

Clearinghouse Review

NATIONAL CLEARINGHOUSE FOR LEGAL SERVICES, INC.

Volume 28 ■ Number 7

November 1994

Statutory Attorney Fees

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Low-Income Energy Assistance Program Reauthorized

By the National Consumer Law Center

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I. Introduction

On May 18, 1994, President Clinton signed into law legislation reauthorizing the Low-Income Home Energy Assistance Program (LIHEAP) through fiscal year (FY) 1999. /1/ Most of the provisions in the new law will take effect at the beginning of FY 1995, October 1, 1994.

Many changes were made in the current statutory provisions governing LIHEAP including:

- a four-year reauthorization of the program at a funding level of \$2 billion for each fiscal year; /2/
- a return to a program year of October 1 through September 30; /3/
- authorization for the program's Leveraging Incentive Fund at \$50 million for FYs 1996 and 1997 and for "such sums as may be necessary" for FYs 1998 and 1999; /4/
- a four year authorization for an Emergency Fund of \$600 million; /5/
- the addition of a new allowable use for LIHEAP funds (in the form of a new assurance that the states must provide) allowing states to use up to 5 percent of their funds to provide additional services, such as needs assessments, counseling, and assistance with energy vendors; /6/
- the targeting of assistance to a new category of households -- those with "the highest home energy needs" -- as newly defined in the statute; /7/
- addition of language in the vendor payment section of the statute clarifying that states, in consultation with their grantees, may make vendor payment agreements with unregulated vendors contingent on certain actions taken by such vendors; /8/
- the inclusion, within the Leveraging Incentive Fund, of a new program called the Residential Energy Assistance Challenge (REACH) Program that, beginning in FY 1996, will allow local grantees to provide a range of supplemental services to LIHEAP clients; /9/
- authorization to fund energy efficiency pilot programs with REACH funds; /10/

- requirement that the Secretary of HHS draft model performance goals and measurements within 18 months after passage of the legislation; /11/ and
- the reduction of funds to HHS for training and technical assistance (T&TA) from \$500,000 to \$250,000 per fiscal year. /12/

While no provision regarding the rights of LIHEAP-eligible households to enforce the statute in the federal courts was added to the statute, there was a "colloquy," or brief dialogue of clarification, on this issue during the full Senate consideration of the compromise legislation adopted by the House and Senate conference committee. /13/

This article briefly discusses many of the significant changes in the current statute. /14/

II. Authorized Funding Levels and Change in Program Year

LIHEAP was reauthorized for FY 1995 through FY 1999 at \$2 billion for each fiscal year. No specific authorized funding level for the program had been included in last year's program extension through FY 1995. /15/ This year's reauthorization thus replaces last year's reauthorization for FY 1995. Of course, the authorized funding level is different from the appropriated level in that the former sets forth the level of funding that Congress believes is realistically needed for the program, while the appropriations process provides the actual funds and usually results in a lower figure than the authorized amount.

This year's reauthorization also changed LIHEAP's program year to overlap again with the federal fiscal year, beginning on October 1 and ending on September 30. LIHEAP's 1990 reauthorization had changed the program year to run from July 1 through June 30 and required the program to be "forward funded," allowing Congress to appropriate LIHEAP funds one year in advance. /16/ The states then would be able to draw down on those funds on July 1, as they began planning for the following year's program.

For a number of reasons, the change to forward funding never materialized. Instead, Congress provided "advance appropriations" for LIHEAP /17/ that, while giving states notice one year in advance of how much funding they could expect for the next program year, did not allow for them to draw upon those funds until the beginning of the federal fiscal year.

The new law allows for the continuation of "advance appropriations." As is evident from this year's budget proposal to reduce by 51 percent the \$1.475 billion Congress appropriated for LIHEAP's FY 1995 program last year, receiving advance appropriations is no guarantee of keeping it through the following year's funding process.

III. Funds for Leveraging, Emergency Uses, and Technical Assistance and Training

The 1990 LIHEAP reauthorization created a Leveraging Incentive Fund within LIHEAP. /18/ The 1993 reauthorization authorized \$50 million for the fund for FY 1995, /19/ and Congress earmarked \$35 million for the fund in the FY 1995 advance appropriations. /20/ The 1994 reauthorization continues the \$50 million authorization level for FYs 1996 and 1997, while authorizing "such sums as may be necessary" for FYs 1998 and 1999.

This year's reauthorization includes a \$600 million Emergency Fund to be distributed to one or more states to meet the additional home energy needs arising from a natural disaster or other emergency. The President must submit a formal budget request to the Congress for release of any portion of the \$600 million. While an emergency fund has been included in the past few appropriations bills /21/ and the President in fact released \$300 million from the \$600 million fund in FY 1994, /22/ the congressional action is significant in making the Emergency Fund part of the permanent statute.

Once monies are released from the Fund, the reauthorization gives the HHS Secretary discretion to determine which states receive funds and how much each state receives. The Secretary must take into account (1) the extent to which a state was affected by the emergency or disaster, (2) the availability of other resources to an affected state under this or any other program, and (3) such other factors as the Secretary determines relevant.

The conference report indicates that it is the Secretary's responsibility to assure that any formula for allocating these funds is based on information obtained in a consistent manner from state to state. /23/ "If information as to weather conditions or other emergency conditions is derived from other agencies, the Secretary shall, to the extent practicable, ascertain and make available to the public the methodology by which such information or data was generated." /24/ The Secretary also is required to notify Congress of the allotment to be made before releasing the funds.

Effective in FY 1995, the reauthorization contains a provision that reduces in half the current \$500,000 of appropriated LIHEAP funds that may be set aside by HHS to provide T&TA to states, territories, and tribes. Among currently funded T&TA activities are the LIHEAP Clearinghouse; travel costs for states, territories, and tribes to attend meetings to discuss LIHEAP administrative issues; and contracted work with outside entities.

IV. Program Purpose Clarified, but Authorized Uses Expanded

Despite initial sentiment in Congress to expand the statute's statement of purpose to place equal emphasis on helping households both in meeting their immediate home energy needs (the original purpose of the statute) and in attaining the capacity to meet such needs independently in the future, /25/ the final bill reemphasizes that LIHEAP's primary purpose is to assist low-income households in meeting their immediate home energy needs. /26/ The conference agreement notes that

[t]he Conferees believe that activities to reduce home energy needs and costs can be a useful supplement to basic benefits. They note, however, the decline in funding for the LIHEAP program over the past nine years as well as the continued high percentage of income spent by low-income households on residential energy and understand the need for basic benefits. The Conferees believe

that, in a time of scarce resources, every possible dollar should be spent on helping households meet their energy bills. /27/

The final bill also reemphasizes the long-standing focus of the program on low-income households, "particularly those with the lowest incomes" that pay a high proportion of household income for home energy. /28/

The final bill, nevertheless, authorizes states to use up to 5 percent of their total LIHEAP allocation, at their option, to provide "services that encourage and enable households to reduce their home energy needs and thereby the need for energy assistance, including needs assessments, counseling, and assistance with energy vendors." /29/ This is in effect a "mini-REACH" program. This provision was intended to authorize formally "REACH types of activities" already being engaged in by at least a handful of states.

States that exercise this option must report to the Secretary of HHS the impact of such activities on the number of households served, the level of direct benefits provided to those households, and the number of households that remain unserved. /30/ States are also authorized to use other federal funds, such as funds from the Community Services Block Grant, for these activities. /31/ Current law provides for states to use nonfederal funds for the costs of planning and administering the program, over the allowable 10 percent. /32/ The change provides an exception to this provision, so that other federal funds may be used specifically for this new provision only.

V. Targeting Assistance

As in previous years, states may not deny eligibility to households with incomes less than 110 percent of the federal poverty level for that state, but the new law emphasizes that states may give priority to those households with the highest energy costs or needs in relation to household income, something they might arguably do before in any case. /33/ The statute also broadens the current focus of the outreach provision to include not only seniors and persons with disabilities but also households with high home energy burdens. /34/ In addition, the actual provision of assistance is no longer just targeted to providing the highest benefits to households with the lowest incomes and highest energy costs in relation to income, but also to households with the "highest home energy needs." /35/

The LIHEAP statute was amended to include and define the term "energy burden" to mean the expenditure of the household for home energy divided by the income of the household. /36/ Since this has been the prevailing definition used in practice over the years, it is an important addition to the statute. The term "highest home energy needs," newly added to the statute, is defined in the statute as "the home energy requirements of a household determined by taking into account both the energy burden of such household and the unique situation of such household that results from having members of vulnerable populations, including very young children, individuals with disabilities, and frail older individuals. /37/

The dual nature of the definition requires states to look beyond the mere fact that a household contains very young children, individuals with disabilities, or frail elderly. Even if a household

contains a "vulnerable" member, the state also must look at the energy burden of the household in determining what priority to assign to it. This is an important point to emphasize because, at times, some states have tended to give priority to a household solely because of the presence of a senior member. As is clear from this new language, states must go beyond use of such classifications in assigning priority of service for its program.

VI. Performance Goals and Criteria

The Secretary of HHS is required to develop performance goals and measurements, in consultation with states, territories, tribes, and local grantees by November 1995. Beginning in 1997, HHS will make available to the states these goals and measurements, together with the model state plan HHS is already required to provide annually. /38/ The states may, at their option, incorporate them into their FY 1997 state plan. HHS is also required to report to Congress within 18 months the manner in and the degree to which states are meeting the purposes of the LIHEAP statute and on any improvements or changes needed to accelerate the achievement of these goals. The Secretary may request data relevant to the development of model performance goals and measurements.

VII. Vendor Payments to Unregulated Utilities

The reauthorization expands the authority states have under current law to pay home energy suppliers directly and to set up certain criteria relating to such activity. /39/ Under the new law, states can make vendor payments to unregulated vendors contingent on those unregulated vendors:

taking appropriate measures to alleviate the energy burdens of eligible households, including providing for agreements between suppliers and individuals eligible for benefits under this Act that seek to reduce home energy costs, minimize the risks of home energy crisis, and encourage regular payments by individuals receiving financial assistance for home energy costs. /40/

These conditions, in both the House and Senate bills, originally applied to all vendors but were changed in conference to apply only to unregulated vendors out of concern that the earlier provision might be interpreted to infringe on a state's regulatory authority or process over regulated utilities.

The reauthorization also deletes a current provision in the law requiring energy suppliers receiving direct LIHEAP payments to agree not to discriminate either in the cost of goods supplied or in services provided to the LIHEAP client for whom the vendor receives payment. /41/ This provision was apparently deleted in the belief that another section of the current law sufficiently protects against unfair discrimination. Furthermore, some vendors argued that the provision would prohibit favorable discrimination, such as lower utility rates, for LIHEAP households.

VIII. The Residential Energy Assistance Challenge Program

The reauthorization legislation includes within the Leveraging Incentive Fund a new program -- the Residential Energy Assistance Challenge Program (REACH) -- that authorizes local programs to provide a range of supplemental services to LIHEAP clients. This provision is not effective until FY 1996. In brief, the Secretary of HHS is authorized to use not more than 25 percent of the funds appropriated for the Leveraging Incentive Program to make challenge grants to states submitting qualifying plans that are approved by the Secretary.

Furthermore, the Secretary is required to reserve, from these REACH monies, funds to make additional payments to state REACH programs that have energy efficiency education services and that have the potential for replication as model program designs. These supplemental REACH funds must be used for the implementation and evaluation of energy efficiency education services.

The REACH provisions are a modified version of proposals to replace the current LIHEAP program. The final version of the law and the accompanying Conference Report state clearly that the REACH services are to be supplemental to LIHEAP payment assistance. /42/ The law requires that, in each state REACH plan, the state will provide an assurance that services and benefits will be in addition to, and in coordination with, other benefit payments and services provided by LIHEAP. /43/

A. State Plans

States must submit a plan listing the type of activities, from those allowed under the program, in which they will engage. /44/ They must assure that REACH services will be delivered through community-based nonprofit entities. /45/ The new law provides the priority that will be given to various types of nonprofit organizations and the administrative services they will offer. /46/

Each local grantee must assure that it will provide a variety of services and benefits, /47/ including:

- (1) payments to, or on behalf of, households eligible for REACH and benefits for regular LIHEAP-eligible households;
- (2) energy-efficiency education;
- (3) residential energy demand management services, including any other energy-related residential repair and energy-efficiency improvements in coordination with, or delivered by, DOE Weatherization Assistance Programs at the discretion of the state;
- (4) family services, such as counseling and needs assessment, related to energy budget management, payment plans, and related services; and
- (5) negotiation with home energy suppliers on behalf of households eligible for REACH services and benefits.

A range of other factors must be included in the state plan, including those relating to crisis assistance, /48/ performance goals, /49/ energy vendor contributions /50/ and an assurance that each

local entity operating a REACH program will solicit and be responsive to the views of REACH-eligible clients. /51/

B. Recipients of REACH Services

The state can designate all or part of the state, or all or part of the client population, as the focus of the REACH initiative. /52/

C. Energy-Efficiency Education Provisions

The final bill incorporates the concept of energy-efficiency education into the REACH portion of the Leveraging Incentive Fund. As noted, the Secretary is to set aside some portion of the REACH funds to provide supplemental grants to states that submit proposals to provide such services. This money could fund energy-efficiency education pilots, either run in coordination with other REACH activities or apart from them. The law is not clear on this point.

IX. Private Right of Action Under LIHEAP Statute

Since there has been no explicit private right of action provision in the LIHEAP statute to enforce the rights of LIHEAP-eligible households in federal court, at least two circuit courts of appeal have raised doubts as to whether Congress intended to provide such a right /53/ or under what circumstances such a right exists. /54/ Congress' actual intent can be determined from a recent "colloquy," or brief dialogue of clarification, on this issue during the full Senate consideration of the compromise LIHEAP reauthorization adopted by the House and Senate conferees.

During the floor discussion of the final version of the bill, /55/ Senator Paul D. Wellstone (D-Minn.) raised this issue in the following manner:

Mr. Chairman, I would like to ask a question regarding the LIHEAP provisions in the Human Services Act. I wanted to clarify that none of the changes made regarding the LIHEAP program, including the provisions directed at the Secretary of HHS, are intended to alter households' current ability to seek redress under the statute directly from the federal courts. Is that correct, Mr. Chairman? /56/

Senator Christopher J. Dodd (D-Conn.), who is the chairman of the Labor and Human Resources Subcommittee with jurisdiction over this bill, responded that "[t]he gentleman's statement is correct." /57/ Senator Edward M. Kennedy (D-Mass.), who is chairman of the full Labor and Human Services Committee, said, "That is also my understanding." /58/

As indicated above, this colloquy was intended to address a concern raised by two circuit courts -- the Sixth and Fourth Circuits -- that individuals cannot enforce their rights under the LIHEAP statute in federal courts /59/ or that an individual must first exhaust state administrative remedies before seeking action from the federal courts. /60/

If individuals cannot enforce their rights under the statute in federal courts, that leaves enforcement in the hands of HHS. Since LIHEAP is viewed as a block grant, with much state discretion in its implementation, HHS is not inclined to enforce judicially the requirements under the law. When individuals must first exhaust their state administrative remedies, the problem is that by the time that is done the state will have spent all of its funds, leaving the individual with relief in theory only.

This colloquy was intended to clarify that LIHEAP-eligible individuals can enforce their rights in federal courts and can do so before exhausting state administrative remedies.

Footnotes

/1/ The Human Services Amendments of 1994, Pub. L. No. 103-252, reauthorizes LIHEAP, the Community Services Block Grant, and Head Start. For the legislative history of this law; see Title III of S. 2000 and the conference report accompanying it, H.R. Rep. No. 497, 103d Cong., 1st Sess. (1994); S. 2000 as reported by the Senate, with accompanying committee report, S. Rep. No. 251, 103d Cong., 1st Sess. (1994), and H.R. 4250 as adopted by the House, with its accompanying report, H.R. Rep. No. 483, 103d Cong., 1st Sess., pt. 1 (1994).

/2/ Pub. L. No. 103-252, tit. III, Sec. 303(a)(1).

/3/ Id. Sec. 303(a)(2).

/4/ Id. Sec. 303(b).

/5/ Id. Sec. 304.

/6/ Id. Sec. 305(b)(3).

/7/ Id. Sec. 306(c).

/8/ Id. Sec. 311(a)(1).

/9/ Id. Sec. 312.

/10/ Id.

/11/ Id. Sec. 311(b).

/12/ Id. Sec. 311(a)(3).

/13/ See 140 Cong. Rec. S5548 (daily ed. May 11, 1994).

/14/ For more information regarding LIHEAP or the reauthorization legislation or for a copy of a side-by-side table, comparing provisions in the current law with those in the new law, contact Helen Gonzales at NCLC's D.C. office.

/15/ LIHEAP was extended for one year as part of the Reauthorization of the National Institutes of Health in Pub. L. No. 103-43, enacted on June 10, 1993.

/16/ Pub. L. No. 101-501.

/17/ Pub. L. No. 102-392, FY 1993 Appropriations for Departments of Labor, Health and Human Services, and Education provided the first "advance appropriations" for LIHEAP.

/18/ 42 U.S.C. Sec. 8626A.

/19/ Pub. L. No. 103-43.

/20/ Pub. L. No. 103-112; see H.R. Rep. No. 275, 103d Cong., 1st Sess (1994).

/21/ See Pub. L. No. 102-170, which provided a \$300 million Emergency Fund for FY 1992, and Pub. L. No. 102-392, which contained a \$600 million Emergency Fund for FY 1993, as did P.L. 103-112 providing for FY 1994 appropriations.

/22/ See chapter 5 of Pub. L. No. 103-211.

/23/ H.R. Rep. No. 497, 103d Cong., 1st Sess., at 70 (1994).

/24/ Id.

/25/ See H.R. 4250 and S. 2000, as passed by the Senate.

/26/ Pub. L. No. 103-252 Sec. 302.

/27/ H.R. Rep. No. 497, 103d Cong., 1st Sess., at 70 (1994).

/28/ Pub. L. No. 103-252 Sec. 302.

/29/ Id. Sec. 305(b)(3).

/30/ Id. Sec.305(b)(1).

/31/ Id.

/32/ 42 U.S.C. Sec. 8624(b)(9)(B).

/33/ Pub .L. No. 103-252 Sec. 306(a).

/34/ Id. Sec. 306(b).

/35/ Id. Sec. 306(c).

/36/ Id. Sec. 304(b)(2).

/37/ Id. Sec. 304(b)(3).

/38/ 42 U.S.C. Sec. 8624(c)(3).

/39/ Id. Sec. 8624(b)(7).

/40/ Pub .L. No. 103-252 Sec. 311(a)(1).

/41/ 42 U.S.C. Sec. 8624(b)(7)(D).

/42/ Pub .L. No. 103-252 Sec. 312(3)(2)(M). See also H.R. Rep No. 497, 103d Cong., 1st Sess., at 73.

/43/ Pub .L. No. 103-252 Sec. 312(3)(2)(M).

/44/ Id. Sec. 312(e).

/45/ Id. Sec. 312(e)(2)(A).

/46/ Id. Sec. 312(e)(2)(B).

/47/ Id. Sec. 312(e)(C).

/48/ Id. Sec.312(e)(2)(G).

/49/ Id. Sec.312(e)(2)(J).

/50/ Id. Sec.312(e)(2)(J)(iii).

/51/ Id. Sec. 312(e)(2)(I).

/52/ Id. Sec.312(d).

/53/ Hunt v. Robeson County Dep't of Soc. Servs., 816 F.2d 150 (4th Cir. 1987).

/54/ Human Resources v. Northern Ky. Welfare Rights Ass'n, No. 91-5122 (6th Cir. Jan. 24, 1992).

/55/ S. 2000.

/56/ See 140 Cong. Rec. 5,548 (May 11, 1994).

/57/ Id.

/58/ Id.

/59/ Hunt, 816 F.2d at 150.

/60/ Human Resources, No. 91-5122.