistent with the new Act, and then state based on that definition, who cannot serve on the Board or the Policy Council. In that regard, your policy should also very clearly define what constitutes a family member, as it is undefined in the new law. It is not enough to simply have the policy; agencies must also implement their conflict of interest policies through documented procedures.

Conflict of interest procedures should include:

- Annual disclosure of business and personal relationships;
- Disclosures if a real or apparent conflict becomes evident;
- Steps to be taken if a real or apparent conflict is discovered (including referral to legal counsel, as appropriate);
- Annual training on what a real or apparent conflict is and how to address it; and
- Notification to ACF in the case of the public body exception.

It would also be wise to review your Board recruitment policies and procedures. The new requirements may be quite difficult for some programs to meet (those in small towns or rural areas) and if you plan to use a consultant because you are unable to meet one of the requirements (e.g., someone with a financial or accounting background), you will need to be able to demonstrate to ACF how you have tried to recruit and been unsuccessful.

Local Government Boards

Some local governments have set up separate Boards for oversight of Head Start. Depending on how the Board has been established, this type of government Board may not meet the requirements of the Head Start Act and will need to be restructured. For example, the new Act requires that the Board “operate as an entity independent of staff.” A Board composed of employees of the local government grantee may not meet this requirement. Accordingly, if you are from a local government and have a separate Head Start Governing Board, you should review your structure very carefully in light of this requirement and the limited exceptions to Board composition discussed previously.

Impasse Procedures

Because the Secretary will be developing policies, procedures, and guidance on resolving disputes, including impasse procedures, you will need to compare what your agency’s current practices are to ACF’s policies, procedures, and guidance. Not surprisingly, a one-size-fits-all impasse procedure will not work for every program across the country, as there are different needs, situations, and ways of working together that work in different communities. Stay tuned for guidance from ACF and be prepared to review your current policies and procedures and change them accordingly.

Information Sharing

The purpose behind the new information sharing requirement is to ensure that your Board and Policy Council have the information necessary to make informed decisions. To fulfill this purpose, Head Start agencies should ensure that Boards and Policy Councils are provided with the required information well in advance of their meetings so that members may review the information and come to meetings prepared. Appointing a staff member with the responsibility to ensure that the required information gets to Board and Policy Council members can be an effective strategy for meeting this requirement.

Training and Technical Assistance

In addition to providing specific reports and other information to the Board and Policy Council, the new Act requires all Head Start agencies to provide “appropriate” training and technical assistance “to ensure that the members understand the information the members receive and can effectively oversee and participate in the programs of the Head Start agency.” The Act does not specify how frequently agencies must conduct this training and technical assistance. Accordingly, that decision must be made on a local level, unless ACF issues regulations to the contrary. However, since some Board and Policy Council members will change at least annually, some training and technical assistance should be provided for new members, if not the whole Board and Policy Council, on an annual basis.

USEFUL TOOLS AND TIPS

Governance Documents that Need to Be Reviewed and Potentially Revised

You should review the following governance documents and revise them accordingly:

- Corporate bylaws
- Policy Council bylaws
- Shared governance policies and procedures
- Impasse procedures
- Information Sharing policies and procedures
- Conflict of Interest policies and procedures (including annual disclosure forms)
- Standards of Conduct policies (if they address conflicts)
- Board Recruitment policies
- Human Resources policies and procedures that deal with hiring and firing
- Financial policies and procedures that deal with oversight
- Monitoring policies and procedures that include any of the above.

Considerations for Reviewing and Revising the Governance Provisions of Your Board Bylaws

- Check to see if you included the complete new composition requirements.
- Check to see if you included a provision allowing the use of consultants if you can't find someone with expertise in accounting/finance, a licensed attorney familiar with issues that come before the Board, or an early childhood specialist. Be sure to clarify that use of such consultants is to assist the Board in decision-making, but does not provide the consultants any voting power or other powers reserved for Board members.
- Check to see if you integrated the Head Start composition requirements with other composition requirements effectively and clearly.
- Check to see if you included a clause on the exception for public entities if it applies to your program.
- Check to see if you defined a financial conflict of interest clearly.
- Check to see if you defined which family members are included in the conflict of interest policy.
- Check to see if you included all of the provision on conflict of interest that are required under the new Act.
- Check to see if you included the entire list of new Board responsibilities.

Outstanding Questions

There are a host of outstanding questions on the governance provisions of Reauthorization which ACF will need to address. ACF will need to promulgate new regulations regarding the Policy Council, as parts of the Program Performance Standards now directly conflict with the new Act. In addition, ACF will need to provide clarity regarding how the new Act shifts the balance of power between the Board and the Policy Council. It will need to clarify what the “approve and submit” language means for the Policy Council as opposed to its older terms of “develop, review and approve.” Further, exactly which hiring and firing decisions need Board approval and which require Policy Council approval? How will the ACF-defined impasse procedure differ from what programs currently have in place? Will ACF allow conflicts of interest to be mitigated, (meaning someone with a conflict is recused from discussion and voting on matters involving the conflict) as is the norm in corporate

law, or will it require anyone with any conflict of interest to be prohibited from sitting on the Board or the Policy Council? Stay tuned for answers to these critical questions!

For More Information on Reauthorization:

NHSA's summary of the changes in the Head Start Act can be found at: <http://www.nhsa.org/download/announcements/HS%20Reauthorization%20Summary.pdf>

Additional information and resources regarding the new Head Start Act can be obtained on the ACF Early Childhood Learning and Knowledge Center web site: <http://eclkc.ohs.acf.hhs.gov/hslc/>. Specifically, there is a copy of the Head Start Act that incorporates all of the new changes into the Act in bold font, so you can see in context what is new. There are also new Information Memoranda, and there will be more of those in the future as well as Policy Clarifications regarding reauthorization.

Opportunities to Get Involved

When ACF promulgates regulations, it will do so through a formal process known as “notice and comment rule-making.” It will publish draft regulations in the Federal Register (available online at <http://www.gpoaccess.gov/fr/index.html>) putting the Head Start community on notice of its intentions. Then there will be an open comment period (typically 90 days) for the community to respond in writing. While NHSA will be responding with comments on behalf of its members, this comment period is your opportunity to get involved and let ACF formally know what you think of the proposed rules.

Stay in Touch

As ACF rolls out the new regulations, guidance and interpretations on the new Act, please let NHSA know if you are encountering difficulties with implementation by directing comments to Michael McGrady and Ted Waters.

CONCLUSION

The Head Start reauthorization requires many changes to Head Start agencies' governance structure and functioning. Some of these changes should be made immediately, while others will undoubtedly become necessary as new guidance and regulations are released by ACF. While some of the new provisions will be burdensome and difficult for programs to operationalize, the overall effect of these changes should be better informed Boards of Directors and Policy Councils, leading to better oversight. In turn, these changes will lead to even stronger programs serving the needs of the nation's children and families.

Endnotes

1. For the purposes of this Action Alert, "Head Start agencies" include both grantees and delegates.
2. Unless there is a conflict between the language of the new Act and the provisions of the Head Start Program Performance Standards, the Act and the regulations must be read together and agencies must comply with both.
3. 1304.50(b)(6).
4. 121 Stat. 1402 (2)(A).
5. 1304.50(h).
6. See *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981); see also *Bennett v. New Jersey*, 470 U.S. 632 (1985).



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