

# “Head Start Works Because We Do”: Head Start Programs, Community Action Agencies, and the Struggle over Unionization

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*Eloise Pasachoff\**

## INTRODUCTION

In the summer of 2002, the city of Boston watched a fierce battle unfold between low-wage workers who provide child care and the social service agencies that employ them.<sup>1</sup> Boston requires its city contractors to pay more than twice the federal minimum wage of \$5.15 an hour to their employees, according to the terms of the city’s “living wage” ordinance.<sup>2</sup> The social service agencies, which receive government subsidies to run their child care programs, claimed that they could not afford to pay this rate. These agencies mounted an intense legal and political campaign, arguing that they would be forced to lay off workers if the city did not exempt them from the living wage requirement, and that they would be compelled to cut off affordable child care for low-income working parents as a consequence.<sup>3</sup> Child care workers, through advocacy groups, responded vigorously that the workers were no less in need of economic support than these low-income working parents, arguing that these are the very types of workers the law was intended to protect.<sup>4</sup>

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\* A.B., Harvard College, 1995; M.A., Yale University, 1998; J.D.-M.P.A. candidate, Harvard Law School-Kennedy School of Government, 2004. Summer internships at the Administration for Children and Families (2001) and at Community Action Program Legal Services (2002) sparked my interest in this topic. Thanks are due to my supervisors and colleagues there, as well as to the Imagitas Fellowship and Rappaport Fellowship that supported those internships. Tom Glaisyer and David Yamada gave helpful comments on early drafts of this Note. Donna Hogle offered insight from the field. The editing team at the Harvard Civil Rights-Civil Liberties Law Review pushed me to clarify my ideas and writing. My family continues to provide the model for scholarship and writing to which I aspire. Any errors in substance or style are mine alone. Please address comments to [eloise.pasachoff@post.harvard.edu](mailto:eloise.pasachoff@post.harvard.edu).

<sup>1</sup> See generally Sarah Schweitzer, “Living Wage” Threatens Child Care, *BOSTON GLOBE*, July 22, 2002, at A1.

<sup>2</sup> *Id.* (noting that the living wage, as of July 2002, was \$10.54 per hour); see also *BOSTON, MASS., MUNICIPAL CODE* § 24-6.2 (2002), Am. Legal Publ’g Corp., available at [http://www.amlegal.com/boston\\_ma](http://www.amlegal.com/boston_ma) (as of Nov. 29, 2002) (establishing a minimum living wage of \$10.25 per hour and providing a formula for annual adjustments).

<sup>3</sup> See Schweitzer, *supra* note 1.

<sup>4</sup> *Id.* In November 2002, the city of Boston decided to grant one-year waivers to four social service agencies that provide child-care services and that had demonstrated hardship in paying the living wage. See Sarah Schweitzer, *City Gives First-Ever Wage Law Waivers*,

Although this particular battle was new, the principles behind it were not. The conflict over the living wage waiver is reminiscent of another struggle that has been taking place around the country for more than a decade as teachers and other employees of Head Start programs initiate union drives and their nonprofit Community Action Agency employers attempt to thwart these efforts. Over the past fifteen years, the Service Employees International Union (SEIU),<sup>5</sup> the United Auto Workers (UAW),<sup>6</sup> the American Federation of State, County and Municipal Employees (AFSCME),<sup>7</sup> the American Federation of Teachers (AFT),<sup>8</sup> and other labor unions<sup>9</sup> have embarked on union organizing campaigns at Head Start programs in Community Action Agencies (CAAs) across the country, from Boston to Houston,<sup>10</sup> Hartford to Los Angeles,<sup>11</sup> New York City to Cleveland,<sup>12</sup> Minneapolis to Michigan.<sup>13</sup> “Head Start works because we do,” one union’s slogan proclaims.<sup>14</sup> Although some CAA employers have accepted the union drives without much rancor, labor strife between Head Start teachers and their employers has been a common story.

Both the living wage struggle and the unionization conflicts manifest a strange tension. The avowed mission of many social service agencies, including the CAAs that operate Head Start programs, is to empower individuals, families, and communities in poverty and to assist them along the path to economic self-sufficiency.<sup>15</sup> The labor movement and worker

BOSTON GLOBE, Nov. 18, 2002, at B1 [hereinafter Schweitzer, *First-Ever Waivers*]. The agencies had requested three-year waivers. *Id.* Twelve other agencies that had similarly requested three-year waivers were not exempted from the Living Wage Ordinance at all. *Id.*

<sup>5</sup> See, e.g., Jon Tevlin, *Kinder, Gentler Union Busting: Companies Finding New Ways to Thwart Organizing Efforts*, STAR TRIB. (Minneapolis-St. Paul), Nov. 3, 1997, at D1.

<sup>6</sup> See, e.g., Tom Condon, *Union Drive Shows Need to Shrink an Empire*, HARTFORD COURANT, Apr. 15, 1999, at A3, 1999 WL 6359773.

<sup>7</sup> See, e.g., Kathleen Kerr, *Head Start Workers Calling for Investigation of Funds*, NEWSDAY (N.Y., Nassau & Suffolk ed.), Aug. 24, 1990, at 22, 1990 WL 3353482.

<sup>8</sup> See, e.g., Mary Anne Perez, *Azteca Director Has Her Backers*, L.A. TIMES, Oct. 11, 1992, City Times, at 10.

<sup>9</sup> See, e.g., Julio Moran, *Deep Staffing Cuts Proposed to Save Head Start Program*, L.A. TIMES (Valley ed.), Apr. 3, 1993, at B3, 1993 WL 2332076.

<sup>10</sup> See, e.g., Diane E. Lewis, *Antipoverty Agency ABCD Votes Against Union*, BOSTON GLOBE, Dec. 9, 1997, at C18; Claudia Kolker, *Social-Service Group Elects to Join a Union: Workers Complain of Bad Job Policies*, HOUSTON CHRON., Jan. 22, 1997, at A22, 1999 WL 6536249.

<sup>11</sup> See, e.g., Condon, *supra* note 6; Perez, *supra* note 8.

<sup>12</sup> See, e.g., Alexis Jetter, *Head Start Staff Plans Walkout Over Pensions*, NEWSDAY (N.Y., City ed.), Mar. 26, 1989, at 8, 1989 WL 3367814; Sandra Livingston, *A Lesson in Value: Head Start Teachers, Aides Seek Respect, Union Assistance*, PLAIN DEALER (Cleveland), May 30, 1999, at 1E, 1999 WL 2365621.

<sup>13</sup> See, e.g., Tevlin, *supra* note 5; FiveCAP, Inc., No. GR-7-CA-43295, 2001 NLRB LEXIS 903 (NLRB A.L.J. Nov. 2, 2001).

<sup>14</sup> Am. Fed’n of State, County and Mun. Employees (AFSCME), *Head Start Poster*, available at <http://www.afscme.org/publications/hsv/hsv00204.htm> (last visited Nov. 29, 2002) [hereinafter *Head Start Poster*].

<sup>15</sup> See Community Services Block Grant Act § 672, 42 U.S.C. § 9901 (2000). The purpose of the Act is

advocates claim similar goals.<sup>16</sup> What, then, lies behind this clash, and what dynamics does the conflict create? More importantly, how can the parties move beyond this conflict and mutually support their common missions?

Answering these questions is crucial, for the issues at the heart of this struggle are hardly going away. As living wage movements gain momentum around the country,<sup>17</sup> as social service labor unions gain influence in the labor movement,<sup>18</sup> as the nonprofit sector increases in prominence,<sup>19</sup> and as the country turns its attention to early childhood education and to the low-wage labor market in the wake of welfare reform,<sup>20</sup> the workforce that is the subject of the Head Start unionization battle stands at the center of important national concerns.

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to provide assistance to States and local communities, working through a network of community action agencies and other neighborhood-based organizations, for the reduction of poverty, the revitalization of low-income communities, and the empowerment of low-income families and individuals in rural and urban areas to become fully self-sufficient . . . [to obtain] the maximum participation of residents of the low-income communities and members of the groups served by programs assisted through the block grants made under this chapter to empower such residents and members to respond to the unique problems and needs within their communities . . . [including a variety of groups such as] individual citizens, and business, labor, and professional groups, who are able to influence the quantity and quality of opportunities and services for the poor.

*Id.*; see also Head Start Act § 636, 42 U.S.C. § 9831 (2000) (stating that the objective of the Act is “to promote school readiness by enhancing the social and cognitive development of low-income children through the provision, to low-income children and their families, of health, educational, nutritional, social, and other services that are determined, based on family needs assessments, to be necessary”).

<sup>16</sup> See, e.g., Am. Fed’n of Labor-Cong. of Indus. Orgs. (AFL-CIO), *What We Stand For: Mission and Goals of the AFL-CIO*, available at <http://www.afl-cio.org> (last visited Nov. 29, 2002). The AFL-CIO states that its mission is

to improve the lives of working families . . . We will make the voices of working families heard across our nation and in our neighborhoods. We will create vibrant community labor councils that reach out to workers at the local level. We will strengthen the ties of labor to our allies. We will speak out in effective and creative ways on behalf of all working Americans.

*Id.*

<sup>17</sup> See, e.g., Ass’n of Cmty. Orgs. for Reform Now (ACORN), *Living Wage Resource Center*, available at <http://www.livingwagecampaign.org> (last visited Nov. 29, 2002) (describing fifteen living wage campaigns spearheaded by ACORN over the last six years).

<sup>18</sup> The increased prominence of social service unions is due at least in part to the decline of domestic manufacturing. See, e.g., KATHERINE S. NEWMAN, *NO SHAME IN MY GAME: THE WORKING POOR IN THE INNER CITY* 44, 153–54, 274–75 (1999); REBECCA M. BLANK, *IT TAKES A NATION: A NEW AGENDA FOR FIGHTING POVERTY* 67 (1997); WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* 28–31 (1996).

<sup>19</sup> See generally PETER DOBKIN HALL, *INVENTING THE NONPROFIT SECTOR AND OTHER ESSAYS ON PHILANTHROPY, VOLUNTEERISM, AND NONPROFIT ORGANIZATIONS* (1992).

<sup>20</sup> See, e.g., Work and Family Act of 2002, S. 2524, 107th Cong. (2002); Self-Sufficiency Act, H.R. 3667, 107th Cong. (2002); A Living Wage, Jobs for All Act, H.R.

This Note outlines initial answers to the questions above. After briefly describing the history and mission of CAAs and the Head Start program, and their intersection with the labor movement, Part I analyzes the practical, rhetorical, and legal arenas in which the battle over Head Start unionization is waged. Part II proposes strategies for change, offering legislative solutions, regulatory proposals, and preemptive problem-solving and dispute resolution possibilities. My central thesis is that the labor movement and the CAAs that operate Head Start programs have many common interests and overlapping missions, and that the two sides in this conflict can and should move beyond competition to cooperation. The struggle over unionization is not simply about the distribution of an inadequate pot of money, so it is not a zero-sum game; beneath the specific points of contention lie opportunities for the parties to work together amicably to achieve better results. I focus on unions in Head Start programs, rather than on the living wage, because the union struggle has a much longer history, but I hope that lessons from the union struggle will inform the emerging living wage debate. In fact, the battle over the living wage may actually comprise the latest stage in the Head Start unionization conflict, since unions themselves have organized and supported several living wage campaigns in recent years.<sup>21</sup> Understanding the history of this conflict is essential to changing its future.

## I. THE CONTOURS OF THE CONFLICT

Community Action Agencies and Head Start both came into existence as part of President Johnson's War on Poverty.<sup>22</sup> In 1964, the Economic Opportunity Act<sup>23</sup> created a national network of local community agencies (CAAs) designed to combat poverty by organizing and employing low-income adults. Today, more than 1100 CAAs serve more than ten

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3682, 107th Cong. (2002).

<sup>21</sup> See, e.g., Janice Fine, *Moving Innovation from the Margins to the Center*, in A NEW LABOR MOVEMENT FOR THE NEW CENTURY 119, 129–33 (Gregory Mantsios ed., 1998) [collection hereinafter NEW LABOR MOVEMENT] (framing the Baltimore living wage campaign as “a key component of community unionism”); Steven Lerner, *Taking the Offensive, Turning the Tide*, in NEW LABOR MOVEMENT, *supra*, at 69, 80 (noting the importance of living wage campaigns in union strategies); JOHN J. SWEENEY, AMERICA NEEDS A RAISE: FIGHTING FOR ECONOMIC SECURITY AND SOCIAL JUSTICE 118 (1996) (describing nationwide living wage campaigns organized by “labor unions and their allies” in localities including Baltimore, Milwaukee, Santa Clara County, Denver, New York City, New Orleans, Chicago, and Los Angeles).

<sup>22</sup> See generally NAT'L ASS'N FOR STATE CMTY. SERVS. PROGRAMS (NASCS), COMMUNITY SERVICES NETWORK: THE COMMUNITY SERVICES BLOCK GRANT IN ACTION, FISCAL YEAR 2000 (2001), available at <http://www.ezlistings.com/MemberFiles/L2084/Text4.pdf> [hereinafter NASCS]; EDWARD ZIGLER & SUSAN MUENCHOW, HEAD START: THE INSIDE STORY OF AMERICA'S MOST SUCCESSFUL EDUCATIONAL EXPERIMENT (1992).

<sup>23</sup> See Economic Opportunity Act of 1964, Pub. L. No. 88-452, § 202, 78 Stat. 508, 516; NASCS, *supra* note 22, at 8.

million low-income people across the nation, in urban as well as rural areas, through a variety of anti-poverty programs.<sup>24</sup> In 1965, the first Head Start programs opened their doors around the country to provide comprehensive services—including health care, social services, and early education—to poor children of preschool age. Head Start programs themselves reached almost one million children through approximately 1500 grantees in the past fiscal year.<sup>25</sup> Although many Head Start programs are operated by service providers other than CAAs, the national Community Action network is the biggest single provider of Head Start, and Head Start is among the largest programs that CAAs run.<sup>26</sup>

At the federal level, control of and support for CAAs comes from the Office of Community Services, which is housed within the Department of Health and Human Services’ Administration for Children and Families (ACF).<sup>27</sup> ACF also contains the federal agency for Head Start programs, the Head Start Bureau.<sup>28</sup> Federal funds for CAAs are provided in block grants to the states, which then allocate the money to local CAAs.<sup>29</sup> In 2000, each dollar of federal money administered to CAAs leveraged an additional five dollars from state, local, and private funds.<sup>30</sup> In contrast, Head Start funds pass directly from ACF to the local grantees,<sup>31</sup> which must contribute twenty percent of their total Head Start budget; federal funds make up the other eighty percent.<sup>32</sup>

Head Start has never limited its scope exclusively to meeting the needs of children. Rather, since its inception, Head Start has provided unemployed parents with training and job opportunities, often as Head

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<sup>24</sup> See NASCSP, *supra* note 22, at 6. CAAs not only run Head Start programs, but also provide job training, educate individuals on income management, help make houses and apartments more energy efficient, partner with health clinics, and identify and create solutions for specific community problems where no clear program already exists. See *id.* at 17–19.

<sup>25</sup> HEAD START BUREAU, U.S. DEP’T OF HEALTH & HUMAN SERVS., 2002 HEAD START FACT SHEET, available at <http://www.acf.hhs.gov/programs/hsb/research/factsheets.htm> (last modified Oct. 2, 2002).

<sup>26</sup> See NASCSP, *supra* note 22, at 9.

<sup>27</sup> See generally Admin. for Children & Families, U.S. Dep’t of Health & Human Servs., *ACF Home Page*, at <http://www.acf.hhs.gov> (last modified Nov. 26, 2002).

<sup>28</sup> See generally Head Start Bureau, U.S. Dep’t of Health & Human Servs., *HSB Home Page*, at <http://www.acf.hhs.gov/programs/hsb> (last visited Nov. 29, 2002).

<sup>29</sup> See NASCSP, *supra* note 22, at 10.

<sup>30</sup> *Id.* at 11.

<sup>31</sup> For controversies surrounding attempts in 1974 and 1981 to make Head Start a block grant, see ZIGLER & MUENCHOW, *supra* note 22, at 176–77, 194–98.

<sup>32</sup> See VALORA WASHINGTON & URA JEAN OYEMADE BAILEY, PROJECT HEAD START: MODELS AND STRATEGIES FOR THE TWENTY-FIRST CENTURY 30–31 (1994).

Start employees.<sup>33</sup> CAAs also have been actively involved in moving individuals and families off public assistance and into well-paying jobs.<sup>34</sup>

At a fundamental level, then, CAAs that administer Head Start programs appear to be natural allies of the labor movement, which has claimed the mantle of fighting for American workers for more than a century. One scholar articulates the mission of the labor movement from 1955 to 1995—the same period that witnessed the rise of CAAs and Head Start programs—as “insur[ing] fair wages, increas[ing] job security, protect[ing] against victimization, improv[ing] the conditions of work, and provid[ing] additional benefits.”<sup>35</sup> It is difficult to believe that managers of CAAs and Head Start programs would not embrace this mission for their clients, many of whom are low-wage workers. Indeed, the labor movement’s current mission fits even more clearly into the grassroots, community-empowering goals of CAAs and Head Start. The new unionism “encourages a shift away from the narrow institutional interests of unions and toward a focus on building coalitions and a broad social movement,” supports not only current union members but also low-income workers in every sector, pays more attention to women and minorities than ever before, and places greater emphasis on “grassroots efforts and direct action.”<sup>36</sup>

Despite similarities in the goals of labor organizers and CAA-operated Head Start programs, the two movements remained largely unconnected for several decades; not until the mid-1980s did their interactions make national news. Sadly, it was labor strife, not a new collaborative effort, that drew them together. Teachers at a Head Start program on Long Island, New York, unionized in 1987 and ultimately went on strike after months of unsuccessful contract negotiations, thereby shutting down the program temporarily.<sup>37</sup> The issues that emerged in this conflict—the disputes over wages, the war of words, and the legal maneuvering—have resurfaced around the country time and again over the past fifteen years, with little variation.<sup>38</sup>

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<sup>33</sup> See, e.g., ZIGLER & MUENCHOW, *supra* note 22, at 227 (“Head Start from its outset was designed as a two-generational program, promoting social competence for children and economic self-sufficiency for parents. At its best, Head Start has incorporated both a jobs and a services strategy in attacking poverty.”).

<sup>34</sup> See NASCSP, *supra* note 22, at 18.

<sup>35</sup> Gregory Mantsios, *What Does Labor Stand For?*, in NEW LABOR MOVEMENT, *supra* note 21, at 44, 46.

<sup>36</sup> *Id.* at 50–51.

<sup>37</sup> See, e.g., Adam Z. Horvath, *Head-Start Strike: 200 in Suffolk to Picket; Centers Vow to Open*, NEWSDAY (N.Y., Nassau & Suffolk ed.), Apr. 11, 1988, at 2, 1988 WL 2944996. There were earlier attempts to unionize Head Start programs elsewhere, but none received as much press coverage as this story. See, e.g., Econ. Opportunity Planning Ass’n of Greater Toledo, Inc., No. 83-127, DAB No. 591 (Dep’t of Health & Human Servs. Appeals Bd. Nov. 6, 1984), 1984 WL 250057 (citing a claim that the Head Start director’s alleged “inept leadership” led to employees’ attempt to unionize in 1980).

<sup>38</sup> See, e.g., *supra* notes 5–12 and discussion *infra* Part I.A–C.

These battles over unionization in CAA-operated Head Start programs take place on three levels. In the practical arena, the CAA directors and Head Start employees argue over specific bread-and-butter issues. In the rhetorical arena, both sides wage heated media campaigns in an attempt to gather public support. Finally, in the legal arena, each side argues its case to a court or to the National Labor Relations Board. It is important to understand these arenas of dispute, not because the issues are new—the arguments and strategies resonate with labor struggles in other sectors—but rather because the familiar issues take on new meanings in this context of anti-poverty social service agencies. Labor conflicts in CAAs and Head Start programs arose quickly and spread rapidly, and there has been little systematic effort to understand the central issues driving the sides apart. It is necessary to understand the dynamics of this conflict in order to find national solutions for what has turned out to be a national problem.

#### A. *Practical Issues*

One central issue in many Head Start union campaigns is the level of compensation in salary and benefits earned by Head Start workers. In most union drives there has been no city-wide living wage ordinance to contend with, so union organizers have pointed to another external index of fairness: the salaries paid to preschool and kindergarten teachers in the public school system. In a 1999 union drive in Cleveland, organizers contrasted a Head Start teacher who made less than \$21,000 teaching preschoolers with a kindergarten teacher who could make \$35,000.<sup>39</sup> Union drives and contract battles have also focused on pensions, a benefit generally received by public school teachers but rarely obtained by Head Start employees. In 1989, for example, 1500 Head Start employees serving 11,000 children in New York City threatened to walk out over the issue of pensions, which no Head Start employee in the city had at that time.<sup>40</sup> The threat alone was successful, and employees won retroactive pensions commensurate with their years of service to the program without actually striking.<sup>41</sup>

The issue of disparate compensation between Head Start instructors and teachers in the public school system has also been widely discussed outside the union context. In 1990, the National Head Start Association released a report finding that almost half of all Head Start teachers earned less than \$10,000 a year.<sup>42</sup> Even a Head Start teacher with a college degree would start at just under \$12,000—thirty-seven percent less

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<sup>39</sup> Livingston, *supra* note 12.

<sup>40</sup> See Jetter, *supra* note 12.

<sup>41</sup> See Kevin Flynn, *City Settles with Head Start*, NEWSDAY (N.Y., City Ed.), Mar. 31, 1989, at 30, 1989 WL 3348971.

<sup>42</sup> See WASHINGTON & BAILEY, *supra* note 32, at 120–21.

than a public school teacher in a comparable position would make.<sup>43</sup> In a recent decision in the decades-long *Abbott v. Burke* litigation over facilities funding in New Jersey public schools, the court expressed concern that Head Start was facing a “brain drain” as qualified teachers left for the public school system, and emphasized that “[d]istricts must address salary parity.”<sup>44</sup> Directors of Head Start programs—“management” in the Head Start union wars—also publicly acknowledge the difficulties they face in attracting and retaining qualified staff, given better salaries and benefits in the public schools.<sup>45</sup>

When faced with union demands for better salaries and benefits, however, some directors of Head Start programs have refused to negotiate, explaining that their hands are financially tied.<sup>46</sup> They note that CAAs have a limited amount of money to spend.<sup>47</sup> As one CAA director said to the *Boston Globe* last summer regarding the living wage, “We would be happy to pay it if someone would give us the money.”<sup>48</sup> Alternatively, CAA directors may pit Head Start teachers against other worthy recipients of public funds. For instance, the City of New York eventually did offer pensions to its Head Start employees, but it said it would have to cut other programs in order to do so.<sup>49</sup>

Yet solutions to these disputes over disparate compensation do exist. Some Head Start directors have found creative ways to provide increased compensation for their teachers. In the mid-1980s, a Head Start program director in Cambridge, Massachusetts, designed a retirement plan for her staff members with a three percent contribution by Head Start, finding it unacceptable that the Head Start instructors would otherwise be without retirement benefits even after spending decades with the program.<sup>50</sup> In 1986, Head Start teachers in Broward County, Florida, shifted to the same compensation scale used in the local public schools.<sup>51</sup> Thus, at least in some circumstances, it is possible to expand the size of the pie and provide compensation levels that benefit both instructors and Head Start programs. Why, then, do negotiations over compensation so frequently

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<sup>43</sup> *Id.*

<sup>44</sup> *Abbott v. Burke*, 790 A.2d 842, 853 (N.J. 2002).

<sup>45</sup> See, e.g., *Head Start Reauthorization: Hearing on H.R. 4151 Before the Subcomm. on Children, Family, Drugs, and Alcoholism of the Senate Comm. on Labor and Human Res.*, 101st Cong. 39–41 (1990) (statement of Sister Barbara McMichael, Director, Providence Head Start, Providence, R.I.); *The Future of Head Start: Hearing on H.R. 4151 Before the Subcomm. on Educ. and Health of the Joint Econ. Comm.*, 101st Cong. 63–64 (1990) (statement of Sandra Waddell, Director, North Shore Community Action Programs, Inc., Beverly, Mass.).

<sup>46</sup> See Condon, *supra* note 6.

<sup>47</sup> See *id.*

<sup>48</sup> Schweitzer, *supra* note 1.

<sup>49</sup> See George James, *Preschool Staff Demand Pensions: Head Start Workers, Saying Negotiations are Stymied, Take to the Picket Lines*, N.Y. TIMES, Oct. 9, 1988, § 1, at 65.

<sup>50</sup> See ZIGLER & MUENCHOW, *supra* note 22, at 214.

<sup>51</sup> See *id.* at 216.

descend into either/or fights between these teachers (through their unions) and the directors?

One way to explain this phenomenon is that union drives usually occur after trust and respect between labor and management have dissipated. In such a hostile environment, collaboration to solve problems is more difficult to achieve.<sup>52</sup> A common refrain in union drives in all economic sectors is that management does not respect employees.<sup>53</sup> This complaint is particularly jarring in anti-poverty agencies, many of whose employees are former clients. Still, the complaints come. When management refuses to meet with employee negotiating teams,<sup>54</sup> or when Head Start instructors are asked to perform menial tasks that make them feel like babysitters rather than professionals,<sup>55</sup> employees argue that they are not being valued or appreciated.

On the other side, CAA directors who otherwise might sympathize with the labor movement may feel attacked and misunderstood, and consequently may refuse to negotiate or collaborate, when union leaders (particularly those from outside the social service sector and the educational community) waltz into their agency offices and demand to meet with them,<sup>56</sup> or, alternatively, seemingly engage in delaying tactics in negotiations.<sup>57</sup> CAA directors can become especially frustrated by, and dismissive of, outside union organizers who fail to acknowledge the constraints imposed on Head Start programs by federal regulations.<sup>58</sup>

Lawyers for CAAs and Head Start programs emphasize the importance of mutual trust and respect in creating workplace environments where employees will not want to unionize. One lawyer in Minneapolis attempts to convey this fundamental point in his “union avoidance” workshops: “[C]ompanies have unions because they deserve them.”<sup>59</sup> He

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<sup>52</sup> See WILLIAM N. COOKE, LABOR-MANAGEMENT COOPERATION: NEW PARTNERSHIPS OR ONGOING CIRCLES? 121–25 (1990) (analyzing the role of distrust in inhibiting labor-management cooperation). *But see* Charles T. Kerchner & Julia E. Koppich, *Rethinking Labor-Management Relations; It's a Matter of Trust, Or Is It?*, at <http://63.197.216.234/crcl/mindworkers/udpages/rethinking.htm> (2000) (describing innovation and creativity in teacher-school district negotiations as more important for achieving educational results than developing trust for trust's sake).

<sup>53</sup> See, e.g., TONI GILPIN ET AL., ON STRIKE FOR RESPECT: THE CLERICAL AND TECHNICAL WORKERS' STRIKE AT YALE UNIVERSITY, 1984–85, at 9 (1995); see also SWEENEY, *supra* note 21, at 124 (“The most important thing we can do is to assist working men and women who are organizing for raises, rights, and respect.”).

<sup>54</sup> See Molly Kavanaugh, *New Head of Agency Cancels Talks with Union*, PLAIN DEALER (Cleveland), Oct. 13, 1999, at 1B, 1999 WL 2386876.

<sup>55</sup> See Livingston, *supra* note 12.

<sup>56</sup> See Telephone Interview with Donna M. Hogle, Coordinator, Indiana Head Start-State Collaboration Office (Oct. 17, 2002).

<sup>57</sup> See Kavanaugh, *supra* note 54 (reporting a CAA director's interpretation of the union representatives' delay in meeting at a scheduled time as “a sign of disrespect”).

<sup>58</sup> See Telephone Interview with Donna M. Hogle, *supra* note 56.

<sup>59</sup> Tevlin, *supra* note 5.

explains that “proper human relations” are one way to avoid a union drive, and that the “best way to keep a union out is by creating trust.”<sup>60</sup>

Employees and directors of Head Start programs would seem to agree that trust and respect are critical factors in the manager-employee relationship. The question is how to ensure that this point of agreement actually gets implemented in a meaningful way, rather than as deceptive language masking either an illegal anti-union campaign or a union drive focused on unionization at any cost and above all else.

### *B. Rhetorical Arguments*

As the preceding discussion suggests, important substantive issues underlie union-management conflicts in Head Start programs. How should the salary and benefit scales be set? How can structures for improved employee-management communication be designed? Yet these arguments over practical issues often slip into rhetorical battles where each side insists that its own demands are indispensable and engages in accusatory fault-finding and self-absolution.

The first set of rhetorical arguments commonly used in Head Start union debates involves competing visions of race and gender. From the unions' perspective, CAAs are trampling on the rights of the poor, minority women who work there. Article after article about the Head Start union movement repeats this demographic theme, emphasizing that some Head Start employees earn so little that they meet the income qualifications to obtain food stamps and to enroll their own children in Head Start programs.<sup>61</sup> These employees deserve better, say the unions, but CAAs are taking advantage of them.<sup>62</sup>

From the perspective of some CAAs, however, unions are dominated by white outsiders who want to exert control over social service agencies with large minority constituencies and leadership. Robert M. Coard, president and chief executive of Action for Boston Community Development (ABCD), voiced this perspective after ABCD employees voted against union representation by the SEIU: “There were . . . no minorities in the delegation of organizers. I think people looked at that and said, ‘Who are they representing?’”<sup>63</sup> Alyce Dillon, executive director of the

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<sup>60</sup> *See id.*

<sup>61</sup> *See, e.g.,* Tim Bryant, *Union Supporters Picket YWCA Headquarters*, ST. LOUIS POST-DISPATCH, Feb. 18, 1997, at 2B; Livingston, *supra* note 12; Editorial, *Suffolk Must Save Stalled Head Start Program*, NEWSDAY (N.Y., Nassau & Suffolk ed.), Aug. 15, 1988, at 54, 1999 WL 2970881; *see also* Lucie White, *On the Guarding of Borders*, 33 HARV. C.R.-C.L. L. REV. 183, 188–89, 194 (1998) (stating that Head Start prioritizes hiring parents of its students as its staff and suggesting that many parents who participate in the program are low-income, minority women).

<sup>62</sup> *See* Bryant, *supra* note 61; Kolker, *supra* note 10; Livingston, *supra* note 12; Editorial, *supra* note 61.

<sup>63</sup> Lewis, *supra* note 10. ABCD was one of the agencies that requested, but did not re-

Minneapolis-based Parents In Community Action (PICA), was more direct in her criticism: “White folks in charge, that’s what [the union leaders’] agenda is . . . White folks in charge, second-class treatment for everyone else.”<sup>64</sup> Dillon went on to accuse the National Labor Relations Board, unions, and the national educational establishment of conspiring with each other: “This is about trying to teach poor and minority people a lesson. If you’re not under control, we’ll get you. That’s what this is about.”<sup>65</sup>

The unions and the CAAs thus make exactly the same argument about the exploitation of women and minorities, simply trading accusations of wrongdoing. But the arguments on each side lack nuance. It is easy to note in an aside, as did the article that reported Alyce Dillon’s anti-union tirade, that Dillon is white and makes \$85,000 a year, while most Head Start employees make less than \$20,000; the article implicitly suggested that Dillon herself is ignorant of the financial difficulties that her low-income employees face.<sup>66</sup> Yet this image of the Head Start director is incomplete, for Dillon once was a single mother on welfare, living in public housing, separated from a drug-addicted husband, with two children in Head Start.<sup>67</sup> Likewise, although even a cursory review of the labor movement’s history will reveal numerous instances where women and minorities were excluded from union representation and leadership, suggestions that unions cannot fully involve women and minorities ignore serious efforts and successes in doing so.<sup>68</sup> In fact, the arguments of both sides are complementary, not competing—CAAs can be helping poor individuals and taking advantage of a low-wage labor market at the same time. This rhetorical debate about race and gender does little to advance solutions.

A second rhetorical argument focuses on the welfare of children in Head Start programs. Each side portrays itself as the champion of this vulnerable population, and either explicitly or implicitly accuses the

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ceive, a waiver from Boston’s Living Wage Ordinance in the summer of 2002. See Schweitzer, *supra* note 1; Schweitzer, *First-Ever Waivers*, *supra* note 4.

<sup>64</sup> Doug Grow, *Head Start Gets Black Eye in Fight: Firing Union Organizer Hurts Image of Popular Program*, STAR TRIB. (Minneapolis-St. Paul), Aug. 31, 1997, at B2.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> See *Hearing on the Reauthorization of the Head Start Act: Hearing on H.R. 4151 Before the Subcomm. on Human Res. of the House Comm. on Educ. and Labor*, 101st Cong. 188, 192 (1990) (testimony and written statement of Alyce Dillon, Director, Parents in Community Action, Inc., Minneapolis, Minn.).

<sup>68</sup> See, e.g., Larry Adams, *Transforming Unions and Building a Movement*, in NEW LABOR MOVEMENT, *supra* note 21, at 202; May Chen & Kent Wong, *The Challenge of Diversity and Inclusion in the AFL-CIO*, in NEW LABOR MOVEMENT, *supra* note 21, at 185; José La Luz & Paula Finn, *Getting Serious About Inclusion: A Comprehensive Approach*, in NEW LABOR MOVEMENT, *supra* note 21, at 171; Ruth Needleman, *Women Workers: Strategies for Inclusion and Rebuilding Unionism*, in NEW

LABOR MOVEMENT, *supra* note 21, at 151; see also NORMA M. RICCUCCI, *WOMEN, MINORITIES, AND UNIONS IN THE PUBLIC SECTOR* (1990).

other side of selfishly prioritizing its own needs. For instance, CAAs may suggest that teachers who are truly committed to the well-being of children do not need much in the way of financial remuneration. Thus Irene Tovar, executive director of the Latin American Civic Association in the Los Angeles area, praised her agency's reorganization strategy, which included union-opposed layoffs.<sup>69</sup> She explained how much the CAA cared for children: "We wanted to show that we had the kids' interest at heart, first and foremost. The agency has been able to show that once we took out all the hurt feelings and misunderstandings, that our real commitment has been to the kids."<sup>70</sup>

On the flip side, a union official in New York City made a similar point with regard to employees of city-run day care and Head Start programs whose pay had been delayed for six weeks. Raglan George explained that the employees had "worked without pay because of concern for the children," and critiqued then-mayor Rudolph Giuliani for "crippling the children."<sup>71</sup> As one editorial wryly observed: "Dedicated teachers, so the stereotype goes, find a satisfaction in working with children that compensates for their low wages. But dedication alone does not put groceries on the table or pay the rent. Dedication does not make up for a lack of health coverage and retirement benefits."<sup>72</sup>

This rhetorical battle is difficult to win. Both sides undoubtedly are concerned that specific proposals might help or harm the children whom it is their common mission to serve, but their competing claims ultimately do the children little good. A newspaper article written at the early stages of the Head Start union movement framed the problem of these competing perspectives bluntly: "Both sides said they had the interests of the program's children at heart. But some parents found it difficult to trust either [side]."<sup>73</sup> By engaging in verbal warfare rather than addressing the concrete problems that actually affect the lives of low-income children, Head Start teachers and CAA directors alike can alienate parents and damage relationships with children and families.

In a third rhetorical argument, unions and Community Action Agencies battle over the "true nature" of the CAA. On the one hand, unions portray CAAs as having abandoned their grass-roots origins to become big business, multi-million-dollar agencies that squeeze everything they can out of their employees. One article describing a union drive in Hartford's largest CAA, the Community Renewal Team (CRT), reflects this perspective:

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<sup>69</sup> See Julio Moran, *Head Start Program Can Reapply for Funds*, L.A. TIMES (Valley ed.), May 5, 1993, at B6, 1993 WL 2320039.

<sup>70</sup> *Id.*

<sup>71</sup> Curtis J. Kheel, *Checks Not in the Mail: Unpaid Day-Care Workers Protest Delay in Pay*, NEWSDAY (N.Y., Queens ed.), Nov. 5, 1996, at A27, 1996 WL 2543320.

<sup>72</sup> Editorial, *Vital Jobs, Meager Pay*, CHRISTIAN SCI. MONITOR, June 5, 1990, at 20.

<sup>73</sup> Horvath, *supra* note 37.

CRT was incorporated 35 years ago as an anti-poverty agency. Its founders hoped it would do its job and be out of business by 1970. It didn't go out of business, it is business. CRT now has 600 employees, 450 of whom are full time, and an annual budget last year of about \$48 million. The executive director, Paul C. Puzzo, makes almost \$140,000 a year . . . . CRT is now what used to be called “the establishment.”<sup>74</sup>

On the other hand, CAAs assert that they are local organizations run by local folks, and that the millions of dollars they manage are federal funds that go directly to empower the local poor.<sup>75</sup>

Outside the context of a unionization battle, in a less heated moment, one former Head Start director offers a perspective that combines both views. The world of Head Start is changing, says Donna Hogle, the former director of a Head Start program and the current Head Start Collaboration Project Coordinator for the state of Indiana.<sup>76</sup> Given the size of the programs' budgets—which often run into the millions<sup>77</sup>—and the need to partner and negotiate with so many different groups, the successful operation of Head Start programs now requires greater business skills than were needed twenty years ago.<sup>78</sup> Although she describes the CAAs that operate Head Start programs as big business, she recognizes their community roots and the number of parent-employees in Head Start programs, and she suggests that both sides must work together more amicably to direct the limited federal dollars to their intended community recipients.<sup>79</sup> As with the rhetorical arguments over race and gender and over the best interests of children, then, arguments over the “true nature” of Community Action Agencies have truth on both sides.

Since each side usually offers the mirror image of the other's assertions, it is difficult to make an independent assessment of the rhetorical arguments employed in the Head Start union struggle. Empirical data could help resolve some of these arguments. For example, since each side claims to be the true champion of the least powerful, a statistical comparison of the racial and gender demographics of union leaders and CAA directors might prove useful. However, empirical evidence can be manipulated easily to continue the war of words.<sup>80</sup> In the end, the rhetorical battles needlessly simplify and obscure the complex reality to which both sides must pay attention in order to achieve their common goals.

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<sup>74</sup> Condon, *supra* note 6.

<sup>75</sup> See, e.g., Livingston, *supra* note 12.

<sup>76</sup> Telephone Interview with Donna M. Hogle, *supra* note 56.

<sup>77</sup> See, e.g., Diane E. Lewis, *Union Looks to Organize ABCD Staff: Move is Part of Effort by Labor in US to Expand into Nonprofit Groups*, BOSTON GLOBE, June 20, 1997, at E1.

<sup>78</sup> See Telephone Interview with Donna M. Hogle, *supra* note 56.

<sup>79</sup> *Id.*

<sup>80</sup> See generally DARRELL HUFF, HOW TO LIE WITH STATISTICS (1954).

*C. Legal Challenges*

Head Start workers and their Community Action Agency employers wage two primary legal battles in the war over unionization. The first battle is over whether federal or state labor law will govern the dispute. The second battle emerges as each side trades accusations of unfair labor practices.

The National Labor Relations Act (NLRA) is the federal law that governs labor relations in the private sector.<sup>81</sup> It guarantees workers the right to bargain collectively with their employers over the terms of their employment<sup>82</sup> and protects them against employer reprisals for engaging in union activity.<sup>83</sup> It imposes obligations on both employers and unions to bargain in good faith without engaging in unfair labor practices, which it extensively defines.<sup>84</sup> The NLRA established the National Labor Relations Board (NLRB) to enforce the NLRA.<sup>85</sup> The NLRB includes the five-member Board that issues final administrative decisions, a general counsel that supervises regional and field offices, and those regional and field offices.<sup>86</sup> At the request of either the union or the employer, regional offices administer union elections and determine whether unions or employers have engaged in an unfair labor practice.<sup>87</sup> Regional administrative law judges hold initial hearings and issue initial decisions, which may be appealed up to the five-member Board in Washington, D.C.<sup>88</sup> Final decisions issued by the Board may be appealed directly to a U.S. Court of Appeals.<sup>89</sup>

The NLRA exempts government employers and any “political subdivision” from its coverage,<sup>90</sup> leaving such employers to be governed by state labor laws.<sup>91</sup> The first legal question in the Head Start unionization context is whether the Community Action Agency employer falls within this exemption. Put another way, the argument centers around whether the NLRB has jurisdiction over the employer. In general, CAAs have argued that they are exempt “political subdivisions,” while employees of

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<sup>81</sup> National Labor Relations Act, 29 U.S.C. §§ 151–169 (2000).

<sup>82</sup> *See id.* § 157.

<sup>83</sup> *See id.* § 158(a).

<sup>84</sup> *See id.* § 158(a)–(b), (d).

<sup>85</sup> *See id.* § 153.

<sup>86</sup> *See* NAT'L LABOR RELATIONS BD., A GUIDE TO BASIC LAW AND PROCEDURE UNDER THE NATIONAL LABOR RELATIONS ACT 52 (rev. ed. 1997), available at <http://www.nlr.gov/publications/basicguide.pdf>.

<sup>87</sup> *See id.*

<sup>88</sup> *See id.* at 58.

<sup>89</sup> *See* 29 U.S.C. § 160(f) (2000).

<sup>90</sup> *Id.* § 152(2) (“The term ‘employer’ . . . shall not include the United States or any wholly owned Government corporation . . . or any State or political subdivision thereof . . .”).

<sup>91</sup> *See* Peter L. Ebb, *Uniformity Replaces Chaos, Sort of: CAA Coverage Under the National Labor Relations Act*, CAPLAW LEGAL UPDATE (Cmty. Action Prog. Legal Servs., Inc.), Apr. 2000, at 5.

Head Start programs and CAAs have argued that the NLRA applies.<sup>92</sup> Employees have tended to seek redress under the NLRB for its perceived greater protection for employees than state labor laws, while employers have generally opposed NLRB jurisdiction for the same reason.<sup>93</sup> Employees have recently begun to win this dispute over jurisdiction. Two separate strands of NLRB decisions over the last decade have expanded the ability of the NLRB to assert jurisdiction over CAAs.

The first strand of NLRB decisions does not refer specifically to CAAs but analyzes generally whether employers with government contracts are covered by or are exempt from the NLRA. From 1979 to 1995, the NLRB used a two-prong test to determine whether it had jurisdiction over such an employer: the employer not only had to meet the NLRA’s definition of an employer—it could not be a public employer or “political subdivision”<sup>94</sup>—but also had to retain “sufficient control over the employment conditions of its employees to bargain with a labor organization as their representative.”<sup>95</sup> Under this test, an employer that received government funding but that did not qualify as a public subdivision might still be able to escape NLRB jurisdiction if it could demonstrate that the stringent requirements of its government funding did not allow it enough flexibility to bargain over working conditions.<sup>96</sup>

In 1995, however, the NLRB refined its test to determine jurisdiction. In *Management Training Corporation*,<sup>97</sup> the NLRB found that the second prong of the test, which it characterized as being about the “control of economic terms and conditions,”<sup>98</sup> was “an over-simplification of the bargaining process”<sup>99</sup> and as such was “unworkable and unrealistic.”<sup>100</sup> The NLRB limited its analysis of whether it should assert jurisdiction to the first prong of the test: whether the employer in question meets

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<sup>92</sup> *See id.*

<sup>93</sup> Ebb notes, however, that the “crazy-quilt” of state labor laws did not uniformly advantage or disadvantage one party, describing a situation where the laws “in some states helped employers seeking to avoid unionization or limit the power of unions, in other states advantaged unions, and in still other states benefited both employers and unions, depending on the particular issue.” *Id.*

<sup>94</sup> 29 U.S.C. § 152(2).

<sup>95</sup> *Nat’l Trans. Serv., Inc.*, 240 N.L.R.B. 565, 565 (1979). In this decision, the NLRB abandoned another test it had sometimes used to assert jurisdiction, the “intimate connection” test. *See* Debra Dyleski Najjar, Note, *The National Labor Relations Board’s Jurisdiction over Employers Contracting with Exempt Public Entities*, 62 B.U. L. REV. 1197, 1212–17 (1982). The “control test” had first been articulated by the Supreme Court in *NLRB v. Atkins*, 331 U.S. 398, 405–06 (1947).

<sup>96</sup> *See, e.g., Res-Care, Inc.*, 280 N.L.R.B. 670, 674 (1986) (NLRB declined to assert jurisdiction over an agency funded by the Department of Labor because the terms of the agency’s employment conditions were set by the Department).

<sup>97</sup> *Mgmt. Training Corp.*, 317 N.L.R.B. 1355 (1995).

<sup>98</sup> *Id.* at 1357.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 1355.

the NLRA's definition of an employer.<sup>101</sup> This expansive definition allows the NLRB to assert jurisdiction more frequently.

The NLRA provides that any party may appeal a final NLRB decision to a federal court of appeals for the region involved.<sup>102</sup> Four of the five circuits that have heard a case on the new *Management Training* rule have adopted it,<sup>103</sup> one actually adopting it in the context of approving NLRB jurisdiction over a Head Start program.<sup>104</sup> While the state of the *Management Training* rule is in some legal flux,<sup>105</sup> the general trend in the federal courts of appeals seems to be towards approving NLRB jurisdiction based on whether the employer in question meets the NLRA's definition of an employer.

How to determine whether an employer is an exempt "political subdivision" is not itself an easy task, however. A second strand of NLRB decisions has clarified and limited the facts under which a CAA may qualify as an exempt "political subdivision." In 1971, the Supreme Court gave some guidance regarding the types of entities that may constitute a "political subdivision" and thus be exempt from the NLRA. The Court noted that the NLRB had adopted a two-prong test, "entitled to great respect,"<sup>106</sup> classifying an entity as a political subdivision only if it was "created directly by the state, so as to constitute a department or administrative arm of the government," or if it was "administered by individuals who are responsible to public officials or to the general electorate."<sup>107</sup>

The first prong of the NLRB test is fairly straightforward in its application to CAAs: if the state created the CAA to administer its programs directly, the CAA counts as an exempt political subdivision. The

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<sup>101</sup> *Id.* at 1358. The NLRB noted that all employers must still meet "the applicable monetary jurisdictional standards." *Id.* These standards vary by industry and refer to the amount of business done each year by the employer in question. *See supra* note 86, at 54–55.

<sup>102</sup> 29 U.S.C. § 160(f) (2000).

<sup>103</sup> *See* NLRB v. YWCA, 192 F.3d 1111, 1119 (8th Cir. 1999); Aramark Corp. v. NLRB, 179 F.3d 872, 881 n.15 (10th Cir. 1999); Teledyne Econ. Dev. v. NLRB, 108 F.3d 56, 60 (4th Cir. 1997); Pikeville United Methodist Hosp. of Ky., Inc. v. United Steelworkers of Am., 109 F.3d 1146, 1153 (6th Cir. 1997); Saipan Hotel Corp. v. NLRB, 114 F.3d 994, 997–98 (9th Cir. 1997). The Seventh Circuit decided the case without reaching the issue. *See* NLRB v. Fed. Sec., Inc., 154 F.3d 751, 755 (7th Cir. 1998).

<sup>104</sup> *See* YWCA, 192 F.3d at 1116–19.

<sup>105</sup> The First, Second, Third, Fifth, Eleventh, and D.C. Circuits have not yet heard a case on the *Management Training* rule; by default, those circuits are covered by the control test. *See* CMTY. ACTION PROGRAM LEGAL SERVS. (CAPLAW), HEAD START: AN OUTLINE OF ADMINISTRATIVE AND JUDICIAL DECISIONS 63–66 (2002).

<sup>106</sup> *See* NLRB v. Natural Gas Util. Dist. of Hawkins County, 402 U.S. 600, 605 (1971).

<sup>107</sup> *Id.* at 604–05 (quoting the government's brief). However, the Court noted that "this case does not require that we decide whether 'the actual operations and characteristics' of an entity must necessarily feature one or the other of the Board's limitations to qualify an entity for exemption" because the Court was able to decide the case on other grounds. *Id.* at 605.

NLRB continues to find CAAs created by the state as exempt from the NLRA under this first prong of the test.<sup>108</sup>

It is on the second prong that the NLRB has recently changed its thinking. Until 1998, the NLRB had considered any CAA that was not exempt under the first prong to be exempt under the second prong because of the statutorily mandated structure of the CAA board.<sup>109</sup> CAAs are governed by a tripartite board: one-third of the board must be elected public officials;<sup>110</sup> at least one-third of the board must be representatives of the poor in the community served;<sup>111</sup> and the balance must come from other community groups.<sup>112</sup> Since the public officials are democratically elected to their political positions, although not to the CAA board, and since the representatives of the poor must be “chosen [to be on the CAA board] in accordance with democratic selection procedures,”<sup>113</sup> the NLRB used to reason that the CAA board consists of a majority of “individuals who are responsible to public officials or to the general electorate,”<sup>114</sup> under the second prong of its test.<sup>115</sup> Governed by such a board, the CAA would be exempt from the NLRA.

In the 1998 decision *Enrichment Services Program, Inc.*, however, the NLRB changed its reasoning by examining more closely the “democratic selection procedures” under which the representatives of the poor are chosen.<sup>116</sup> The NLRB noted that the electorate for the slots reserved for representatives of the poor was not usually the same as the electorate for a general political election.<sup>117</sup> Only if the electorate were the same would a majority of the individuals on the CAA board be responsible to the general electorate and thus exempt from the NLRA.<sup>118</sup> In reaching this decision, the NLRB overruled the line of cases finding CAAs to be exempt political subdivisions where the two electorates were not the same.<sup>119</sup>

This NLRB decision has yet to be tested in any federal court, and some lawyers for CAAs expect to see it challenged.<sup>120</sup> When a federal court disagrees with the NLRB, it is the court’s opinion that is control-

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<sup>108</sup> See, e.g., *Hinds County Human Res. Agency*, 331 N.L.R.B. 1404 (2000).

<sup>109</sup> See generally 42 U.S.C. § 9910 (2000) (establishing the structure of CAA boards).

<sup>110</sup> *Id.* § 9910(a)(2)(A).

<sup>111</sup> *Id.* § 9910(a)(2)(B).

<sup>112</sup> *Id.* § 9910(a)(2)(C). In the context of this struggle over NLRB jurisdiction, it is interesting to note that labor organizations are among the community groups mentioned as candidates for sending representatives to this part of the CAA board. *Id.*

<sup>113</sup> *Id.* § 9910(a)(2)(B)(i).

<sup>114</sup> See *NLRB v. Natural Gas Util. Dist. of Hawkins County*, 402 U.S. 600, 604–05 (1971).

<sup>115</sup> See, e.g., *Woodbury County Cmty. Action Agency*, 299 N.L.R.B. 554, 555 (1990); *Econ. Sec. Corp. of S.W. Area*, 299 N.L.R.B. 562, 563 (1990).

<sup>116</sup> See *Enrichment Servs. Program, Inc.*, 325 N.L.R.B. 818 (1998).

<sup>117</sup> See *id.* at 819.

<sup>118</sup> See *id.*

<sup>119</sup> See *id.* at 820 n.13.

<sup>120</sup> See *Ebb*, *supra* note 91, at 6 n.3.

ling, at least in that federal circuit, and it is possible that different judicially enforced standards may emerge in different areas of the country unless and until the Supreme Court decides the matter.<sup>121</sup> Even in the administrative context itself, it is worth noting that there has been turn-over in the five members of the NLRB since 1998, when the *Enrichment Services Program* standard was announced, and that a new Board may decide the matter differently.<sup>122</sup> Still, although the ultimate state of this law is uncertain, the new NLRB analysis making it more difficult for CAAs to gain exemption from the NLRA has provided CAA employees, including Head Start teachers, with a greater probability that federal labor laws will protect them.

Yet the nominal protection of federal labor laws goes only so far. Although the labor movement perceives NLRB jurisdiction over CAAs as a success, continuing administrative maneuvering and litigation over these issues may work to the strategic advantage of employers, which can use legal challenges to delay tangible union accomplishments.<sup>123</sup> In addition, jurisdiction is a legal description of the NLRB's reach rather than a structural modification of a CAA's behavior, and CAAs have sometimes continued anti-union activities despite the requirements of the NLRA.

Such anti-union activity does have prescribed legal boundaries, however, both from the terms of the NLRA and from the Head Start Act itself. CAAs that are covered by the NLRA must abide by its terms to remain within the law. Further, as of 1990, the Head Start Act explicitly directs that "[f]unds appropriated to carry out this subchapter shall not be used to assist, promote, or deter union organizing."<sup>124</sup> How, then, have Head Start programs and Community Action Agencies that operate them been able to carry out their anti-union campaigns?

The answer may be found in two recent information memoranda issued by the federal Head Start Bureau, the regulatory agency responsible for funding, monitoring, and communicating with individual Head Start programs.<sup>125</sup> Disseminated in response to the rise in unionization efforts,

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<sup>121</sup> See *id.*

<sup>122</sup> As of this writing, the only current member of the Board who also decided *Enrichment Services Program* is Wilma Liebman, who was appointed by President Clinton in 1997 and whose term expires in December 2002. See Nat'l Labor Relations Bd., *NLRB Board Members*, at <http://www.nlr.gov/board.html> (last modified Aug. 12, 2002).

<sup>123</sup> See Tevlin, *supra* note 5.

<sup>124</sup> 42 U.S.C. § 9839(e) (2000). The provenance of this new clause is not entirely clear. There is no mention of union activity in the House or Senate hearings surrounding the 1990 reauthorization of the Head Start Act, and the House Conference Report simply recommends the change without explaining any reason for its insertion. See H.R. CONF. REP. NO. 101-816, at 1, 11 (1990). Similar language forbidding the use of federal funds for activities connected with union campaigns started to appear in other Congressional authorizations at least as far back as 1982, when it was inserted into the Job Training Partnership Act. See H.R. CONF. REP. NO. 97-889, at 127 (1982). There may well be an interesting story behind the clause, both in the Head Start Act and elsewhere, but recounting this background is beyond the scope of this Note.

<sup>125</sup> See Information Memorandum ACYF-IM-HS-00-11 from the Head Start Bureau,

the memoranda have two goals. First, they refer agencies to the NLRB for information regarding which anti-union activities are legal and which are illegal under the terms of the NLRA.<sup>126</sup> Second, they clarify the Head Start Act’s prohibition on using Head Start funds in response to a union campaign.<sup>127</sup> They explain that, although no Head Start funds may be used in connection with a pro- or anti-union campaign, agencies may use other funds in this vein so long as they document their spending and their funding sources.<sup>128</sup> Further, the memoranda indicate that Head Start funds may cover incidental costs, such as utilities used during an after-hours union organizing meeting, and may be used to consult lawyers about “rights and responsibilities” under the NLRA and other laws related to union organizing.<sup>129</sup> Notwithstanding these limitations on the use of Head Start funds to deter union organizing, some Head Start employers have found a way to fight nascent unions in their midst. They remain within the bounds of the Head Start Act by using non-Head Start funds for these activities, but they simultaneously violate the terms of the NLRA in the process by engaging in unfair labor practices.

Accusations of these unfair labor practices constitute the second type of legal battle between Head Start employees and employers. Both employers and unions may bring an unfair labor practice (ULP) charge against the other party in front of the NLRB, although in practice, unions file these charges more frequently than do employers.<sup>130</sup> In the Head Start context, employers have been found in violation of the labor laws for retaliating against employees who were engaged in legal unionizing activities. Within the past five years, directors of Head Start programs have violated labor laws in numerous ways: by discharging or threatening to discharge teachers who supported the union;<sup>131</sup> by harassing union members through false accusations of theft or the imposition of new restric-

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U.S. Department of Health & Human Services, to Head Start Grantees and Delegate Agencies, Head Start and Labor Unions (Mar. 27, 2000), *available at* [http://www.headstartinfo.org/publications/im00/im00\\_11.htm](http://www.headstartinfo.org/publications/im00/im00_11.htm) [hereinafter Labor Unions Memorandum]; Information Memorandum ACYF-IM-HS-97-14 from the Head Start Bureau, U.S. Department of Health & Human Services, to Head Start Grantees and Delegate Agencies, Head Start Funds and Union Organizing (Nov. 19, 1997), *available at* [http://www.headstartinfo.org/publications/im97/im97\\_14.htm](http://www.headstartinfo.org/publications/im97/im97_14.htm) [hereinafter Funds and Union Organizing Memorandum].

<sup>126</sup> Labor Unions Memorandum, *supra* note 125, at 1; Funds and Union Organizing Memorandum, *supra* note 125, at 1.

<sup>127</sup> Labor Unions Memorandum, *supra* note 125, at 2–3; Funds and Union Organizing Memorandum, *supra* note 125, at 1–2.

<sup>128</sup> See Labor Unions Memorandum, *supra* note 125, at 2–3; Funds and Union Organizing Memorandum, *supra* note 125, at 1–2.

<sup>129</sup> Labor Unions Memorandum, *supra* note 125, at 3; Funds and Union Organizing Memorandum, *supra* note 125, at 2.

<sup>130</sup> See Dan Morgan, *Pressure on NLRB Turns into a Doubled Budget Cut*, WASH. POST, July 20, 1995, at A8 (reporting that a majority of unfair labor practice complaints are filed against employers, but that approximately fifteen percent are filed against unions).

<sup>131</sup> See, e.g., *FiveCAP, Inc.*, 331 N.L.R.B. 1165, 1222 (2000); *Parents in Cmty. Action, Inc.*, No. 18-CA-14406, 1998 NLRB LEXIS 460, at \*267–\*268 (NLRB A.L.J. July 15, 1998).

tions on their use of program facilities;<sup>132</sup> by scheduling mandatory teachers' meetings at the same time as previously scheduled union meetings;<sup>133</sup> by refusing to negotiate with the union at all.<sup>134</sup> The list goes on.

Even if the NLRB finds merit in the union's claim, however, the victory is not unmitigated. Relationships in the CAA often are damaged by these charges and administrative hearings, and the parties may find it difficult to move on. For example, one of the most recent Head Start ULP cases to come before the NLRB was the third such case out of the same CAA over a period of five years. The Head Start directors were found to have engaged in many of the unfair labor practices described above and a wide variety of others.<sup>135</sup> The administrative law judge deciding this most recent case commented sadly on the "substantial history of [the parties'] contentious relationship. That history records in many instances [the CAA's] open hostility at its highest management level both to the Union and employees who supported its organizing efforts."<sup>136</sup> The judge further stated, "It is my fervent hope, that with the conclusion of this case, this marks the end of [this] repetitious and somewhat wasteful litigation . . . ."<sup>137</sup> Yet he noted that "matters between the parties have not completely settled," even though the collective bargaining agreement had been signed two years earlier.<sup>138</sup> Although the judge bid the parties to follow the new procedures put in place by the contract as the parties "attempt to fulfill, as they are committed to, the difficult but nonetheless worthy goal of providing educational and other opportunities to disadvantaged Americans,"<sup>139</sup> his decision—spanning more than one hundred pages—gives no indication of how the legal resolution of these issues will translate into a change in the actual dynamics of the parties' relationship.

Further, resolution of a ULP in one party's favor is not necessarily an unqualified victory or loss for either party, since the remedy may be unsatisfactory to the victor. For example, consider the case of Jan Radder, a Head Start teacher fired from Parents in Community Action, Inc., a CAA in Minneapolis, for his involvement in organizing a union.<sup>140</sup> When

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<sup>132</sup> See, e.g., *FiveCAP, Inc.*, 332 N.L.R.B. No. 83, 2000 NLRB LEXIS 769, at \*11–\*12 (Oct. 31, 2000).

<sup>133</sup> See, e.g., *Parents in Cmty. Action*, 1998 NLRB LEXIS 460, at \*268.

<sup>134</sup> See, e.g., *YWCA*, 324 N.L.R.B. No. 64, 1997 NLRB LEXIS 689, at \*5 (NLRB Sept. 11, 1997), enforced by *NLRB v. YWCA*, 192 F.3d 1111 (8th Cir. 1999).

<sup>135</sup> *FiveCAP, Inc.*, No. GR-7-CA-43295, 2001 NLRB LEXIS 903 (Nov. 2, 2001); *FiveCAP, Inc.*, 332 N.L.R.B. No. 83, 2000 NLRB LEXIS 769 (Oct. 31, 2000), *aff'g and modifying* No. GR-7-CA-39503, 1998 NLRB LEXIS 965 (NLRB A.L.J. Dec. 17, 1998); *FiveCAP, Inc.*, 331 N.L.R.B. 1165, 1222 (2000), *aff'g and modifying* No. GR-7-CA-37182, 1997 NLRB LEXIS 86 (NLRB A.L.J. Jan. 31, 1997).

<sup>136</sup> *FiveCAP*, 2001 NLRB LEXIS 903, at \*68.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at \*69.

<sup>139</sup> *Id.*

<sup>140</sup> See *Parents in Cmty. Action, Inc.*, No. 18-CA-14406, 1998 NLRB LEXIS 460, at

Radder was fired, the union filed initial charges of unfair labor practices against the CAA.<sup>141</sup> After examining the facts, the NLRB petitioned the district court in the District of Minnesota for a preliminary injunction against the CAA’s anti-union activity,<sup>142</sup> as permitted by the terms of the NLRA.<sup>143</sup> Yet the district court declined to issue an injunction, and a year later the Eighth Circuit affirmed its decision.<sup>144</sup>

The Eighth Circuit explained that a court may issue a preliminary injunction only after the NLRB has demonstrated that “irreparable harm” will come to the collective bargaining process if the parties must wait for a remedy before the NLRB has finished adjudicating the matter.<sup>145</sup> While the district court agreed that the teacher had likely been fired for his union activities, it declined to order him to be reinstated, since revisions to the federal Head Start requirements for teacher qualifications meant that Radder was no longer qualified to hold his position.<sup>146</sup> The Eighth Circuit held that the district court was correct in not ordering his reinstatement because, in balancing the public interest with the likelihood of irreparable injury to Radder, the district court reasonably determined that the Head Start program would suffer if Radder were reinstated.<sup>147</sup> Additionally, the Eighth Circuit noted that injury to the individual was not the appropriate standard for determining whether an injunction is appropriate, given the existence of a monetary remedy; the key issue is ongoing irreparable injury to the union organizing drive.<sup>148</sup> An employer’s actions that may chill union organizing do not establish such irreparable harm, the court decided, unless collective bargaining has been ongoing or a scheduled union election has been disrupted, especially if unionization efforts have not garnered widespread support from employees.<sup>149</sup> The court did not consider the negative effect that anti-union activities might

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\*267–\*268 (NLRB A.L.J. July 15, 1998). This is the same CAA discussed *supra* in the text accompanying notes 64–67.

<sup>141</sup> See *Sharp v. Parents in Cmty. Action, Inc.*, 172 F.3d 1034, 1037 (8th Cir. 1999).

<sup>142</sup> See *id.*

<sup>143</sup> The Act states that:

The Board shall have power, upon issuance of a complaint . . . charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

29 U.S.C. § 160(j) (2000).

<sup>144</sup> See *Sharp*, 172 F.3d at 1037, 1040.

<sup>145</sup> *Id.* at 1038.

<sup>146</sup> See *id.* at 1039.

<sup>147</sup> See *id.*

<sup>148</sup> See *id.* at 1040.

<sup>149</sup> See *id.*

have had on the union drive itself, however, nor could it consider any additional negative impact that this court decision might have.

As this case was wending its way through the federal courts, an administrative law judge of the NLRB determined that the CAA had committed almost a dozen unfair labor practices in its attempts to keep its employees from forming a union.<sup>150</sup> The NLRB ordered among other remedies that Radder be reinstated,<sup>151</sup> but the Eighth Circuit's recognition that Radder was no longer qualified under the new Head Start requirements made that reinstatement unlikely. While the union won a victory in the NLRB forum, in that the unfair labor practice charge was decided in its favor, the actual remedy was hardly what the union members had hoped for. The fired union activist was not reinstated, and the CAA was able to continue its anti-union activity with no preliminary injunction to stop it, all seemingly with the imprimatur of the federal court system. On the other hand, despite its victory in the federal courts, the CAA lost in the NLRB and received bad press for its anti-union activities.<sup>152</sup> In the end, the legal maneuvering in the Head Start unionization struggle can achieve only limited success.

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<sup>150</sup> Parents in Cmty. Action, Inc., No. 18-CA-14406, 1998 LEXIS 460, at \*267-\*268 (NLRB A.L.J. July 15, 1998). Specifically, the administrative law judge found that:

Parents in Community Action, Inc. has committed unfair labor practices affecting commerce by issuing a warning memo to and discharging Jan Radder and by discharging Rose Ryan, in violation of Sections 8(a)(3) and (1) of the Act, and by coercively interrogating employees about their union activities and those of their coworkers; by threatening that if employees chose to become represented by Minnesota Federation of Teachers they would be subjected to deteriorating working conditions, such as loss of paid holidays, parents being unable to become assistant teachers without teaching degrees or certificates, elimination of year-end personal and sick leave, and being required to start punching a timeclock; by threatening to retaliate against employees for discussing the above-named union while working, in the absence of a valid rule prohibiting discussions during work time; by threatening adverse consequences to an employee's future if she gave testimony or information concerning the above-named union or concerning the unlawful termination of a coworker; by prohibiting distribution of union literature at McKnight Center in the absence of a valid work rule restricting distribution of literature; by telling an employee that union literature may not be distributed because statements in it are personally offensive to a center's director; by telling an employee that union activities could be conducted during work time only so long as the center director did not personally disapprove of them; by creating the impression of surveillance of employees' union activities; by scheduling a meeting with employees timed to conflict with a meeting of employees previously scheduled by the above-named union; and by prematurely conferring wage increases to discourage employees from supporting the above-named union.

*Id.*

<sup>151</sup> See *id.* at \*268-\*269.

<sup>152</sup> See, e.g., Grow, *supra* note 64; Jon Tevlin, *Firing of Two Head Start Employees Violated Labor Laws, A Judge Rules*, STAR TRIB. (Minneapolis-St. Paul), July 21, 1998, at D1; Tevlin, *supra* note 5.

## II. STRATEGIES FOR REFORM

These arenas—the practical, the rhetorical, and the legal—provide the stages on which the main conflicts between labor and management in Head Start programs and Community Action Agencies are acted out. But what happens next? How can the parties move beyond such conflicts the better to accomplish their shared mission? This Part proposes three types of solutions: legislative changes to the Head Start Act, regulatory alterations from the Head Start Bureau, and external relationship-building and problem-solving solutions from the National Head Start Association.

### A. *The Head Start Act: Legislative Solutions*

The Head Start Act is up for reauthorization this year.<sup>153</sup> Modifications to the Head Start Act in four areas would help alleviate conflicts related to unionization.

First, the reauthorized Act should include a stronger prohibition against using Head Start funds to assist, promote, or deter union organizing. A complete ban on the provision of Head Start funds to organizations that are engaged in these activities would likely be deemed an unconstitutional restriction on free speech.<sup>154</sup> Furthermore, Congress may be reluctant to bind agencies’ hands too tightly. Given the recent debates about job protection and civil service unions in the proposed Department of Homeland Security,<sup>155</sup> Congress might prefer to let agencies decide for themselves whether to deter unions using non-federal funds.

Given these concerns, a more reasonable and politically feasible change would be the addition of the following sentence to the Head Start Act: “Receipt of Head Start funds is contingent on an organization’s obeying the relevant state and federal labor laws.” Why should Congress continue to provide financial support under one act to an organization that ignores the requirements of another? Yet CAAs have flouted labor laws, and have been cited by the NLRB for unfair labor practices, with no apparent effect on their Head Start budgets.<sup>156</sup> The Head Start regula-

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<sup>153</sup> In 1995, Congress reauthorized Head Start programs through the end of fiscal year 2003. Coats Human Services Reauthorization Act of 1998, Pub. L. No. 105-285, § 416, 112 Stat. 2702, 2772.

<sup>154</sup> See, e.g., *Rust v. Sullivan*, 500 U.S. 173, 197 (1991) (“[O]ur ‘unconstitutional conditions’ cases involve situations in which the Government has placed a condition on the recipient of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program.”).

<sup>155</sup> See, e.g., David Firestone, *Unions Lobby to Safeguard Proposed Agency’s Workers*, N.Y. TIMES, Sept. 26, 2002, at A18.

<sup>156</sup> The decisions of the Departmental Appeals Board, the board within the Department of Health and Human Services (HHS) that hears disputes involving HHS agencies, do not appear to report any funding termination or other ramifications for Head Start agencies that have been cited by the NLRB for unfair labor practices. Labor law violations do occasion-

tions already contain a proscription against violating federal laws for entities receiving federal money.<sup>157</sup> Making this requirement statutory and tying it explicitly to the Head Start unionization context would demonstrate the importance of obeying labor laws. It also would clarify the Head Start Bureau's authority to initiate proceedings against Head Start agencies that engage in unfair labor practices. Unless Congress more strongly affirms its support for the NLRA and state labor laws, agencies will be able to break labor laws with no financial repercussions for their Head Start programs.

A second change to the Head Start Act that might alleviate or reduce union conflicts would be the required development of federal regulations on labor-management relations. Aside from the stipulation that no Head Start funds be used in connection with union organizing, the Act contains no reference to labor-management relations, even though such relations are increasingly important as unionization efforts occur with greater frequency. The Act already mandates the Secretary of the Department of Health and Human Services to establish "policies and procedures" and "appropriate administrative measures" to ensure that various program goals are met, such as the provision of services to a certain percentage of children with disabilities, or the equitable distribution of resources between urban and rural areas.<sup>158</sup> Similarly, the Act should require the Head Start Bureau to develop its own policies and procedures on labor relations. Such a requirement would demonstrate a programmatic commitment to ensuring that labor relations run smoothly.

In the same vein, the reauthorized Act could require the development of a set of performance standards for management. The Act presently contains a detailed list of standards that the Secretary of Health and Human Services must create, including those for educational, administrative, and financial performance, and for facility conditions and locations.<sup>159</sup> Another set of detailed requirements focuses on teacher and staff qualifications.<sup>160</sup> Just as teachers must have certain educational backgrounds and follow specified classroom procedures, so managers could be obligated to take classes in labor-management relations, human resources, and leadership, and to reach designated performance levels in

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ally prompt the termination of a Head Start grantee's funding, but this penalty has not been levied consistently. *See, e.g.*, Rural Day Care Ass'n of Northeastern N.C., No. A-94-38, DAB No. 1489 (Dep't of Health & Human Servs. Appeals Bd. Aug. 8, 1994), 1994 WL 618572 (terminating grantee's funding not because of anti-union activity, but rather because of wage violations and other misconduct).

<sup>157</sup> 45 C.F.R. § 1303.14(b)(9) (2001) ("Financial assistance may be terminated for any or all of the following reasons . . . . The grantee fails to abide by any other terms and conditions of its award of financial assistance, or any other applicable laws, regulations, or other applicable Federal or State requirements or policies.").

<sup>158</sup> *See* 42 U.S.C. § 9835(d)-(f) (2000).

<sup>159</sup> *See id.* § 9836a.

<sup>160</sup> *See id.* § 9843a.

their interactions with employees. Such a provision would send a clear message that Head Start programs can work smoothly only if managers as well as teachers are held accountable. Training in management skills could also lead to improved labor relations. Requiring agencies to monitor labor relations and to develop performance standards for management would signal the federal government’s commitment to improving labor relations in Head Start agencies.

Third, the reauthorized Act should revisit the issue of salary and benefit levels so that the urge to increase employee compensation is not undercut by a race to the bottom. The current version of the Head Start Act does emphasize the importance of adequate salary and benefit levels. For example, the Act indicates that such levels at their base should be “adequate to attract and retain qualified staff,”<sup>161</sup> and it suggests that additional “[q]uality improvement funds” should be set aside “to improve the compensation (including benefits) of classroom teachers and other staff of Head Start agencies and thereby enhance recruitment and retention of qualified staff.”<sup>162</sup> Yet the Act also includes language that limits agencies’ flexibility in designing generous compensation packages:

The Secretary shall take such action as may be necessary to assure that persons employed in carrying out programs financed under this subchapter shall not receive compensation at a rate which is (1) in excess of the average rate of compensation paid in the area where the program is carried out to a substantial number of persons providing substantially comparable services, or in excess of the average rate of compensation paid to a substantial number of the persons providing substantially comparable services in the area of the person’s immediately preceding employment, whichever is higher; or (2) less than the minimum wage . . . .<sup>163</sup>

The floor for Head Start salaries is simple—staff must make at least the minimum wage.<sup>164</sup> This is not much of a requirement, however, given the general applicability of the minimum wage.<sup>165</sup> The discussion of the ceiling for Head Start salaries is more complicated—Head Start staff cannot be paid more than the average rate for other workers providing “substantially comparable services” in the same geographic area. How-

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<sup>161</sup> *Id.* § 9835(a)(3)(B)(iii).

<sup>162</sup> *See id.* § 9835(a)(3)(C).

<sup>163</sup> *Id.* § 9848.

<sup>164</sup> The Fair Labor Standards Act, 29 U.S.C. §§ 201–219 (2000), establishes a variety of labor policies that cover employers and employees in the private sector and government. The statute requires a minimum wage, which has been \$5.15 per hour since September 1, 1997. *Id.* § 206(a)(1).

<sup>165</sup> *See id.* § 206.

ever these “substantially comparable services” are defined, it is clear that the services provided by Head Start employees are not provided by well-paid workers in other occupations.

Instead of stipulating that Head Start staff earn no more than the going rate, the Act could mandate that Head Start staff earn at least as much as other workers providing “substantially comparable services.” This change would convert the current ceiling into a new floor, and would preclude government-funded programs from undercutting what is already a low-wage labor market. Alternatively, the Act could require Head Start salaries and benefits to be commensurate with the compensation packages provided to teachers in local school districts. This approach would address the aforementioned concern about disparities in compensation and the consequent brain-drain of Head Start teachers to the public school system.<sup>166</sup> In any event, the current limit on Head Start salaries prevents agencies from experimenting with the full range of salary and benefit packages and places an unreasonable ceiling on compensation, thereby undermining the statutory mandate to attract and retain qualified candidates.

Finally, the Act should be altered to provide incentives for research on labor-management relations in Head Start programs. Not enough academic research on Head Start employees and workforce management exists, since the wealth of Head Start research focuses (understandably and reasonably) on child and family development outcomes.<sup>167</sup> Because the Head Start union campaigns repeatedly fight with management over the same concerns, however, thorough and systematic attention must be paid to these issues at a national level. The Head Start Act already authorizes funding for several specified research topics;<sup>168</sup> designating labor and employment issues in Head Start programs as a new priority area for research would be a step in the right direction. In addition, the Act should identify teachers and union officials as important groups to consult in the establishment of research agendas, since these groups currently are excluded from the list of important players.<sup>169</sup>

In addition to empirical research on wages and pensions, there is a particular need for research on the effects of unionizing on the CAA workplace and on Head Start program success. Qualitative research, including descriptions of best practices in employee-management relations, also would be useful. Not all CAAs with Head Start programs have met

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<sup>166</sup> See discussion *supra* Part I.A.

<sup>167</sup> A bibliography compiled by the Head Start Bureau contains 2900 entries covering almost forty years of research, of which 655 articles fall into the category of “Management and Staffing”; of these, no more than a few dozen focus on employment conditions, and many of those examine only salary levels. See Head Start Bureau, U.S. Dep’t of Health & Human Servs., *Annotated Bibliography of Head Start Research*, at <http://www.acf.hhs.gov/programs/hsb2/biblio/index.jsp> (last modified June 17, 2002).

<sup>168</sup> See 42 U.S.C. § 9844 (2000).

<sup>169</sup> See *id.* § 9844(c).

unionization drives with rancor, and it would be instructive to understand what other models exist. A body of work devoted to cataloguing and analyzing the stories from CAAs and Head Start programs that have witnessed unionization would inform the struggles to come and, with any luck, would help the parties move from conflict to common ground.

*B. The Head Start Bureau: Regulatory Changes*

Although the Head Start Bureau has responded to the rise in Head Start unionization efforts by issuing the aforementioned information memoranda,<sup>170</sup> its independent ability to address labor-management tensions is limited, for the Bureau must follow the dictates of Congress. If Congress adopts the four recommendations discussed above, the Head Start Bureau will be authorized to create and implement an extensive series of regulations designed to promote improved labor-management relations. Even in the absence of such changes, however, the Bureau's hands are not completely tied. Although the Head Start Act has very detailed requirements, the Bureau retains some discretion to develop regulations through the usual administrative process of rule-making and the explicit terms of the Head Start Act.<sup>171</sup> Thus, the Bureau might undertake a number of helpful initiatives, such as revising current regulations to favor agencies with clear labor relations plans in the grantee selection process, or expanding the provision of training and technical assistance on labor and employment issues to funding recipients, within already statutorily approved guidelines.

For example, the regulation on grantee selection currently provides that candidates will be chosen based on “the extent to which the applicants demonstrate in their application the most effective Head Start program.”<sup>172</sup> The applicable criteria include “the qualifications and experience of the applicant and the applicant's staff in planning, organizing and providing comprehensive child development services at the community level, including the administrative and fiscal capability of the applicant to administer all Head Start programs carried out in the designated service area.”<sup>173</sup> It would not be too much of a stretch to consider management's labor relations skills and human resources training plans as evidence of “administrative capability.” Explicit reference to these criteria would put applicants on notice that such issues are important and would require

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<sup>170</sup> See Labor Unions Memorandum, *supra* note 125; Funds and Union Organizing Memorandum, *supra* note 125.

<sup>171</sup> See generally Administrative Procedure Act § 4, 5 U.S.C. § 553 (2000); see also Head Start Act § 640, 42 U.S.C. § 9835(d)–(f) (using broad language authorizing the Secretary of Health and Human Services to establish “policies and procedures” and “appropriate administrative measures” to ensure a variety of program goals).

<sup>172</sup> 45 C.F.R. § 1302.10(a) (2001).

<sup>173</sup> *Id.* § 1302.10(b)(2).

them to establish relevant procedures and policies before they receive any funding.

After being chosen as Head Start grant recipients, agencies are required to develop written personnel policies that contain, among other items, “a description of employee-management relations procedures, including those for managing employee grievances and adverse actions.”<sup>174</sup> The regulations could go one step further and require that training on these written policies be provided to managers and employees.

Finally, the regulations already mandate that directors of Head Start programs “have demonstrated skills and abilities in a management capacity relevant to human services program management.”<sup>175</sup> Since the Act’s requirements with regard to the skills and knowledge that teachers must possess are much more detailed, it would be reasonable for the regulations to further elaborate management’s qualifications as well, perhaps by stipulating that directors must be trained in labor and employment law and experienced in fostering employee leadership.

Beyond getting new regulations on the books, the Head Start Bureau should undertake a second major initiative even in the absence of a new legislative mandate—expanding its provision of training and technical assistance to Head Start directors. For instance, many directors need help in interpreting and complying with the NLRA. The information memoranda on union organizing were an important first step in a national response to this new issue facing Head Start programs, but more needs to be done. Instead of simply listing a few actions that violate the NLRA and sending people to the NLRB’s Web site for further information,<sup>176</sup> the Bureau could create Head Start-specific training material on the NLRA, perhaps using case studies from the various conflicts described in Part I above.

The Head Start Bureau also could provide additional training on sound management practices. Its regulations manual cites to written works on program governance, management systems and procedures, and human resources management, but most of these references are at least a decade old and make almost no mention of labor-management relations.<sup>177</sup> The Bureau should create and disseminate up-to-date materials on such practices. It is worth noting that the federal Child Care Bureau, which is adjacent to the Head Start Bureau in Washington, D.C., has been

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<sup>174</sup> *Id.* § 1301.31(a)(7).

<sup>175</sup> *Id.* § 1304.52(c).

<sup>176</sup> *See, e.g.*, Labor Unions Memorandum, *supra* note 125.

<sup>177</sup> *See* HEAD START BUREAU, U.S. DEP’T OF HEALTH & HUMAN SERVS., HEAD START PROGRAM PERFORMANCE STANDARDS AND OTHER REGULATIONS 240 (1999). The lack of any reference to collaborative employee-management practices is especially strange, since the Head Start philosophy (as articulated in 45 C.F.R. § 1304.50 (2001)) emphasizes the importance of collaboration with parents and the community for an effective program. The failure to mention collaborative employee-management processes is almost certainly attributable to the Head Start Act’s inattention to employee-labor relations.

funding research projects on the workforce in child care programs for several years, although nothing in its authorizing statute requires it to do so.<sup>178</sup> Even if the reauthorized Head Start statute contains no reference to research on labor relations, the Head Start Bureau could still begin a research initiative on workforce issues modeled after that of the Child Care Bureau, and could provide additional training to grantees based on the research findings.

Finally, the Head Start Bureau could inform its grantees about alternative dispute resolution mechanisms in labor conflicts. The second information memorandum on union organizing includes an explicit disclaimer for the ACF, explaining that this agency “plays an important but limited role” in the area of labor disputes—ensuring that no Head Start money is spent to deter or promote labor unions in violation of the statute.<sup>179</sup> The memorandum emphasizes that the NLRB, not ACF or the Head Start Bureau, is responsible for enforcing compliance with the NLRA, and that “it is not appropriate for ACF to become involved in activities such as arbitrating disputes between unions and Head Start grantees.”<sup>180</sup>

The appearance of this explanation of ACF’s role in the second memorandum suggests that Head Start agencies turned to ACF and the Head Start Bureau for guidance and assistance, and that such assistance was deemed inappropriate. Yet because the Head Start Bureau ultimately is responsible for ensuring that Head Start programs run smoothly and effectively, this agency must play a role in preempting and ameliorating labor conflicts. The Bureau currently contracts with outside agencies to provide resources on a variety of issues that affect Head Start programs,<sup>181</sup> from transportation<sup>182</sup> to facilities.<sup>183</sup> It should do the same with labor and employment issues. If it is not the Bureau’s job to mediate or arbitrate in labor problems, it can at least provide resources to which programs can turn.

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<sup>178</sup> See, e.g., Child Care Bureau, U.S. Dep’t of Health & Humans Servs., *Field Initiated Child Care Research Projects*, at <http://www.acf.hhs.gov/programs/ccb/research/ccprc/field/index.htm> (last updated Sept. 26, 2002) (listing current grant recipients and providing links to summaries of their grant proposals); see also 42 U.S.C. § 9858 (2000) (appropriating funds for execution of Child Care and Development Block Grant Act but making no mention of research priorities).

<sup>179</sup> See Labor Unions Memorandum, *supra* note 125.

<sup>180</sup> See *id.*

<sup>181</sup> See Head Start Bureau, U.S. Dep’t of Health & Human Servs., *Programs and Services*, at <http://www.acf.hhs.gov/programs/hsb/programs/index.htm> (last modified June 12, 2002).

<sup>182</sup> See, e.g., Nat’l Trans. Ctr. for Sch. Children, *Who We Are*, at <http://www.mhwest.com/NTCSC.htm> (last visited Nov. 29, 2002).

<sup>183</sup> See, e.g., Nat’l Facilities Assistance Desk, Region IV Head Start Quality Improvement Ctrs., *Facilities*, at <http://www.wku.edu/Info/General/TTAS/fac/index.htm> (last visited Oct. 19, 2002).

*C. The National Head Start Association:  
Labor and Employment Initiative*

Legislative and regulatory changes would go a long way towards improving labor relations in Head Start programs, but they will not provide a complete solution. At the most basic level, the best way to move beyond the current dynamic of conflict is to change the relationships between and among the different parties. The National Head Start Association (NHSA) should create a new labor and employment initiative to bring the parties together for preemptive problem-solving before labor strife emerges, and for mediation and conciliation services in moments of dispute.

The NHSA is a private nonprofit membership organization whose mission is to serve the interests of the entire national Head Start community: children, parents, staff, and directors.<sup>184</sup> The NHSA has paid relatively little attention to the explosion of union organizing in Head Start programs, however. For instance, its Web site provides resources and information for every sector of the Head Start community, but it contains just one reference to unionizing efforts.<sup>185</sup> Given the importance the NHSA attaches to helping employees obtain raises and maintain job security,<sup>186</sup> this organization should expand its focus on labor and employment issues to speak to all parties in the unionization debates.

In each arena of conflict discussed in Part I of this Note, the parties raise important issues while creating dynamics that are not conducive to long-term relationships. Each point of controversy is presented as a zero-sum game where there can be only one winner. Thus, more work must be done at the national and the local level to identify the common interests that underlie the parties' seemingly contrary positions. Given the shared commitment to lifting families out of poverty and into self-sufficiency, points of mutual benefit are likely to exist. The proposed NHSA Labor and Employment Initiative could provide a framework through which the parties can discover areas of agreement and develop healthy working relationships before any labor strife emerges.

The existence of some labor conflicts will be inevitable, however, and members of the Head Start community need resources to help them work through their problems. The NHSA should partner with the Federal Mediation and Conciliation Service, or with a private nonprofit alternative dispute resolution organization, to provide both training and counsel-

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<sup>184</sup> See Nat'l Head Start Ass'n, *About the National Head Start Association*, at <http://www.nhsa.org/about/index.htm> (last visited, Nov. 29, 2002).

<sup>185</sup> See Nat'l Head Start Ass'n, *Executive Challenges Conference*, available at <http://www.nhsa.org/training/mini%5Ftraining/executive/executive%5Fsessions.htm> (last visited Nov. 29, 2002).

<sup>186</sup> See Nat'l Head Start Ass'n, *Why Join NHSA*, at <http://www.nhsa.org/join/index.htm> (last visited Nov. 29, 2002).

ing to agencies experiencing conflict. Because so much of what is at stake in labor discussions in the Head Start context refers to national standards and requirements, a national organization that is familiar with Head Start issues must take the lead in addressing them. Moreover, since so many local disputes repeat themselves around the country, individuals crafting solutions at the local level would benefit from knowledge of the rich array of experiences nationwide. The NHSA is well positioned to play this important role.

#### CONCLUSION

Not all union drives in Community Action Agencies that operate Head Start programs lead to rancor and bitterness, of course, but those that do can be extremely divisive and hurtful to everyone involved. This Note suggests that more attention must be paid at a national level to help resolve these local manifestations of a national problem. I propose several strategies that might address some root causes of the conflict, but my primary hope is that a greater focus on labor and employment issues in these programs will generate even more solutions, not only for the struggle over unionization, but also for the nascent struggle over the living wage. Since the missions of CAA-operated Head Start programs and the labor movement overlap, labor and management should be able to work together more effectively. Recall the union’s slogan cited at the beginning of this Note: “Head Start works because we do.”<sup>187</sup> If the word “we” in this slogan can be expanded to encompass both directors and teachers, and if directors and teachers can learn to work together on labor and employment issues more amicably and productively, then Head Start will work even more successfully for everyone.

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<sup>187</sup> See *Head Start Poster*, *supra* note 14.

