

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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POLICY AND RESEARCH, LLC, et al,

CA No. 1:18-cv-00346-KBJ

Plaintiffs,

Washington, D.C.

v.

Wednesday, April 18, 2018  
10:00 a.m.

DEPARTMENT OF HEALTH AND HUMAN  
SERVICES, et al.,

Defendants.

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TRANSCRIPT OF MOTION HEARING  
HELD BEFORE THE HONORABLE KETANJI B. JACKSON  
UNITED STATES DISTRICT JUDGE

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APPEARANCES:

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P R O C E E D I N G S

1  
2 THE DEPUTY CLERK: Your Honor, this is Civil  
3 Action 18-346, Policy and Research, LLC, et al, v. the  
4 Department of Health and Human Services, et al.

5 Will counsel please approach the podium and  
6 identify yourselves for the record as well as any additional  
7 parties at your table.

8 MR. SHERMAN: Your Honor, this is Sean Sherman and  
9 my co-counsel Allison Zieve on behalf of the plaintiffs.  
10 And I'd also like to introduce Traci Baird who's here.  
11 She's CEO of Plaintiff, SHIFT NC.

12 THE COURT: Thank you.

13 MR. GERARDI: Good morning, Your Honor. Michael  
14 Gerardi on behalf of Health and Human Services and sitting  
15 at counsel table with me today is Joel McElvain from the  
16 Department of Justice --

17 THE COURT: I'm sorry, we're going to have you  
18 talk right in the microphone --

19 MR. GERARDI: Sure.

20 THE COURT: -- because we couldn't hear. John --

21 MR. GERARDI: Joel McElvain from the --

22 THE COURT: Thank you.

23 MR. GERARDI: -- Department of Justice; Brian  
24 Stimson from Health and Human Services; Michael Quinn from  
25 the Department of Justice; and Jonathan Jacobson from the

1 Department of Justice.

2 THE COURT: Wonderful. Thank you all for being  
3 here.

4 This is a motions hearing with respect to the  
5 pending dispositive motions in this action which are the  
6 cross-motions for expedited summary judgment. This matter  
7 involves HHS's decision to cease funding for certain grants  
8 that that agency had previously awarded to various  
9 non-profit organizations pursuant to an appropriation from  
10 Congress for the administration of a Teen Pregnancy  
11 Prevention Program. I have scheduled this hearing in order  
12 to give the parties an opportunity to provide argument and  
13 insight regarding their briefs and the issues in this  
14 matter. The plaintiffs have claimed that the agency's  
15 recent funding determination was arbitrary and capricious in  
16 violation of the Administrative Procedures Act and there's  
17 also a threshold issue of reviewability that the agency has  
18 raised and that I hope you will address here this morning.

19 As you all know, the plaintiff groups filed this  
20 civil action in mid-February and sought a preliminary  
21 injunction shortly thereafter, but after consultation with  
22 the Court, the parties have agreed that we should proceed  
23 directly on the merits in an expedited fashion. And I have  
24 promised -- they tell me not to do these things, but -- I  
25 promised to rule on the merits of this matter relatively

1 quickly. My hope is that we will have this hearing today;  
2 that I will finalize my thoughts overnight; and my plan is  
3 to bring you back tomorrow for my ruling on the motions with  
4 an opinion to follow. So let me ask first whether or not  
5 that works in terms of scheduling, whether you would be  
6 available to return tomorrow or whether we might have to try  
7 to figure out doing this next week. I'm away on Friday  
8 which is why I'm getting a little bit truncated in terms of  
9 my timing.

10 Let me ask you, Mr. Sherman.

11 MR. SHERMAN: Yes, Your Honor. I'll be available  
12 tomorrow.

13 MR. GERARDI: Your Honor, defendants have a  
14 hearing on a related case in the District of Maryland  
15 tomorrow afternoon where we will need to be present.

16 THE COURT: If I did this in the morning, would it  
17 work for you? I'm sorry to put you on the spot. I'm just  
18 trying to --

19 MR. GERARDI: No, no, I -- I think we could have  
20 someone available tomorrow morning for -- if it's -- to wrap  
21 up the proceedings, if that's what Your Honor wishes.

22 THE COURT: I am just trying to abide by my  
23 agreement to both sides to try to get this done as quickly  
24 as possible. I'm away on Friday and then I start a jury  
25 trial on Monday. So it becomes complicated in terms of my

1 schedule. As you know, I'm going to be not giving you  
2 anything in writing right away, as we discussed, but I did  
3 want to tell you what I decide, assuming I can decide  
4 overnight.

5 MR. GERARDI: Your Honor, would a telephonic  
6 conference be possible tomorrow morning?

7 Would plaintiff's counsel be agreeable to that  
8 arrangement?

9 That might make our -- that might be more --

10 THE COURT: The logistics easier?

11 MR. GERARDI: That might be easier with our  
12 hearing --

13 THE COURT: Is that fine?

14 MR. SHERMAN: Whatever the Court prefers. We want  
15 the decision as soon as possible.

16 THE COURT: All right. So what I'll do -- my  
17 thought is that something like 9:30 -- because I have a  
18 10:30 matter in another matter -- is -- anybody who can come  
19 can come for 9:30 tomorrow morning. We'll do -- anybody  
20 who's not available, we can have you call in, but I will  
21 announce the ruling orally here in court for -- to whomever  
22 is available. All right? Does that sound like it works?

23 MR. GERARDI: That works for the Government, Your  
24 Honor.

25 THE COURT: All right.

1 MR. SHERMAN: Thank you.

2 THE COURT: Terrific.

3 For today's purposes, you should know that I have  
4 reviewed your briefs and I am familiar with your arguments,  
5 but you should certainly feel free to restate them and to  
6 provide as much background detail as you think will be  
7 necessary for the Court to resolve the issues. And, of  
8 course, because the purpose of this hearing is to provide  
9 the Court with the information that it needs in order to  
10 rule, I will be asking you questions, although I will try  
11 not to ask too many or interrupt you too much.

12 As far as the procedures, I don't ordinarily  
13 impose strict time limits or anything of that nature for my  
14 hearings. I find them distracting. I'm trying to listen to  
15 what it is that you are saying. I envision allowing the  
16 plaintiff to speak first to give us an overview of the case;  
17 the claims that have been made; and then I think I'd like to  
18 address what I see as the two primary or main issues  
19 separately, the reviewability question and then the merits  
20 of the plaintiffs' APA claim. In that regard, I think I'll  
21 have the defendant start by explaining why -- once the  
22 plaintiff gives us the overview of the claims in the case,  
23 having the defendant start by explaining why the matter is  
24 unreviewable and the plaintiff can respond and we'll have a  
25 reply on the reviewability issue and then once we've dealt

1 with reviewability, we can have the plaintiff explain why it  
2 believes that the agency has acted arbitrarily and  
3 capriciously on the merits, assuming I can get to them, and  
4 then the defendant can respond and I will entertain any  
5 replies. All right? We'll see how it works.

6 So why don't we start with Mr. Sherman. You're  
7 just setting the table for us, explaining why you've brought  
8 this case.

9 MR. SHERMAN: Thank you, Your Honor.

10 In 2015, plaintiffs were among 81 recipients of  
11 grants with five-year project periods under the Teen  
12 Pregnancy Prevention Program. Congress created the program  
13 in 2009 to shift federal health care policy away from  
14 ideology and towards evidence. Accordingly, the plaintiffs  
15 are in the midst of replicating programs that have been  
16 proven through rigorous evaluations to reduce teen pregnancy  
17 and are conducting five-year randomized control studies of  
18 new and innovative approaches designed to do the same.

19 Last year, HHS notified the plaintiffs and 74  
20 other grants that their five-year project periods would end  
21 June 30th, 2018, two years early. The agency provided no  
22 explanation for its decision. HHS does not point to  
23 evidence in the administrative record supporting its  
24 decision and does not argue that its action is authorized  
25 under the agency's termination regulation. Instead, the

1 agency claims that despite shortening the project period by  
2 two years, its decision to end the grants was not a  
3 termination because the grants were for one year only and it  
4 had unfettered discretion to decide whether to issue new  
5 grants each year.

6 THE COURT: All right. Well, the one-year  
7 position is -- has something to it insofar as the money that  
8 you received was coming to you in one-year increments, was  
9 it not?

10 MR. SHERMAN: Yes, Your Honor. The money was  
11 coming in one-year increments; however, the project period  
12 system which HHS has used for decades to administer  
13 multi-year grants in a variety of contexts involves  
14 programmatic approval for multi-year periods that HHS has,  
15 for decades, called project periods, but then funding in  
16 annual increments that HHS refers to as budget periods.

17 THE COURT: And so it's your position that they're  
18 not allowed to stop funding in the midst of the programmatic  
19 period?

20 MR. SHERMAN: Your Honor, they're allowed to if  
21 they comply with their regulations. And the regulation  
22 provides for a termination only in certain circumstances.  
23 And the definition of "termination" in the regulation is  
24 ending a grant anytime prior to the planned end of period of  
25 performance. The agency's regulation expressly defines the



1 project period as the period of performance and this is no  
2 accident. HHS, as I mentioned, has used the project period  
3 system for decades where the project period is a multi-year  
4 period, and then in 2014, OMB issued uniform guidance, Your  
5 Honor, that does not refer or use the term "project period,"  
6 but instead uses the term "period of performance". HHS,  
7 when it adopted the OMB guidance as its own regulations,  
8 added the term "project period" and defined it as the period  
9 of performance. Now, Your Honor, the notice of award itself  
10 in this case indicates that the project period extends to  
11 June 30th, 2018 -- no, sorry, June 30th, 2020.

12 THE COURT: The original one. But the one they  
13 issued last go-round changed the date; right?

14 MR. SHERMAN: That's right, Your Honor, and that  
15 shortening, as they call it, under the terms of the  
16 regulation for defining a termination shortened the project  
17 period. It shortened what HHS defined as the period of  
18 performance which qualifies as a termination under their  
19 regulation, Your Honor.

20 THE COURT: Could they have given you a project  
21 that was only three years to begin with?

22 MR. SHERMAN: Yes, Your Honor.

23 THE COURT: So this is something about expectation  
24 that they previously said five years and now they say  
25 they're shortening it; is that what the problem is?

1 MR. SHERMAN: I don't think it's expectation.  
2 It's about what the programmatic approval was for. The  
3 funding opportunity announcement that HHS issued for these  
4 grants in 2015 was for a five-year period of performance  
5 which is the same as the 2010 funding opportunity  
6 announcements for the first cohort of grants which was for a  
7 project period not to exceed five years. So --

8 THE COURT: Is that announcement in the record,  
9 did you --

10 MR. SHERMAN: Yes, Your Honor.

11 THE COURT: Do you know where it is?

12 MR. SHERMAN: It's Sherman Declaration Exhibit-N.  
13 At Page 39 is the 2015 announcement. And the 2010  
14 announcement using the term "project period" but describing  
15 the same thing is Sherman Declaration Exhibit-E, Your Honor.

16 And, Your Honor, in addition, HHS continues to use  
17 these two terms interchangeably. There was a funding  
18 opportunity, Your Honor -- a funding opportunity  
19 announcement that closed last week for a -- 2018 grants and  
20 that funding opportunity announcement uses the terms  
21 "project period" and "period of performance" interchangeably  
22 within one paragraph to mean a multi-year period. And, Your  
23 Honor --

24 THE COURT: All right. So you'll be back again  
25 here in a moment. But I take it you disagree with the

1 defendant's position that this entire thing is something  
2 that the Court really cannot be involved in because it's an  
3 unreviewable exercise of agency discretion.

4 MR. SHERMAN: Yes, Your Honor. We disagree.

5 THE COURT: What standards do you think apply to  
6 this?

7 MR. SHERMAN: Well, the APA's arbitrary,  
8 capricious or otherwise not in accordance with law standard,  
9 as interpreted by the Supreme Court in State Farm, Your  
10 Honor. So we think that --

11 THE COURT: Yes, but the APA also has committed to  
12 agency discretion by law. So under what circumstances do  
13 you think the Court should find that this is not committed  
14 to agency discretion such that I can even get to the merits  
15 of the question that you're raising?

16 MR. SHERMAN: Sure, Your Honor.

17 The Supreme Court has explained that the committed  
18 to agency discretion by law standard is a very narrow  
19 standard and that not all discretionary decisions are  
20 committed to agency discretion by law. In fact, the APA's  
21 review section allows the Court to set aside decisions that  
22 are an abuse of discretion. So there is a little tension  
23 there, but we think that based upon the State Farm  
24 standard -- and you can look at City of Kansas City v. HUD,  
25 Your Honor. We think that decision really helps explain

1 what the Court -- how the Court can review this regardless,  
2 Your Honor, because there, the agency determined not to  
3 issue a grant with no explanation whatsoever. And the court  
4 explained that this was final action and it was subject to  
5 the State Farm independent arbitrary and capricious standard  
6 and because there was no explanation and no basis in the  
7 administrative record, the decision was arbitrary and  
8 capricious.

9 THE COURT: Yes, I understand. I'm trying to  
10 separate out reviewability as a matter of subject matter in  
11 terms of the Court's own ability to consider whether or not  
12 something is arbitrary and capricious. And, maybe, you're  
13 telling me I'm doing it wrong to have divided reviewability  
14 as a threshold issue before I get to the question of whether  
15 or not what the agency has done is arbitrary and capricious,  
16 but on the issue of reviewability, I'm wondering, to what  
17 extent can the Court -- isn't it governed by whether or not  
18 there are standards that the Court is supposed to be able to  
19 apply in determining whether or not the agency has exercised  
20 its discretion appropriately?

21 MR. SHERMAN: So Your Honor, to answer the first  
22 part of your question, I do think they're intermeshed,  
23 because under the regulations which are in place here and do  
24 provide standards --

25 THE COURT: So that's the answer. The regulations

1 provide the standards.

2 MR. SHERMAN: No, Your Honor.

3 THE COURT: No?

4 MR. SHERMAN: My apologies. The regulation  
5 provides a standard that the Court can determine this is  
6 arbitrary and capricious under, but even if the Court were  
7 to determine that determination regulation, for example,  
8 does not apply, the independent arbitrary and capricious  
9 standard that requires a reasoned explanation for the  
10 decision still applies, Your Honor.

11 THE COURT: So you're saying, to the extent there  
12 is no explanation, the agency can never say this is  
13 unreviewable?

14 MR. SHERMAN: Your Honor --

15 THE COURT: If the claim under the APA is they  
16 have done something and haven't told us why -- they have  
17 made an action; they have terminated our grants; they have  
18 done any number of other things and provided no reason --  
19 you're saying that can never be an unreviewable kind of  
20 claim because the agency, essentially, doesn't have the  
21 discretion to act without explaining itself?

22 MR. SHERMAN: Your Honor, I -- yes, that's what  
23 we're saying.

24 THE COURT: All right. Good.

25 MR. SHERMAN: Absolutely.

1 THE COURT: Let me have defendant come forward,  
2 then. Thank you.

3 (Brief pause.)

4 MR. GERARDI: Excuse me, Your Honor. I need to  
5 grab a glass of water.

6 THE COURT: Sure.

7 MR. GERARDI: Are you ready?

8 THE COURT: Yes.

9 MR. GERARDI: Good morning, Your Honor.

10 THE COURT: Good morning.

11 MR. GERARDI: When plaintiffs drew down their TPP  
12 grant funding, they accepted that they were receiving, as  
13 Your Honor noted, a year of funding for a year of work that  
14 the agency had approved based on their continuing  
15 applications. With respect to future years of funding, all  
16 they received were projections of future funding. The terms  
17 and conditions of those awards which plaintiffs accepted  
18 when they drew down those annual funds clearly state that  
19 those funds are contingent; that they are no legal  
20 guarantees of future funding.

21 THE COURT: I'm sorry. So what terms and  
22 conditions are you referring to when you make that  
23 statement?

24 MR. GERARDI: I'm referring to the terms and  
25 conditions in the Grant Policy Statement. The Grant Policy

1 Statement is incorporated into the terms of the grant  
2 agreement pursuant to 45 CFR 75.210. I mean, you could take  
3 a look at any of the notices of award in this case. I think  
4 you would generally find it in Paragraph 4 of --

5 THE COURT: All right. And so to the -- let me  
6 just go with where you are --

7 MR. GERARDI: Sure.

8 THE COURT: -- which is, you're suggesting  
9 something of a quasi, if not explicit, contractual  
10 arrangement that when the plaintiffs drew down the money,  
11 they were agreeing to the terms. And you say the terms are  
12 in the Grant Policy Statement. So what about the Grant  
13 Policy Statement authorizes the agency to do what it did in  
14 this circumstance?

15 MR. GERARDI: Sure.

16 So I would point to -- these are cited in our --  
17 the -- Exhibit-B to the -- to my declaration in the second  
18 brief. They're Pages I-33 and I-34 of the Grants Policy  
19 Statement which described project periods and budget periods  
20 as HHS has understood them from both before the recent 2014  
21 revisions to the regulations and afterwards, as the agency  
22 didn't change any of that guidance and it wasn't HHS's  
23 intention in changing any of those regulations to change its  
24 longstanding policy guidance. And those explain the  
25 differences between the two periods. The budget period is

1 for the year of -- worked ahead and it obligates money  
2 presently to the grantee for that one-year period, but I  
3 note that project periods are different in kind. They are  
4 projections of funding, not obligations, and the Government  
5 reserves to itself discretion to -- in terms of deciding  
6 whether to confer funding in those future project periods.

7 THE COURT: But what's the -- I'm a little  
8 confused --

9 MR. GERARDI: Sure.

10 THE COURT: -- because I had understood you to be  
11 equating the budget period with the project period. So you  
12 agree that those are different?

13 MR. GERARDI: We agree that those are different.  
14 We are not equating the budget period to the project period.

15 THE COURT: All right. So what is a project  
16 period versus a budget period?

17 MR. GERARDI: So the project period, as it is used  
18 in the grant instruments, is this five-year period of  
19 programmatic approval that grantees are given when their  
20 initial -- at the initial funding opportunity announcement,  
21 the grantees were told here that the Government's  
22 expectation was a five-year program of continuing awards  
23 that they would not have to compete for.

24 THE COURT: All right. And if this is really a  
25 year-to-year Government making a decision, why do that? Why



1 does the Government have a five-year projection, This is our  
2 expectation, if really what you want plaintiffs -- the  
3 parties to understand is that you only get it for one year  
4 at a time?

5 MR. GERARDI: Well, there's a variety of reasons  
6 for that. First of all, it's the nature of the funding for  
7 this program. This program is funded through year-to-year  
8 appropriations --

9 THE COURT: As is almost everything in the  
10 government; right?

11 MR. GERARDI: Right, but it's still a real limit  
12 and we have -- in this case, there was a real policy debate  
13 about whether or not this program was going to be funded for  
14 another year that went down to the wire. The House proposed  
15 a version of the appropriations bill this year that didn't  
16 include funding for this program and, eventually, through  
17 the political process, they agreed to reauthorize the  
18 program as it has been in past years, but one of the  
19 principles of government program funding is that the  
20 government can't, kind of -- agencies, sort of, can't get  
21 ahead of where Congress is on appropriations. So there's,  
22 at least, that restraint, but the terms and conditions also  
23 --

24 THE COURT: Of course, the -- I'm sorry, let me  
25 just say, the legislative history that you just recited

1 really has no bearing on this; right? I mean, it actually  
2 was funded.

3 MR. GERARDI: Right. In terms of this -- in terms  
4 of the outcome, yes --

5 THE COURT: Okay.

6 MR. GERARDI: -- the Congress did eventually fund  
7 the program. I guess I was -- in trying to understand your  
8 question of why the government counsels people that these  
9 funds are one year at a time, one reason is appropriations.  
10 And other reasons could be that, for instance, you have a --  
11 you have new administrators come in and they've concluded  
12 that, maybe, the previous programs don't serve the interests  
13 of the statutory authorization, and so they would like to  
14 re-compete the funds and see if --

15 THE COURT: But you can't just do that randomly.  
16 What I'm trying to understand is, to what extent is the  
17 agency bound -- although I don't know if I appreciate that  
18 word in the way that I'm saying it, but -- by their  
19 agreement at the outset to have a five-year programmatic  
20 approval for this program? I understand the funding comes  
21 in as the appropriations are done at a year at a time, but  
22 there's got to be something to the five-year projection. So  
23 explain to me what that's about.

24 MR. GERARDI: So the five-year projection is  
25 primarily intended for the government's benefit so it can

1 allow funds to build year on year if it believes that's an  
2 appropriate use of funds, but I'd -- in terms of what it --  
3 whether it obligates the government --

4 THE COURT: I don't understand. I'm sorry.

5 MR. GERARDI: Sure.

6 THE COURT: The five-year is for the government's  
7 benefit, even though the government is only getting the  
8 money as appropriated year after year?

9 MR. GERARDI: Well, yes, in a year-to-year basis,  
10 it can decide whether continuation funding of current  
11 projects is the best use of that funding or --

12 THE COURT: Why can't it just do it one year at a  
13 time? Why does the government care whether it's -- wouldn't  
14 it be better for the government not to promise five years of  
15 funds if it really was --

16 MR. GERARDI: But our position is that they  
17 haven't promised five years at a time. There's -- I mean,  
18 the notices of award --

19 THE COURT: Yes.

20 MR. GERARDI: I mean -- excuse me, let's go back  
21 to -- let me start back.

22 The funding opportunity announcements here --

23 THE COURT: Yes.

24 MR. GERARDI: -- state that there's five-year  
25 programmatic approval, but they also refer grantees to the

1 Grants Policy Statement which describes the nature of  
2 project periods --

3 THE COURT: Can I -- why? Why does it state that  
4 there are five-year programatic approval? What is that  
5 about? That's my question.

6 MR. GERARDI: I guess I'm not clear on the  
7 question. Do you want to understand why --

8 THE COURT: You're suggesting that the government  
9 has set this program up in a way to allow for the funding to  
10 come in year after year based on these progress reports that  
11 come in but that there should be no expectation on the part  
12 of the parties who receive the funding that they're going to  
13 continue to get it over some period of time. And what I'm  
14 trying to figure out is, if that is true, why would the  
15 government say, "We are announcing this for a five-year  
16 period"? Why wouldn't they say, "We're -- this is a  
17 year-by-year grant of funding. You out there who think  
18 you're going to get it, don't start planning for anything  
19 longer than a year because every year, we're going to take a  
20 look at this and a new administrator can come and we can  
21 decide to withhold the funds"? It's, sort of, a weird  
22 scenario to suggest that what HHS is doing is telling people  
23 that, We're going to approve this for five years, but they  
24 don't really mean that in any meaningful sense. So I'm  
25 trying to understand what the five-year promise is about, if

1 it's really a year-to-year dynamic.

2 MR. GERARDI: I think, to answer your question,  
3 Your Honor, is that the government creates these programs so  
4 that there can be an opportunity for the government, if it  
5 would like, to build on the prior success of grantees who  
6 have been awarded funds previously through a five-year  
7 period, but the government is clear that that is contingent  
8 on a variety of factors, including the policy interests --  
9 the continued policy interests of the Federal Government.  
10 So there's four non-competing years and one competing year  
11 at, sort of, the outset of the -- of these programs and  
12 there's no benefit to -- there's no -- I think there's no  
13 commitment to the plaintiffs on that point that there's  
14 going to be a continued --

15 THE COURT: It's very interesting, your argument,  
16 because I would have thought that the answer would be that  
17 we actually want these organizations to do research and we  
18 want them to come up with the answers that Congress has  
19 authorized through its appropriations and we know in the  
20 real world that it can't be done over a 12-month period  
21 because we can't gather data. We can't set it up. We can't  
22 do the kinds of things that the agency wants to be done in  
23 that time frame. So we have to give them a longer horizon  
24 in order to develop the projects that have been authorized.  
25 And if you tell people, We're only going to do this year to

1 year to year to year to year, you'll never really get the  
2 kinds of research and information that you are contracting  
3 for. Why isn't -- am I wrong about that? I just don't  
4 understand how you can have a research program in 12 months.

5 MR. GERARDI: Well, take that as true. It's also  
6 the case that -- and, again, I think this gets back, maybe,  
7 to the reviewability question.

8 THE COURT: Yes, let's --

9 MR. GERARDI: Certainly --

10 THE COURT: Let's go there.

11 MR. GERARDI: Sure.

12 THE COURT: Reviewability. Okay.

13 MR. GERARDI: Certainly, it's the case that the  
14 decision that you're talking about of whether to continue to  
15 fund the program -- whether it's worthwhile for the agency  
16 to continue building funds on -- year on year within a  
17 particular program is justified or whether the programs are  
18 no longer serving those purposes and there needs to be a  
19 re-competition since you -- obviously, that choice --

20 THE COURT: Yes. But the regulations provide for  
21 you to do that, don't they? I mean, there is -- what's  
22 confusing to me about this case is that if the agency's  
23 action counts as termination, we have a set of standards  
24 that are supposed to apply. And, understandably, you're  
25 suggesting this is not a termination which is why you're so

1 reluctant to suggest or indicate that this was really a  
2 five-year program to begin with. I mean, I get the, sort  
3 of, mechanics of where we are, but I'm trying to understand  
4 whether it makes sense for you to set this up as not a  
5 termination in any meaningful sense.

6 MR. GERARDI: I mean --

7 THE COURT: Do you -- well, let me put it a  
8 different way.

9 MR. GERARDI: Okay.

10 THE COURT: Do you agree that the regulations  
11 contain standards for terminating the project period?

12 MR. GERARDI: I think we -- I think that's common  
13 ground here, Your Honor.

14 THE COURT: Okay.

15 MR. GERARDI: I think that a termination has --  
16 there's four different criteria it can fit under. One of  
17 them is terms and conditions of the grant instrument have  
18 been violated. And I think that if the Court concludes that  
19 there's a termination here, then, obviously, the agency  
20 would have had to take a variety of steps in order to  
21 enforce that termination. It, obviously, didn't believe  
22 there was a termination here --

23 THE COUR: Right. Right.

24 MR. GERARDI: -- and so it didn't proceed on that  
25 --

1 THE COURT: But the -- from -- going back to  
2 reviewability, the reviewability question, then, turns on  
3 whether or not there's a termination because if there is,  
4 there are meaningful standards in the regulation to -- that  
5 the agency was supposed to follow and the Court can enforce  
6 them; right?

7 MR. GERARDI: I think that's correct.

8 THE COURT: Okay. So we're all now focused on  
9 whether this is a termination or something else. What else  
10 could it be?

11 MR. GERARDI: The other -- the thing that it is,  
12 is the withholding of continuing relief. If you look at the  
13 Grants Policy Statement, Pages 2-89 and 2-90, there's a  
14 clear distinction between continuing relief -- continuing  
15 awards and terminations, and we believe that's borne out by  
16 the substantive definition of what a period of performance  
17 is in the regulations.

18 THE COURT: All right. So explain that. You want  
19 to fit into the withholding a non-competing continuation  
20 award which is in your policy statement. Plaintiffs say,  
21 Ah, but the regulations -- and you've agreed -- have  
22 standards for termination. So the real question is, which  
23 one of these buckets are we in, termination or withholding?  
24 So why do you think we're not in termination?

25 MR. GERARDI: We're not in termination because the



1 awards have not been ended prior to the conclusion of the  
2 period of performance. The substantive definition of a  
3 period of performance, as set out in the regulations, is  
4 that is the time during which the non-federal entity may  
5 incur new obligations to carry out the work authorized under  
6 the federal award, and the federal award is a one-year  
7 award. Project period funds have yet to be --

8 THE COURT: Why do you say it's a one-year award?  
9 Isn't the whole point of the announcement and the way in  
10 which this entire thing is set up is that the project period  
11 that was programatically approved is the five-year period?

12 MR. GERARDI: No, because the federal -- the  
13 notice of award is the operative document that governs this  
14 relationship. The plaintiffs accept the terms of it when  
15 they draw down their funds. The funding opportunity  
16 announcements are an invitation to send applications for  
17 that initial round of competing awards, but the binding  
18 instrument here -- the agreement is the notice of award.

19 THE COURT: All right. But isn't that view  
20 inconsistent with the very language that you use in the  
21 notice of award at issue here? I'm quoting, This award also  
22 shortens the project period to end on June 30th, 2018, at  
23 the end of this budget year. If you thought it was a year  
24 to begin with, then what are you shortening?

25 MR. GERARDI: We're -- well, we're shortening the

1 projections of future funding that were in the --

2 THE COURT: No, but that's not what it says. It  
3 says it shortens the project period. And in prior notices  
4 of award, the project period has been a five-year window.

5 MR. GERARDI: But the future funds within the  
6 project period are projected funds. They are not funds that  
7 are obligated at that time. The funds are only --

8 THE COURT: That was never the case. I understand  
9 that. I'm trying to define "project period". You say, This  
10 award also shortens the project period. You don't say,  
11 Shortens the projected funds that were going to be coming to  
12 the end of the project period which you were never entitled  
13 to in any event. I mean, I -- nobody's saying that the  
14 government was obligated to pay the money, you know, every  
15 single year without any other restrictions or conditions. I  
16 think everybody understood that the money had to be  
17 appropriated from Congress. If you didn't get it, so, you  
18 know -- too bad, so sad. But the question is, what is the  
19 meaning of "project period"? Because you say in this notice  
20 that you're shortening the project period. So I'm not sure  
21 that your argument makes sense.

22 MR. GERARDI: I think it does, Your Honor, and the  
23 reason why is because the project period, when you look at  
24 the terms of the grant instrument which includes the Grant  
25 Policy Statement, talks about what the legal, you know --

1 the legal quality of projected funds within that project  
2 period is, and it says there's no guarantee to those funds  
3 and that the government has the right to decide to not issue  
4 continuing relief or continuing awards within a project  
5 period for whatever reason. So that is -- I'm not disputing  
6 that the project period shortening is the relevant action  
7 here, but I think the grant instrument terms are plain that  
8 a project period is not a commitment or a guarantee of  
9 future funds. It's clear on the face of the Grants Policy  
10 Statement and the terms of their agreements that plaintiffs  
11 accepted and -- full stop.

12 THE COURT: So I see that the Grant Policy  
13 Statement also has provisions pertaining to suspension or  
14 termination. So how does your interpretation work?

15 MR. GERARDI: So our interpretation is that a  
16 termination is not the withholding of a continuing  
17 non-competing award. Those things are clearly treated  
18 differently in not only the Grants Policy Statement but in  
19 the appeal regulations that govern this program. A  
20 termination is defined as being always appealable to the  
21 Departmental Appeals Board. The denial of continuing relief  
22 is treated separately and those are only appealable when  
23 there's been a violation of terms and conditions --

24 THE COURT: Yeah, but you didn't tell me what a  
25 termination was. You just told me it was appealable. Tell

1 me what it is --

2 MR. GERARDI: A termination --

3 THE COURT: -- under your interpretation.

4 MR. GERARDI: Sure. A termination, under our  
5 definition, would be the withdrawal of funding that has  
6 already been awarded within a budget period year. So for  
7 instance, if six months into the program, there has been  
8 some cause either through, you know -- possibly through a  
9 plaintiff's violation of the terms and conditions to --

10 THE COURT: How are you going to know that? Isn't  
11 that assessed based on the progress reports that happen year  
12 to year? How would you ever know to terminate in the middle  
13 of a budget -- of a one-year budget period? You're just  
14 saying -- this is an extraordinary case, I think, you're  
15 talking about.

16 MR. GERARDI: I don't know if it's extraordinary  
17 or -- I mean, I would -- it would be -- I don't know if we  
18 have a record on it here where I could speculate on the  
19 reasons why -- how that would come to the attention of the  
20 agency. Obviously, if there was some material -- there's  
21 all sorts of conditions in the grant -- in the term -- in  
22 the grant terms about various legal requirements that the  
23 grantees have to comply with. If a violation was reported  
24 in the middle of the cycle but without the -- outside of the  
25 normal progress report, I assume that that could be a reason

1 -- a violation of terms and conditions that would give the  
2 agency a reason within a budget period to cut off their  
3 funding during that budget period.

4 THE COURT: So the funding isn't allocated all at  
5 once. They're giving -- they're getting monthly  
6 installments or something? I mean, if the funding is given  
7 up front, then what do you mean, terminate in the middle of  
8 a budget period?

9 MR. GERARDI: Well, the funding is -- I -- my  
10 understanding is that the funding is put in some sort of  
11 account that the plaintiffs draw down over the course of the  
12 one-year budget period.

13 THE COURT: So your view of termination is once  
14 that funding is put into the account for that year, if  
15 something comes to the attention of the agency and they need  
16 to terminate, they take the funds out of the account --

17 MR. GERARDI: That's correct.

18 THE COURT: -- or something?

19 MR. GERARDI: That's correct.

20 THE COURT: All right.

21 MR. GERARDI: And there may be cases where a  
22 particular notice of award requires, you know, more --  
23 requires more frequent updates from a grantee in order to  
24 ensure that there's been compliance. So that might be  
25 another situation where there's a trigger to find

1 determination within that space.

2 THE COURT: And you get that because you say --  
3 let's look at what the regulations says about termination.  
4 Termination means ending of a federal award in or -- whole  
5 or in part at any time prior to the planned end of the  
6 period of performance. Of course, it doesn't say in the  
7 regulation, Prior to the end of the budget period. It says,  
8 The period of performance. So you must be equating budget  
9 period with period of performance in that.

10 MR. GERARDI: We believe -- as our briefs set  
11 forth, we believe that, as it's used in the grant  
12 statements, the relevant period of performance here is the  
13 budget period.

14 THE COURT: As it's used in the grant statements?  
15 Does the grant statement define it in that way?

16 MR. GERARDI: It doesn't -- I mean, there are  
17 definitions of "budget period" in the Grants Policy  
18 Statement, but based on the way those terms are used in the  
19 Grants Policy Statement, because funds are only actually,  
20 you know, put in -- I know I stated earlier that there was a  
21 bank account. I've been corrected by counsel at my table  
22 that it's actually a letter of credit that the grantees draw  
23 on --

24 THE COURT: I see.

25 MR. GERARDI: -- but when --

1           THE COURT: But you're -- but the point that you  
2           were making was trying to explain to me why you even think  
3           the Grant Policy Statement equates period of performance and  
4           budget period. I mean, there's no line in the Grant Policy  
5           Statement that says, For the purpose of these grants, the  
6           period of performance -- project period -- is the budget  
7           period; right?

8           MR. GERARDI: That's correct. So there's no, kind  
9           of, connection -- I mean, the regulations have, sort of,  
10          this set of definitions; then the Grants Policy Statement  
11          discusses these terms, sort of, separately. The regulations  
12          don't -- as -- unlike prior regulations, don't specifically  
13          make it a labeling issue where they say, like, You should  
14          look to what the regulation -- what the -- a notice of award  
15          says is the -- they don't -- the regulations don't say, You  
16          should look to what the document says is the period of  
17          performance in order to understand what it is. There's a  
18          substantive definition. There is a cross-reference within  
19          the regulation definitions that says, like, Project period,  
20          see period of performance. But when you turn to the -- when  
21          you actually try to apply the substantive definition of  
22          "period of performance" to the budget period and the project  
23          period, as those terms are used therein, it can't be the  
24          case that the project period, as that term is used in the  
25          Grants Policy Statement, is a period of performance because

1 the period of performance deals with --

2 THE COURT: I don't know what you're talking  
3 about. The regulation says the project period is the period  
4 of performance. I thought that was well established.

5 MR. GERARDI: It is.

6 THE COURT: Okay. So what do you mean?

7 MR. GERARDI: What I mean is that there's a  
8 cross-reference between the -- what I think is settled is  
9 that there is a cross-reference in the regulations between  
10 project period and period of performance.

11 THE COURT: And the plaintiffs have explained that  
12 historically, those two things came together in a way that  
13 makes them be the same thing; right?

14 MR. GERARDI: And I guess we would dispute that  
15 history, because you can start with the Grants Policy  
16 Statement itself which predates the regulations here. And  
17 the Grants Policy -- again, if you look at the substantive  
18 definition of period of --

19 THE COURT: Well, it can't supersede the  
20 regulation. So --

21 MR. GERARDI: No, no, no --

22 THE COURT: -- let me --

23 MR. GERARDI: -- I'm not saying that.

24 THE COURT: Yeah. All right.

25 MR. GERARDI: No, no, I'm not saying that.



1 THE COURT: I'm trying to understand what terms  
2 you think are the same. I thought we had agreed, per the  
3 regulation, that project period and period of performance  
4 were the same, and the question is whether those two things  
5 were also the same as the budget period which is the  
6 argument that I thought you were making. Now, you're  
7 suddenly --

8 MR. GERARDI: No, no, no, no.

9 THE COURT: -- suggesting that --

10 MR. GERARDI: No, no, no, that's --

11 THE COURT: Okay.

12 MR. GERARDI: -- the argument that I'm making.

13 THE COURT: Okay. So budget period, you say,  
14 equals project period or period of performance or whatever  
15 we're now calling it.

16 MR. GERARDI: As that is used in the --

17 THE COURT: As that's --

18 MR. GERARDI: -- regulations.

19 THE COURT: -- used in the regulations?

20 MR. GERARDI: Yes.

21 THE COURT: What I don't understand is, if that's  
22 the case, why does your notice of award have two separate  
23 lines? You have a project period and they tell you the  
24 dates and you have a budget period and they tell you the  
25 dates. If that's one and the same, why are you setting it

1 up that way?

2 MR. GERARDI: Again, I think we're trying to --  
3 we're trying to create, I think -- the space here is not  
4 that they're both -- the thing that -- the line items in the  
5 project of --

6 THE COURT REPORTER: I'm sorry? What?

7 MR. GERARDI: I'm sorry.

8 The line items in the project of award are  
9 obviously not the same thing. You have to understand them  
10 by looking to the terms of the grant document for guidance  
11 to understand how -- which of the -- which of those two line  
12 items meets the period of performance definition in the  
13 regulations, because funds are only put in -- a letter of  
14 credit is only extended for the one year --

15 THE COURT: Yes, but that's always been the case.  
16 It's always been the case; right? Because money is  
17 appropriated year to year by Congress. Everybody knows  
18 that. That's, pretty much, the case for everything we do in  
19 the government. All right? Fine. Nevertheless, somehow --  
20 and this was the question I asked you at the beginning --  
21 the agency is, quote-unquote, obligating itself to provide  
22 the funding over this project period because it says that  
23 upfront. Five years. It doesn't say, One year. It says,  
24 Five years. And so now, I hear you trying to suggest, No,  
25 no, no, when you really trace through the regulations, it's

1 really only one year such that in the middle of a five-year  
2 period, we can swoop in and, without triggering the  
3 termination requirements, look at our policy statements and  
4 somehow change course. And I don't know that the law  
5 supports that. And what I'm trying to understand is where  
6 you get the fact that, first of all, the five years is  
7 really inconsequential; doesn't really matter; not a big  
8 deal; and secondly, that when you talk about termination in  
9 the regulations, it's talking only about within that  
10 one-year period of budget obligation as opposed to within  
11 the five-year period of project performance which seems to  
12 be what the termination regulation actually says.

13 MR. GERARDI: I mean, where we're getting this  
14 from is the Grants Policy Statement and the terms that the  
15 plaintiffs agreed to when they accepted these awards. The  
16 Grants Policy Statement is the, you know -- you -- we can't  
17 just look at the -- how the terms are used in the notice of  
18 award in a vacuum. They are -- this is an instrument that  
19 the plaintiffs agreed to when they drew down their funds.  
20 The terms have to be understood in the context of the award.  
21 The reason why the five years is not something they're  
22 entitled to is because the terms clearly outline that it is  
23 not something that they are entitled to. I mean, whether  
24 that is good policy or not, that -- those are the terms that  
25 the plaintiffs accepted and the agency exercised its right

1 because --

2 THE COURT: Did the agency accept any terms when  
3 it said, "We're programatically approving this for five  
4 years"?

5 MR. GERARDI: The agency -- I mean, the agency  
6 certainly accepted the terms that are in the Grants Policy  
7 Statement about the conditions under which a continuation  
8 award -- a decision to either compete fund or to issue a  
9 continuation award could be --

10 THE COURT: And did they accept anything in the  
11 regulation about the circumstances under which a termination  
12 could occur?

13 MR. GERARDI: I think that as a matter of --  
14 obviously, as they are bound to follow their regulations.  
15 So yes, they are required to comply with the regulations in  
16 terms of the procedures they have to follow when a  
17 termination has occurred. The question is whether these --  
18 under these grant instruments, competing funds in this  
19 forthcoming budget year as opposed to issuing continuing  
20 relief is a termination. And I think -- and we -- and it's  
21 our position that when the -- that the way the Grants Policy  
22 Statement is structured, that the terms that the plaintiffs  
23 accepted when they accepted these three -- these shortened  
24 down project period awards, it's plain that it's not what  
25 those terms mean.

1 THE COURT: So you also rely to some extent on the  
2 Antideficiency Act in your briefs. Can you help me  
3 understand that argument.

4 MR. GERARDI: Sure. So on our -- in our view,  
5 what the plaintiffs are asking for here is five years of  
6 funding -- essentially, a multi-year agreement before any of  
7 the funding for those future years have been appropriated by  
8 Congress. It's their theory that when the initial notice of  
9 award was given, that they would be funded for five, you  
10 know -- four years into the future --

11 THE COURT: You said it was the government's  
12 expectation that they would be; right?

13 MR. GERARDI: Yes.

14 THE COURT: I mean, it's not like they're just  
15 making that up. You --

16 MR. GERARDI: Well, right, but -- I mean, that's  
17 plaintiffs' theory. I mean, the government's view is that  
18 that's an -- is that that was their expectation and that it  
19 wasn't a thing they should have expected based on the terms  
20 of the Grants Policy Statement --

21 THE COURT: So you're saying --

22 MR. GERARDI: -- but we're dealing --

23 THE COURT: Well, I'm sorry. So your position is  
24 that when non-profit organizations that do research accept  
25 grant funding from HHS, they should expect that on a

1 year-to-year basis, the agency can suddenly decide, "We're  
2 not giving you this money anymore," no matter how long the  
3 agency said its expectation to give the money was up front;  
4 that they -- that they're supposed to set up their research  
5 studies and hire people and do things knowing that every  
6 June 30th, the agency could suddenly say, "Too bad. So sad.  
7 Regardless of whether there's cause or anything else, look  
8 at our Grant Policy Statement"?

9 MR. GERARDI: I mean, those are the terms of the  
10 award and that's what plaintiffs accepted when they drew  
11 down their funds. The decision to make a -- to compete  
12 further awards which plaintiffs would be eligible to apply  
13 for versus to issue continuing support is explicitly spelled  
14 out in those grants --

15 THE COURT: And you don't think it's at all  
16 confusing or misleading for the agency to represent up front  
17 that you're competing for a five-year programatically  
18 approved thing?

19 MR. GERARDI: But the agency also represented that  
20 that -- those funds were not guaranteed and that there was  
21 no legal obligation to continue providing them. I don't --  
22 I think the representations have to be read in context. I  
23 don't think they can be taken in isolation.

24 THE COURT: And the context here -- setting aside,  
25 apparently, that anybody could possibly set up a research

1 study in 12 months knowing that the funding was going to be  
2 potentially yanked, the context here is your representation  
3 that notwithstanding that the regulations have clear steps  
4 for the actual termination of performance -- because I'm  
5 looking at the regulation and not your own terms --  
6 notwithstanding the regulation, these organizations were to  
7 understand that when they competed for these funds, without  
8 explanation -- and we'll get to that in a moment -- without  
9 explanation, the agency could decide on a year-to-year basis  
10 whether or not to continue for any reason or no reason?

11 MR. GERARDI: I mean, that -- those are the clear  
12 terms of the grant instrument that the plaintiffs accepted  
13 when they drew down their funds. There's a difference in  
14 the terms of these agreements between terminations and the  
15 decision not to issue continuing awards and the rules that  
16 govern a termination don't apply to a decision to withhold  
17 continuing support. And in terms of -- I mean, full stop  
18 there.

19 THE COURT: So the Antideficiency Act argument is,  
20 basically, you can't oblige the government to pay for things  
21 before you get the money?

22 MR. GERARDI: That's correct. And I would -- with  
23 the caveat that simply having an out for the failure of  
24 appropriations or termination procedures isn't enough on its  
25 own in order to cure an ADA violation.

1           THE COURT: So what is an ADA violation? I mean,  
2           don't the regulations and your policy statements also have  
3           language pertaining to the carryover of unobligated  
4           balances? Extensions beyond the final budget period? I  
5           mean, obviously, there's some conception on the part of the  
6           agency that people can continue to work even though there  
7           isn't money budgeted for that period of time; isn't there?

8           MR. GERARDI: Well, right, but carryover is, sort  
9           of, the exception that proves the rule in our view, because  
10          carryover's a very -- first of all, carryover has to be  
11          explicitly approved by the agency. You can't just spend  
12          funds in future project years without approval of the  
13          agency. If the grantee does that, they can potentially be  
14          sanctioned. And I think more to the point, when carryover  
15          is approved, it's integrated into the notice of award for  
16          the subsequent budget period. It either changes the terms  
17          -- it either results in a revision to the change of terms of  
18          the notice of award or it results in a carryover. And the  
19          notices of award include a specific space for setoffs to  
20          previous years' funding based on carryover, but it's not  
21          this -- it's not a free-floating authority to spend funds in  
22          --

23          THE COURT: I'm not suggesting it's a  
24          free-floating authority. And I -- and you know the details  
25          much better than I do. I'm just trying to understand this



1 concept of government contractors not being able to plan;  
2 not being able to hire people to have more than annual  
3 research studies and projects because they don't already  
4 have the money in hand. That can't be right. That's not  
5 the way the government works. I don't understand how you  
6 could possibly say that people who contract with the  
7 government in whatever industry can't project that they're  
8 going to hire people and they're going to do whatever and  
9 everybody assumes that it is going to be subject to actually  
10 getting the money appropriated.

11 MR. GERARDI: Well, that's right, but in many  
12 contexts -- obviously, you're correct that in the vast  
13 universe of government agreements, the government couldn't  
14 operate in many fields if it didn't have the ability to make  
15 multi-year obligations, but that is the exception to the  
16 norm. Congress has to create that authority explicitly.  
17 The program at issue here is an annual appropriation that  
18 doesn't confer any of that authority. There's no authority  
19 here to issue multi-year agreements --

20 THE COURT: Authority by whom, Congress or --

21 MR. GERARDI: Congress.

22 THE COURT: -- HHS?

23 MR. GERARDI: By Congress.

24 THE COURT: Okay.

25 MR. GERARDI: HHS couldn't create that authority

1 for itself. It would have to be created by statute.

2 THE COURT: Okay. So Congress authorizes year to  
3 year the money for this program. So under what circumstance  
4 -- and I feel like I keep coming back to the same  
5 question -- under what circumstance does HHS get to  
6 represent to people that they are appropriating or agreeing  
7 to -- approving a five-year grant of funding for this kind  
8 of research?

9 MR. GERARDI: Again, Your -- I just -- I --

10 THE COURT: They're not doing that? They're  
11 not --

12 MR. GERARDI: I don't agree that they're doing  
13 that, Your Honor.

14 THE COURT: I see.

15 MR. GERARDI: I -- it's clear from the Grants  
16 Policy Statement that the five-year project period is not a  
17 guarantee of funding; that -- and that the continuing awards  
18 within that project period are not legal guarantees.  
19 Termination is treated differently in that statement than  
20 the mere refusal -- or decision to issue continuing relief.

21 THE COURT: All right. So let me just ask you two  
22 final things and I want the plaintiff to have an  
23 opportunity.

24 One is with respect to reviewability. Plaintiff  
25 says -- I hear you, the whole termination versus budget

1 period argument, etcetera. But to the extent the agency did  
2 not explain -- that one sentence I read previously appears  
3 to be all the agency has ever said about why it acted in  
4 this way -- isn't that reviewable regardless based on the  
5 lack -- the claim that there was a lack of explanation?

6 MR. GERARDI: So if I'm understanding you  
7 correctly, whether there would be a reviewable -- whether it  
8 was reviewable, simply the fact that they didn't say  
9 anything --

10 THE COURT: Mm-hmm.

11 MR. GERARDI: -- at all? I mean, I -- if you  
12 conclude that there is a termination --

13 THE COURT: No, he's saying forget that. We  
14 haven't gotten there yet. Regardless of whether or not  
15 there's a termination --

16 MR. GERARDI: We would -- I guess -- that's not  
17 reviewable in our view. I don't think -- there's no statute  
18 or regulation that requires the agency to say anything  
19 that's separate from the termination procedures.

20 THE COURT: So you're saying when the APA says,  
21 Arbitrary and capricious, you can't do it, and the Supreme  
22 Court in State Farm has interpreted that language to mean at  
23 a minimum that the agency has to explain itself, if the  
24 plaintiffs' claim is, The agency terminated our grants; the  
25 agency withheld the funding of our grants; whatever the

1 language you want to use with regard to the action, the  
2 agency did something and they did not explain, if the thing  
3 the agency did, I guess you're saying, is a termination,  
4 then it's unreviewable, but if it's something else, it's not  
5 -- it is reviewable?

6 MR. GERARDI: If it's a termination, it is  
7 reviewable; if it's not a termination, it's not reviewable,  
8 but it -- I think that's -- I think that's right. The --

9 THE COURT: Can't --

10 MR. GERARDI: The reviewability question is a  
11 threshold jurisdictional issue before you get to the  
12 question of whether there's been arbitrary and capricious  
13 action. So you have to get that decision down first, and  
14 then if you conclude that it's not reviewable, then it's not  
15 reviewable all the way down. On the other hand, if there  
16 was a termination, then that lack of explanation would be  
17 reviewable.

18 THE COURT: All right. So let's posit that.  
19 There is a termination. Let's say I agree with the  
20 plaintiffs with regard to that threshold issue. We get to  
21 reviewability. This is my second question. Is the agency  
22 prepared to concede that it did not provide sufficient  
23 reasons for its actions?

24 MR. GERARDI: I think it's common ground here,  
25 Your Honor, that if there was -- the agency proceeded in

1 this case as if there was not a termination. There would  
2 have been a variety of -- and they're spelled out in the  
3 briefs -- there would have been a variety of procedures the  
4 agency would have had to follow if it wanted to pursue a  
5 termination. Those steps have not yet been taken. So I  
6 think that's correct.

7 THE COURT: So you think you lose if I disagree  
8 with you on reviewability?

9 MR. GERARDI: I think that if the -- if you  
10 conclude that there was a termination here, I think that the  
11 agency hasn't followed those procedures and would have to go  
12 back to determine whether or not there's any basis for that.

13 THE COURT: All right. Thank you.

14 Mr. Sherman, I apologize. We've covered a lot of  
15 ground, but I wanted to understand the Government's  
16 position.

17 MR. SHERMAN: That's okay, Your Honor. I'll try  
18 to catch up.

19 Your Honor, I wanted to start with the funding  
20 opportunity announcement that closed just last week, if I  
21 can hand it up, Your Honor. It wasn't included in our --

22 THE COURT: Has defendant seen it?

23 MR. SHERMAN: Your Honor, I have a copy for  
24 defendant. It's on their website. It's OAH's funding  
25 opportunity announcement.

1 THE COURT: You can hand it to them; you can hand  
2 it to me; and I hope you'll get to its relevance right away.

3 MR. SHERMAN: I will, Your Honor. The funding  
4 opportunity announcement for another grant issued by OAH.  
5 And if you look at the bottom of Page 18 -- there's only two  
6 pages here; I excerpted it -- it says it's generally  
7 approved for a project period of up to two years and on the  
8 next page, it says, Period of Performance: Not to exceed  
9 two years, followed by, Budget Period Length: 12 months,  
10 Your Honor. So outside of litigation in a funding  
11 opportunity announcement with the same OAH, the agency has  
12 within one paragraph equated the budget -- or the project  
13 period with the period of performance just as the agency  
14 does in the regulation, Your Honor, and as they do for our  
15 --

16 THE COURT: So your point, I guess, is that the --  
17 notwithstanding counsel's representations here this morning,  
18 the way the agency actually operates is to treat period of  
19 performance as something different than the budget period?

20 MR. SHERMAN: Yes, Your Honor.

21 THE COURT: Why do they do that? What's your view  
22 as to why we have these two separate time frames operating  
23 in the context of these grants?

24 MR. SHERMAN: Sure, Your Honor.

25 It's in order to assure adequate stewardship and

1 progress of the program. So it's a time to break it up. At  
2 each year, there has to be a continuation application that,  
3 then, as the Government has represented, takes about 60 days  
4 to review; that the government, then, takes that time to  
5 determine whether or not the program has been complying with  
6 the terms and conditions. And so this is an opportunity at  
7 the end of each budget period to review and, furthermore,  
8 Your Honor, to assure that there has been an appropriation  
9 for that period. And so --

10 THE COURT: Yes, I understand why they do the year  
11 to year. What I don't understand -- and what I've been  
12 asking government's counsel -- is, why do they say two years  
13 or five years or whatever when everybody knows they have  
14 these one-year increments that -- where they're doing  
15 exactly what it is that you've just said?

16 MR. SHERMAN: Your Honor, they programatically  
17 approve for five-year project periods because it's the only  
18 -- the agency has determined that it's the period of time  
19 necessary in order to conduct the program like the Teen  
20 Pregnancy Prevention Program, for example, Your Honor.  
21 These are research grants and it would be impossible or, at  
22 least, highly, highly unfeasible to plan the program; to  
23 plan their five -- to plan a randomized control study, for  
24 example, Your Honor; and then implement the program; collect  
25 sufficient data; analyze that data; and make a report on

1 that all within one fiscal year, Your Honor. And so --

2 THE COURT: Well, counsel says -- Mr. Gerardi  
3 says, nevertheless, you agreed to that. You knew that. You  
4 -- the planned policy statement for the HHS clearly says  
5 that these funds can be withdrawn. You bid for that.

6 MR. SHERMAN: Your Honor, with respect to the  
7 policy statement, it was not fully incorporated into the  
8 notice of award. What the notice of award says, Your Honor,  
9 is that -- it says that plaintiffs will comply with the  
10 Grants Policy Statement. And, Your Honor, there are  
11 portions of the Grants Policy Statement with which a  
12 plaintiff -- a grantee must comply. Those are obligations  
13 on the grantee. The ability of HHS to take an enforcement  
14 action -- which is what this is -- is not something that a  
15 grantee could comply with.

16 THE COURT: I see. So you're back at the  
17 beginning in terms of not even agreeing that what's in the  
18 policy statement is a part with respect to these  
19 circumstances of the circumstances that you find yourself  
20 in. You don't see the -- withholding a non-competing  
21 continuation award part of the policy statement as part of  
22 the notice of award.

23 MR. SHERMAN: Yes, Your Honor. That's right.

24 And, furthermore, if you look at the definition of  
25 a withholding in the Grants Policy Statement, first, it's



1 not an obligation on a grantee. It's not something a  
2 grantee could comply with. But second, it actually says  
3 that the agency can refuse -- can not issue a non-competing  
4 award. But here, the agency -- that's not what this is.  
5 They shortened the project period. They didn't even accept  
6 applications for the continuation. And so a withholding  
7 doesn't really fit what happened here. Instead, they just  
8 decided -- they didn't decide not to make a non-competing  
9 continuation award. They shortened the project period.

10 THE COURT: All right. Setting aside what they  
11 just -- what you say they did, let me understand the  
12 argument that you just made. What does it look like to  
13 decide not to make a non-competing continuation award? It's  
14 receiving applications and then saying, I'm not going to do  
15 it, is that what you mean?

16 MR. SHERMAN: Your Honor, I -- what that would  
17 look like is exactly what Your Honor described, receive  
18 applications; determine for an allowed reason under the  
19 regulation -- which we think's -- which, per the terms of  
20 the Grants Policy Statement and the notice of award itself,  
21 prevail over this policy statement. If the agency  
22 determines, for example, there's non-compliance with program  
23 terms and conditions, that is a basis to --

24 THE COURT: Yes, but that's termination. You  
25 don't need to bleed the two. I'm trying to understand

1 within the context of this language. I'm looking at  
2 withholding a non-competing continuation award. And there  
3 is a bullet point here that government counsel points to  
4 that says, for whatever reason, continued funding would not  
5 be in the best interests of the Federal Government; that  
6 this -- that could be a reason to decide not to make a  
7 non-competing continuation award. So assuming for the  
8 moment that we're in this world, what does that look like?  
9 They receive the application and then --

10 MR. SHERMAN: Yes, Your Honor. They would issue a  
11 letter or some sort of notice to the grantee that would  
12 state the agency has determined that the continuation of  
13 this grant is not in the best interests of the government,  
14 assuming that this applied which, Your Honor, we --

15 THE COURT: Can they do that in the middle of the  
16 program? Can they do that in the middle of the approved  
17 programmatic period?

18 MR. SHERMAN: Your Honor, the plain terms of this  
19 specific provision which is -- if we're sticking with this  
20 actual provision applying, then the answer is no because  
21 it's about a non-competing continuation award which only  
22 comes in response to a non-competing continuation  
23 application which is for the next budget period within an  
24 approved project period. And I can slow that down, Your  
25 Honor.

1 THE COURT: I'm just trying to understand it.  
2 Government says, We are here. Look at, you know, Page 89.  
3 That's where I'm looking. They say, This is exactly what we  
4 did. We decided it was not in the best interests of the  
5 government and we said, you only get three years rather than  
6 the projected five. You say, No, this is a termination.  
7 Look at the regulation. There are steps that you were  
8 supposed to follow. And, as I said to government counsel,  
9 my turning out to be not-so-easy task is to decide which one  
10 of those worlds we're in. So I need to understand them. I  
11 need to know what you think -- when is this appropriate?  
12 When could they do it? And I think you just suggested that  
13 they could do it in the context of the five-year programatic  
14 period, or no?

15 MR. SHERMAN: Well, Your Honor, I thought your  
16 question was premised on this section actually applying.  
17 And, again, we think it's been superseded because it's  
18 inconsistent with the regulations, but if this provision  
19 applied --

20 THE COURT: When does this -- well, let me start  
21 there. When does this provision apply, in your view? If  
22 not now, when?

23 MR. SHERMAN: Sure, Your Honor. It applies to  
24 other grant programs, not this grant program, Your Honor.

25 THE COURT: Why?

1 MR. SHERMAN: Because --

2 THE COURT: What do you mean?

3 MR. SHERMAN: Sure.

4 So other grant programs, Your Honor, do make a  
5 distinction between a termination and a withholding and we  
6 cite those in our briefs. And they specifically say that a  
7 termination does not include a decision like this, but the  
8 regulation here doesn't make that distinction. But, Your  
9 Honor, if there was a program that this withholding applies  
10 to, then it would be in response, as it says -- it would be  
11 a -- at the time after a non-competing continuation  
12 application has been made by the grantee and then the  
13 government -- HHS could make a decision not to issue a  
14 non-competing continuation award and then the -- that  
15 decision would be provided to the grantee and would provide  
16 that the government has determined it's not in the best  
17 interests. And --

18 THE COURT: So the one-year progress reports that  
19 your clients are submitting are not non-competing  
20 continuation applications?

21 MR. SHERMAN: They are, Your Honor.

22 THE COURT: Okay. So why does this not apply?  
23 This regulation -- I mean, this policy statement. Why is  
24 this not the universe -- at least, theoretically, you  
25 suggested that this withholding a non-competing continuation

1 award can't happen in the regulatory scheme that we're in  
2 right now or in this grant scheme. Why are you saying that?

3 MR. SHERMAN: Your Honor, I'm saying that because  
4 the notice of award itself as well as the Grants Policy  
5 Statement state that if there's any inconsistency between  
6 the regulations and this policy statement, then the  
7 regulations prevail. And this policy statement is from 2007  
8 and is based on regulations that have been superseded by the  
9 current adaptation of the OMB uniform guidance. And, as  
10 Your Honor's pointed out, for a termination, there are  
11 specific grounds and best interests is not one of them.

12 THE COURT: I think I'm not asking the question in  
13 a way that is helping me to understand your answer. So let  
14 me try again. All right?

15 The question for me is whether or not this is a  
16 termination or a withholding. You say termination; he said,  
17 withholding. I thought I heard you to suggest that there  
18 really is no such thing as a withholding in the context of  
19 the grant program that we're talking about here. Maybe  
20 there are other grant programs under other regulations where  
21 withholding could be a thing. It's not a thing here. And I  
22 was expecting you, when I asked you that question, to point  
23 me to something about this regulatory scheme that is  
24 governing your grant program that says, If the government's  
25 going to end this, it's got to be by termination. There's

1 no such thing as withholding, but that's not the answer you  
2 gave me. So why is it that you think that the government  
3 couldn't invoke this provision in the middle of your  
4 five-year programatic period?

5 MR. SHERMAN: So Your Honor, I can point you to  
6 the regulatory provision.

7 THE COURT: Okay. All right.

8 MR. SHERMAN: It's 45 CFR 75.372 which is the  
9 termination provision as well as 371 which is the provision  
10 for remedies for non-compliance, and those are the  
11 provisions that apply and indicate when a government can  
12 take the action -- when the government can take the action  
13 and any sort of action, no matter what we want to call it.  
14 But, Your Honor, even if they had invoked -- even if this  
15 withholding part of the best interest -- of the Grants  
16 Policy Statement applied, Your Honor, they did not invoke it  
17 at the time that they made the decision. And the best  
18 interests -- this best interests standard in here -- in the  
19 Grants Policy Statement is a meaningful standard that the  
20 Court could review. So even if the Court were to apply this  
21 withholding and determine it was a withholding and believe  
22 that they could do it in the basis of the best interests,  
23 all of which we argue is improper, even then, they have  
24 provided no explanation --

25 THE COURT: Do you have case law for that? Isn't

1 that -- I mean, isn't -- haven't courts said that the best  
2 interests standard cannot be applied by a Court?

3 MR. SHERMAN: Your Honor, actually, courts have --  
4 especially here in D.D.C., courts have said that the best  
5 interests standard is a standard that's subject to judicial  
6 review.

7 THE COURT: But only insofar as you've got to tell  
8 me what it is; right? Only insofar as you announce it. I  
9 can't police whether or not the HHS is right about what is  
10 in the best interests of the government, can I?

11 MR. SHERMAN: Well, Your Honor, at the very least,  
12 they have to provide some sort of explanation. And I would  
13 point Your Honor to Foster v. Mabus which is 895 F. Supp. 2d  
14 135. That's Judge Howell -- Chief Judge Howell, and then,  
15 Your Honor, PGBA v. United States which is federal claims  
16 court, 57 Fed. Cl. 655. And there, the court really  
17 explained that the best interests finding, the court looks  
18 at whether the assumptions or assertions upon which the  
19 finding is based are borne out by the record and whether the  
20 factors relied upon were relevant or whether they were --  
21 whether the relevant factors were ignored. And, Your Honor,  
22 we have indicated and explained that not only was there no  
23 explanation at the time and there is no basis in the  
24 administrative record that the government has now provided  
25 that would support their decision, but the Court -- the

1 agency now points to matters of public record and points to  
2 two documents both filed -- or both after the date of the  
3 determination decision and not included in the  
4 administrative record, one of which is a press release; the  
5 other of which is a letter to a senator. The -- and,  
6 furthermore, those are actually contradicted by evidence  
7 before the agency or information before the agency. So this  
8 press release says that HHS had determined, based on the  
9 first cohort's evaluations, that the program was not  
10 working.

11 THE COURT: Yes, I understand, but Mr. Gerardi  
12 indicates that those arguments that you're making right now  
13 are actually arguments about the alleged arbitrary nature of  
14 the agency's determination and we have the threshold  
15 question of whether the Court can even reach them. And what  
16 I'm suddenly concerned about is your suggestion that if we  
17 get to the policy statement and that's the appropriate  
18 document to be considering, that it contains a meaningful  
19 standard for the Court to review the agency's decision. I  
20 will look at this case, but I'm, frankly, quite surprised.  
21 So you're not conceding that best interest is not a standard  
22 that is meaningful for the purpose of this Court's analysis?

23 MR. SHERMAN: No, Your Honor, we're not conceding  
24 that and we don't think it applies, but even if it does, we  
25 think that because the agency provided no explanation; never



1 said it was not in the best interests of the government at  
2 the time the decision was made -- which, Your Honor, in City  
3 of Kansas City v. HUD, was important to the D.C. Circuit's  
4 decision there -- there was no explanation and there was  
5 nothing --

6 THE COURT: I understand, but you keep blending  
7 the substantive with the threshold. I've broken them out.  
8 And, maybe, it's because the Government has led me to do so  
9 in terms of the way in which they analyzed the problem, but  
10 whether or not there was an actual explanation, I think, is  
11 different from whether or not the governing -- whether or  
12 not there are standards that I'm supposed to apply in  
13 determining the merits.

14 MR. SHERMAN: Yes, Your Honor. And we think that  
15 there are multiple different standards, all of which are  
16 meaningful standards. One is the regulations. If you don't  
17 think those apply, but you think the Grants Policy Statement  
18 applies, that's a meaningful standard. If you don't think  
19 that applies --

20 THE COURT: But what is the standard for  
21 determining whether or not they cannot make a non-competing  
22 continuation award under the Grant Policy Statement?

23 MR. SHERMAN: Well, Your Honor --

24 THE COURT: Whether or not they decide that it's  
25 in the best interests of the Federal Government.

1 MR. SHERMAN: Right, Your Honor, but the agency  
2 never made that determination. It did not make that  
3 determination --

4 THE COURT: But I can't police that if I can't  
5 review it.

6 MR. SHERMAN: Well, Your Honor, you can determine  
7 whether or not the best interest standard is reviewable.  
8 And, Your Honor, at the -- it may be very deferential. It  
9 seems the best interest standard is clearly very  
10 deferential, but where the agency has not actually issued  
11 any explanation; has not even said these words that it's not  
12 in the best interests of the government, that is arbitrary  
13 and capricious under the best interests standard.

14 THE COURT: Interesting. All right. I mean, I'm  
15 going to have to -- I'm going to have to have a late night.

16 (Laughter.)

17 I understand, I think, the point that you're  
18 making. Let me make sure that I have had -- are there other  
19 points that you wanted to address?

20 MR. SHERMAN: No, Your Honor, not if Your Honor  
21 doesn't have further questions.

22 THE COURT: I wanted to ask you about deference.  
23 You talked about deference to the, you know -- it might be  
24 very deferential, the standard of best interests. What  
25 about deference to the agency's own interpretation of its

1 regulation? Mr. Gerardi has pulled together a theory under  
2 the regulation as to why this is not termination. Do I owe  
3 him any deference in considering that?

4 MR. SHERMAN: No, Your Honor.

5 THE COURT: Why not?

6 MR. SHERMAN: Well, first, the regulations are  
7 clear. And so to the extent that the regulations are clear,  
8 any sort of contrary interpretation that the Government puts  
9 forward should be disregarded, but if Your Honor believes  
10 that the definition was ambiguous, the easiest thing to do  
11 is look at HHS's administration outside of litigation and  
12 how it had operated, and everything indicates that the  
13 agency has always operated with the budget period being a  
14 subset of the project period and the period of performance  
15 equating with the project period. The agency has never in  
16 any document equated the period of performance with the  
17 budget period.

18 THE COURT: So they can't just say that suddenly  
19 now?

20 MR. SHERMAN: Your Honor, they can't just say it,  
21 especially when the regulation that they added -- the  
22 definition they added says, Project period, see period of  
23 performance.

24 THE COURT: All right. So finally, don't you, at  
25 least, concede that this type of agency action -- that is,

1 exercising discretion in the allocation of appropriated  
2 funds -- is, at least, presumptively unreviewable? I mean,  
3 there is this thing in the administrative law and in the  
4 cases of the D.C. Circuit where I have to, sort of, figure  
5 out the starting point; that typically, things are  
6 presumptively reviewable, but there are certain kinds of  
7 actions that are presumptively unreviewable; isn't this one  
8 of them?

9 MR. SHERMAN: Your Honor, we don't concede that  
10 this is one of them that it's presumptively unreviewable.  
11 We think the proper place to start is with the APA's  
12 presumption of review. And it is -- Your Honor's correct  
13 that if -- the law is -- like *Lincoln v. Vigil* -- that if it  
14 was just a lump sum appropriation and there was absolutely  
15 no regulation or any sort of standard and the government was  
16 just giving -- like, giving money on a random year with no  
17 statement at all related to it, that decision would be  
18 presumptively unreviewable. It would just be a decision to  
19 discretionarily -- without any statements indicating any  
20 sort of commitment to provide some funds and the government  
21 might, then, not have that decision subject to review, but  
22 here, the government has created an entire regulatory  
23 scheme, notices of award, terms and conditions. All of  
24 these things are presumptively reviewable and the APA  
25 requires that the government make reasoned decisions related

1 to its decisions where there's regulations governing its  
2 actions.

3 THE COURT: All right. Thank you.

4 MR. SHERMAN: Thank you, Your Honor.

5 THE COURT: Mr. Gerardi, despite my best effort at  
6 keeping reviewability separate from the merits, I feel like  
7 we've merged them. So this may be the last word, but go  
8 ahead.

9 MR. GERARDI: Sure, Your Honor. Just a few  
10 points, sort of --

11 THE COURT: Yes.

12 MR. GERARDI: -- in rebuttal.

13 First, in terms of the regulations superseding the  
14 Grants Policy Statements, obviously, not our position that  
15 there's superseding -- there's a superseding issue here.  
16 Our position is that the period of performance is the period  
17 in which the grantee may obligate funds under the federal  
18 award and that federal award, the letter of credit -- the  
19 line of credit that the grantees get only gives them funds  
20 for one year, and so --

21 THE COURT: So does that mean they can -- they  
22 can't contract within that year for a researcher whose  
23 salary they hope to have extend beyond it? They can't ever  
24 -- they can't -- they can only be obligated for things that  
25 can happen within the 12-month budget cycle?

1 MR. GERARDI: That is the way it works. It's when  
2 the plaintiffs apply for funds, they submit a budget for the  
3 coming year's funds that the notice of award is going to be  
4 used to spend on that --

5 THE COURT: When do they submit that, do you know?

6 MR. GERARDI: They usually submit it around April,  
7 Your Honor. That's why there was an issue in this case  
8 about timing, because right around this time of year, the  
9 grantees would be submitting that award. And it's  
10 attached -- I believe it is Exhibit-C to my declaration  
11 which is the, sort of, criteria for filling out a  
12 continuation award. And it's clear that grantees proceed on  
13 filing -- seeking a year -- they submit a year work plan --

14 THE COURT: So they submit it, let's say, in April  
15 for a year beginning in June --

16 MR. GERARDI: Yes.

17 THE COURT: -- that coming year?

18 MR. GERARDI: Yes, and the awards usually come out  
19 right around that period of time --

20 THE COURT: All right. And so what you're  
21 suggesting is that the period of performance definition in  
22 the regulations means what, that they can't, for the plan  
23 that they're submitting, suggest that they're going to be  
24 hiring anybody whose term with them will extend beyond the  
25 year?

1 MR. GERARDI: Their -- the applications that they  
2 file when they're seeking a continuing relief don't  
3 contemplate work plans, at least, for the immediate  
4 continuing award that go beyond the subsequent budget  
5 period. I hope I'm answering your question.

6 THE COURT: No, I think you are. I'm just trying  
7 to understand how it works in the context of a research  
8 program where you, I'm sure, have to have, like, the same  
9 people looking at it over a period of time in order to  
10 standardize things. I mean, I'm not a scientist.

11 MR. GERARDI: Neither am I, Your -- well, I  
12 actually am an engineer, Your Honor, but --

13 THE COURT: Oh, so you should know. You should  
14 know.

15 MR. GERARDI: Yes, I do.

16 THE COURT: You know, so you're saying that when  
17 it says period of performance, it's the period in which you  
18 can obligate. And the period of obligation is only that  
19 coming year?

20 MR. GERARDI: Right, because the definition is key  
21 to the federal award and the federal award note -- does  
22 note, as we've discussed, a project period and a budget  
23 period --

24 THE COURT: But it's key to the federal award only  
25 insofar as you are applying it in that sense, because it's

1 not in the actual regulation. It doesn't say that. It  
2 doesn't say, The period for which you -- funds will be  
3 allocated over the next -- it just says, The period for  
4 which you can be obligated. You can obligate.

5 MR. GERARDI: Right. I mean -- right. It --  
6 right. And it is -- but it is tied to the federal award  
7 instrument. That is the term that is used to key the  
8 definition.

9 THE COURT: Let me -- just so the record is clear,  
10 I'm reading, Period of performance means the time during  
11 which the non-federal entity may incur new obligations to  
12 carry out the work authorized under the federal award. The  
13 time during which the non-federal entity may incur new  
14 obligations to carry out the work authorized. What does,  
15 The work authorized under the federal award, mean to you?

16 MR. GERARDI: The work authorized under the  
17 federal award is the work for the subsequent budget period.  
18 That is the work that the grantees applied for funding for  
19 with their continuing application and that is the only  
20 period for which funds are made available by HHS. They're  
21 not made available for the future project period years.  
22 Those statements about the funding in that instrument are  
23 only projections.

24 THE COURT: So the period of performance in your  
25 view, as defined by the regulations, has no connection to



1 the rest of the five years or the rest of the two years or  
2 whatever. It's only the immediate 12 months that are being  
3 authorized by the budget period and it's not pertaining, in  
4 any way, to the rest of the projected period.

5 MR. GERARDI: If I --

6 THE COURT: I still don't understand why you're  
7 projecting the period, if that's true, but --

8 MR. GERARDI: Well --

9 THE COURT: I don't see any function in the  
10 projection, unless you're suggesting that people can plan  
11 and obligate and incur new obligations and make the research  
12 study work over that period of time.

13 MR. GERARDI: I mean, as I stated before, I  
14 believe that we -- our position is that that five-year  
15 period exists so that the government can take advantage of  
16 the benefits of either continuing a study that has been  
17 going on or, if it's not in the best interests --

18 THE COURT: Why do you need the five-year period  
19 to do that? You can take advantage year to year. That --  
20 there's nothing stopping you from doing that. I -- what  
21 I -- what concerns me, frankly, Mr. Gerardi, about the way  
22 you've set this up is that it feels like the five-year  
23 period is a smokescreen if you're right; that there's really  
24 nothing to it; that you're luring people into believing that  
25 they're likely to be funded over this period of time but

1 when, in fact, the government really is just looking for  
2 every opportunity to cut this off as we go along. I  
3 understand that you only give the money year to year, but it  
4 seems odd to me that you have -- that the regulations set it  
5 up this way if there's really nothing to the period of  
6 performance being longer than the one-year obligated budget  
7 period.

8 MR. GERARDI: Be that as it may, that is the way  
9 that these programs function and the term -- and under the  
10 terms of the agreements that they accepted, that is how  
11 they're structured --

12 THE COURT: Has this ever happened before? Has  
13 any other court looked at a similar circumstance and ruled  
14 in the government's favor? In other words, I'm sure that if  
15 you're right that if the government, sort of, set this up in  
16 this way and it's got buried somewhere in its policy  
17 statement that at any moment, it could wake up and decide  
18 that it doesn't want to do this anymore, that somebody else  
19 has sued on this and courts have ruled on this as to whether  
20 or not the budget period is -- the period of performance  
21 equals the budget period and it's only one year. Do you  
22 have a case that supports you?

23 MR. GERARDI: Your Honor, I wouldn't concede that  
24 there isn't such a case, but I do not have a case that I'm  
25 aware of where that's taken place.

1 THE COURT: All right. So I'd be the first to be  
2 agreeing with this dynamic?

3 MR. GERARDI: As far as I am aware, this would be  
4 the first decision that affirms it, but it's -- again, it's  
5 under the terms of the instrument that the plaintiffs  
6 accepted here. And I -- we -- the terms of that agreement  
7 are --

8 THE COURT: But the terms --

9 MR. GERARDI: -- clear and they're not  
10 contradicted by --

11 THE COURT: The terms -- he says the terms aren't  
12 even incorporated fully. So let's get to that point; right?

13 MR. GERARDI: Yeah, I -- we disagree, I think, on  
14 that point. I think that 75.210(a) is clear that in the  
15 grants -- in the grant policy -- that in the regulations,  
16 that the standard grant terms and conditions have to be, you  
17 know -- have to be incorporated into each grant and they've  
18 done so by a reference to a link to the place on the  
19 Internet where the regulations are located. In Paragraph 4  
20 --

21 THE COURT: Well, that -- I'm sorry, the link  
22 can't possibly be --

23 MR. GERARDI: But the regulation mentions the  
24 hyperlink, Your Honor.

25 THE COURT: No, I understand, but think -- I'm,

1 like, a really practical person and I'm trying to piece this  
2 all together in the context of the law.

3 MR. GERARDI: Right.

4 THE COURT: It cannot be that at the time that you  
5 are contracting with these people, that you are referencing  
6 a link to the Internet where terms could easily change and  
7 things can happen; right? That -- and that you're saying  
8 that whatever's there on the Internet is incorporated into  
9 the contract. How do I know that on the day these people  
10 agreed, what appears there now is what actually they agreed  
11 to?

12 MR. GERARDI: So --

13 THE COURT: It can't be the hyperlink; right?  
14 You've got to tell me what the actual terms are that --

15 MR. GERARDI: But the hyperlink --

16 THE COURT: -- are incorporated.

17 MR. GERARDI: -- includes a link to the document  
18 in which the terms are contained. And, again, this is  
19 explicit in the regulation. The regulation directs the  
20 agency to incorporate its general terms and conditions in  
21 this manner by including a reference to what those are and  
22 providing a link to the website where they are available,  
23 and that's exactly what the grant instruments do here.

24 THE COURT: And so you referenced what, the  
25 particular withholding provision --

1 MR. GERARDI: The --

2 THE COURT: -- or just the overall policy --

3 MR. GERARDI: We referenced --

4 THE COURT: -- document?

5 MR. GERARDI: -- the Grants Policy Statement.

6 It's a 217-page document that's full of general terms and  
7 conditions that govern these sorts of grant agreements. It  
8 governs carryover; it governs all of the things that, you  
9 know -- many of the things that we've been discussing today  
10 are governed by that --

11 THE COURT: And where is that reference? I'm  
12 sorry, because plaintiff suggested the reference pertains  
13 only to the plaintiffs' obligations. The actual entities,  
14 what you have to do, see the website. It doesn't say, And,  
15 oh, by the way -- according to plaintiff -- what I'm  
16 referencing also is the thing that is, essentially,  
17 superseding the regulations in terms of what the government  
18 can do.

19 MR. GERARDI: So it's -- I mean, I think we're  
20 pointing to the same language. What I would -- what --

21 THE COURT: I'm sorry. Where is it?

22 MR. GERARDI: It's -- if you look at any of the  
23 grant instruments, it should be, like, Paragraph 4 of those  
24 grant instruments.

25 THE COURT: Paragraph 4? I'm sorry?

1 MR. GERARDI: Yes, in the general terms and  
2 conditions. There's often some subheadings -- I mean,  
3 there's many examples that we could probably give. And I  
4 could get on the same page as you if I --

5 THE COURT: Yes.

6 MR. GERARDI: Let me --

7 THE COURT: Thank you.

8 (Brief pause.)

9 MR. GERARDI: So if we took a look at the Jenner  
10 Declaration Exhibit-C, Paragraph 4 --

11 THE COURT: All right.

12 MR. GERARDI: So again, it says, You must comply  
13 with all terms and conditions outlined in the grant award,  
14 including grant policy terms and conditions contained in  
15 applicable Department of Health and Human Service Grant  
16 Policy Statements, and, Any references in the GPS to 45 CFR  
17 Part 74 or 92 are now replaced by the current regulations  
18 after the 2014 revision to those, and then it includes the  
19 hyperlink below that where the HHS Grant Policy Statement is  
20 available.

21 THE COURT: Right. But to the extent it's  
22 addressed to the, You, isn't plaintiff correct that that is  
23 just telling you that you must do what the policy statement  
24 says, but it has nothing to do with what the government can  
25 do in terms of either terminating or withholding anything?

1 MR. GERARDI: But what I -- that would prove too  
2 much because it would, essentially, say that the  
3 government's not bound by any of the general terms and  
4 conditions to which it normally --

5 THE COURT: I don't think so. The government can  
6 bind itself. It can put out policy statements that have  
7 nothing to do with the contract it's making with other  
8 people. The government can always say, Here is the  
9 different conditions that we are going to follow. The  
10 question is whether or not, when you say, You have to follow  
11 X, and you hyperlink to the policy statement, you really are  
12 incorporating into the contract the terms of that policy  
13 statement that pertain to the government's actions which is  
14 the argument that you're making and I don't see that  
15 necessarily from the language that you read.

16 MR. GERARDI: I'm sorry, Judge, Your Honor, is  
17 there a question or --

18 THE COURT: I'm just wondering whether the  
19 language that you read actually supports the plaintiffs'  
20 argument insofar as the incorporation that you're talking  
21 about is the incorporation of the requirements of the policy  
22 statement as they pertain to the recipient of the grant and  
23 not necessarily the portions of the policy statement as they  
24 pertain to what the government can and cannot do pursuant to  
25 the grant.

1 MR. GERARDI: We believe it's sufficient to  
2 incorporate the provisions of the agreement that give the  
3 government the -- that set out the conditions under which  
4 the government is able to withhold continuing relief or to  
5 terminate. I mean, if those -- if those provisions didn't  
6 apply, then we'd simply be back in a universe where there  
7 was a -- the question would be whether there's a termination  
8 or not, and then there would be no standard under which the  
9 government could proceed, but that would, I guess, get to  
10 the same question on reviewability --

11 THE COURT: I mean, there would be no -- that  
12 would support you. I mean, I was surprised that the  
13 plaintiffs suddenly suggested that in the policy statement,  
14 there were standards. I see it where it says, Best  
15 interests. That seems like the government can do whatever  
16 it wants, assuming the policy statement is what governs.  
17 The question is whether the regulations govern. And, if so,  
18 when the regulation says, Termination, is that what's  
19 happening here?

20 MR. GERARDI: Right. And termination is not  
21 what's happening here for, I think, the reasons we've  
22 discussed. We went over the -- we just discussed the period  
23 of performance issue and we think that that's dispositive on  
24 this question.

25 THE COURT: All right. Anything -- oh, it looks



1 like Mr. Sherman is jumping up. Yes.

2 MR. GERARDI: I just want to make a note on the  
3 document that Mr. Sherman just showed us that I had not seen  
4 that document prior to today. I don't have an ability to  
5 confirm its authenticity at this time and we just reserve  
6 the right to object to it.

7 THE COURT: Understood.

8 MR. GERARDI: On -- and I don't know, if you're  
9 going to give Mr. Sherman an opportunity to speak, whether I  
10 would get an opportunity to rebut that. I was going to make  
11 some final points and --

12 THE COURT: You can -- why don't you -- yes, make  
13 your points.

14 MR. GERARDI: Sure.

15 You know, I heard -- I think it was suggested from  
16 plaintiffs that -- again, looking back at this Grants Policy  
17 Statement, that -- perhaps, that the reviewability question  
18 here would be contingent on the plaintiff submitting an  
19 application in the first place rather than the agency simply  
20 deciding as a programmatic matter that it would not issue  
21 continuing awards. I mean, that would make this whole  
22 reapplication process, kind of, a futile one and we don't  
23 think that that's -- that could be proper.

24 As to the best interests reviewability question,  
25 we think the cases that the plaintiffs have relied upon in

1 their briefs, kind of, deal with individual decisions on  
2 best interests rather than programatic ones and, in any  
3 event --

4 THE COURT: But is your position really that even  
5 when you make a programatic change -- first of all, that you  
6 don't have to announce it; that you can do it in a press  
7 statement randomly after the decision has been made in -- or  
8 applied in this context? Didn't you, at least, have to say,  
9 "We're not continuing your thing. We're not going to" --  
10 what is it -- "we're withholding the non-competing award  
11 because we have determined that it's in the government's  
12 best interests to do so"? Why isn't he right on that just,  
13 like, very basic thing?

14 MR. GERARDI: Because, again -- I mean, I think  
15 it's a fine point, but, again, that conflates, I think,  
16 reviewability with the substance of the decision. So if  
17 it's not the type of decision that's reviewable, it's not  
18 reviewable, kind of, all the way down.

19 THE COURT: But it's presumptively unreviewable.  
20 What makes it a presumptive --

21 MR. GERARDI: Well, the class of --

22 THE COURT: Yeah.

23 MR. GERARDI: I'm sorry to --

24 THE COURT: Yeah, please.

25 MR. GERARDI: -- interrupt, Your Honor.

1 THE COURT: Go ahead.

2 MR. GERARDI: The class of decision --

3 THE COURT: Yes.

4 MR. GERARDI: -- is what we're concerned about in  
5 the reviewability context; that the type of decision that's  
6 at issue here is this decision whether to issue continuing  
7 support or to compete the awards. And that particular  
8 decision is unreviewable and, therefore, the, you know --  
9 obviously, I don't think the agency's hidden the ball. It's  
10 been public about its policy concerns with this program and  
11 its intentions, but in terms of a contemporaneous  
12 explanation, whether that is reviewable or not is the first  
13 question, and then the sufficiency of that would have to  
14 come afterwards. It's based on the type of decision --

15 THE COURT: So you say the decision that we need  
16 to isolate and think about is the decision whether or not to  
17 issue a non-competing continuation award or to re-compete  
18 those funds; is that the decision?

19 MR. GERARDI: That's correct.

20 THE COURT: In -- under what circumstance can you  
21 effect that policy decision in the way that you have done?  
22 I mean, what I understand -- it's, kind of, weird; right?  
23 It's -- the way that you did this was not receive the  
24 application for the non-competing continuation award and  
25 then say, We're not going to issue and here are the reasons

1 why. The way that you did that was, in the prior year while  
2 giving the award, saying, Oh, by the way, we're shortening  
3 the program period --

4 MR. GERARDI: Project period.

5 THE COURT: -- project period. Excuse me. And so  
6 I'm -- that does, at least, open the government up to this  
7 concern that what you're doing is terminating rather than  
8 withholding. Because if you were really withholding, it  
9 looks different than that, doesn't it?

10 MR. GERARDI: Perhaps it opens up the concern, but  
11 I still think the reviewability issue is -- goes the same  
12 way. I think that there's a pretty clearcut question for  
13 your decision here about whether or not there's been a  
14 termination or not and there are certain conditions that  
15 have to be satisfied if there is a termination in the first  
16 place. And I think -- and the agency proceeded here as if  
17 it -- there was not a termination because it didn't believe  
18 it was terminating the --

19 THE COURT: But it also didn't believe it was  
20 withholding. That's my point. My point is -- we're, like  
21 -- it's not clear on this record that the action that you  
22 want me to judge the reviewability about is really what you  
23 say it is, because if you were actually withholding, your  
24 own policy statement indicates that you can decide not to  
25 make a non-competing continuation award which determination

1 you would make in the context of being asked. Here's our  
2 application. We're saying no, and here are the reasons why.

3 MR. GERARDI: Well, if that's the -- if that is  
4 the issue and the violation here is purely a case of --  
5 there was -- the agency didn't say whether it was doing a  
6 termination or denying continuing awards, then -- I mean, if  
7 Your Honor's -- if that's Your Honor's ultimate conclusion,  
8 then I think the remedy is for -- to go back to the agency  
9 and have them explain what that is in the normal course  
10 rather than to --

11 THE COURT: I'm glad you raised remedy, because  
12 that was on my list and I had forgotten it. We were going  
13 to go before I got there, but -- yeah, except the agency  
14 can't really make it up at the end; right? I mean, under  
15 administration -- administrative law, you can't give a post  
16 hoc rationalization for what it is that you've done. I'm  
17 supposed to look at what you actually did and your statement  
18 says, We're shortening the project period. It doesn't say,  
19 We're withholding non-competing continuation of awards for  
20 future years. So when you give it to us, don't expect to  
21 get it.

22 MR. GERARDI: But I guess to the point that you're  
23 making, can non-competing continuation awards only come up  
24 in the context of project period systems? They refer to the  
25 additional years of support within that project period. So

1 I mean, as you've phrased it, I think it's -- it can be  
2 clear that there's only --

3 THE COURT: Well, they can, but so can  
4 termination, says the plaintiff. See the regulations.  
5 That's the world I'm in; right? Deciding which one of these  
6 things we're going with.

7 MR. GERARDI: Is your -- is there a question, Your  
8 Honor?

9 THE COURT: I mean, there isn't really a question.  
10 Let me ask you -- let me -- the whole thing is a question,  
11 actually. But let me ask you about remedy.

12 MR. GERARDI: Okay.

13 THE COURT: And I'm going to ask -- end with  
14 plaintiff on the question of, let's say you lose. Okay?  
15 Let's say I agree with the plaintiff. You can't do it the  
16 way that you did it. Obviously, the APA says the Court is  
17 to, you know -- has the power to vacate the action of the  
18 agency. Do you know what that would look like in this  
19 context? Because the action was taken in connection with  
20 the grant of this last year's award. No action has been  
21 taken, as far as I can tell, with respect to the upcoming,  
22 except insofar as the agency may have already articulated to  
23 the plaintiffs, Don't even give us the application. So  
24 would it be an injunction to the agency to require you to  
25 receive the application? I know it's hard for you because

1 you want to win, but let's assume --

2 MR. GERARDI: No, no -- well, no, I -- no -- yeah,  
3 assuming -- I mean, the basis under which in the universe  
4 we're proceeding is that there was not a proper basis  
5 provided for a termination, but insofar as that, you know,  
6 there is no, sort of -- I mean, if the conclusion is that  
7 there is no consideration of that on the record, we think  
8 that the normal course would be to go back to the agency for  
9 a reconsideration decision which would be typical in this  
10 case. I mean, essentially, what --

11 THE COURT: But what was the decision? What's the  
12 -- you've given them the money for the program period or for  
13 the budget period that has this line in it. So that's  
14 already done. What decision am I addressing in the context  
15 of an injunction?

16 MR. GERARDI: Well, I'm trying to --  
17 understandably, I'm trying to, kind of, frame the context of  
18 what exactly the decision is, because I think that that  
19 matters. I think if it's -- if the conclusion is that  
20 arbitrary and capricious review applies and the agency's  
21 provided no explanation contemporaneous with the --  
22 contemporaneous with that decision explaining why it did  
23 what it did -- I mean, you know, it's --

24 THE COURT: Send it back and let them explain, but  
25 then there's also -- I think the plaintiff has two aspects

1 of their claim which is -- and you couldn't shorten the  
2 program period consistent with the regulations. At a  
3 minimum, you didn't explain why you did it, but because they  
4 say this was a termination, you had to follow the four or  
5 five steps or whatever it is to make the termination  
6 determination.

7 MR. GERARDI: Well, it would -- so they would go  
8 back to the -- so let's say -- I mean, in a universe where  
9 the plaintiffs have prevailed, the plaintiffs have obviously  
10 -- pursuant to our arrangement that we had, the plaintiffs  
11 submitted continuing applications to the agency for review.  
12 I think it would be -- obviously, the agency would have to  
13 review those applications as it would in the normal course  
14 and it would have to apply the law as you've understood it  
15 here in terms of deciding whether to grant or deny those  
16 applications. So in a universe where you've ruled that  
17 termination only applies, if there's been a violation of  
18 grant terms and conditions, it would have to look at the  
19 applications under that spectrum to decide whether  
20 continuing relief is merited or not.

21 THE COURT: What about a universe in which I say  
22 that termination only applies under those circumstances as  
23 listed in the regulation and so, therefore, this is  
24 reviewable and plaintiff wins because the agency hasn't  
25 explained why it terminated the grants? You say they go



1 back. And --

2 MR. GERARDI: I mean, the --

3 THE COURT: -- could the answer be the agency,  
4 then, just explains?

5 MR. GERARDI: I mean --

6 THE COURT: But it would have to explain  
7 consistent with the four things; right? With the --

8 MR. GERARDI: It would have to explain consistent  
9 with those four things, but it -- but the agency would have  
10 to be -- I mean, a year has -- nearly a year has passed now  
11 since the initial decision was made.

12 THE COURT: Right.

13 MR. GERARDI: So there has to be a continuing  
14 application and an analysis of that, as there would be in  
15 any circumstance. What I think the fallout from your ruling  
16 on that point would be is that the agency couldn't, for  
17 these programmatic reasons, say that they're not going to  
18 issue continuing relief. It would have to base it on a --  
19 if this is a termination -- if the only way to shorten the  
20 award is through the termination procedures, it would have  
21 to look at whether the grantee has terminated the -- has --  
22 sorry, has broke -- breached the -- has met one of those  
23 four criteria for --

24 THE COURT: I see. All right. Thank you.

25 All right. Mr. Sherman, maybe, you can definitely

1 address remedy and then whatever other final points you want  
2 to make.

3 MR. SHERMAN: Yes, Your Honor.

4 As far as remedy, we don't think that there's any  
5 reason to remand to the agency. Anything that they would  
6 add would be counterfactual based on what they've added  
7 afterwards was --

8 THE COURT: Well, he says a whole year has passed.  
9 Wouldn't they have to, at least, have the opportunity to  
10 review where we are today in terms of the applications that  
11 you have submitted pursuant to our agreement to decide  
12 whether or not any of the four termination criteria apply?  
13 I mean, clearly -- you're not suggesting that the remedy  
14 that is appropriate here if you win is for me to order them  
15 to continue to fund your program for the next two years?

16 MR. SHERMAN: No, Your Honor.

17 THE COURT: All right. So --

18 MR. SHERMAN: Your Honor, we just -- we don't  
19 think it would be proper for them to reconsider whether or  
20 not they could terminate the grants based upon the decision  
21 that they've previously made. For instance, to supplement  
22 the record --

23 THE COURT: Oh, I don't think that's what he said.  
24 I think at the end, he, sort of, indicated that if you won,  
25 it would, from his perspective, I think, have to be because

1 I had determined that the only way to shorten the period is  
2 through termination as the regulations indicate and,  
3 therefore, with respect to the pending applications, they  
4 would have to follow the regulatory scheme to determine  
5 whether or not to continue with the non-competing awards, I  
6 think. I think.

7 MR. SHERMAN: Your Honor, that's --

8 THE COURT: I think.

9 MR. SHERMAN: You know, that's -- that is the  
10 remedy that we have sought which is an injunction to require  
11 the agency to accept and process the plaintiffs'  
12 non-competing continuation applications in accordance with  
13 their regulations --

14 THE COURT: All right.

15 MR. SHERMAN: -- and practices.

16 THE COURT: Okay.

17 MR. SHERMAN: But, Your Honor, just real quick, on  
18 the Government's point about the work plans, the Gerardi  
19 Declaration Exhibit-C explains that the work plan should  
20 include the goals that span the life of the five-year grant  
21 project, and that's Page 4 of that exhibit, and then  
22 moreover, Your Honor, Page --

23 THE COURT: So you're -- I'm sorry. So that's to  
24 suggest that the work plan doesn't just go to the following  
25 ensuing year?

1 MR. SHERMAN: That's right, Your Honor. And Page  
2 7 requires the inclusion of a budget and a budget narrative  
3 for the total budget which the agency says on Page 7 is  
4 equivalent to the amount shown in Box 14 which includes the  
5 future support in the future years. So the budget narrative  
6 that grantees have to provide includes the entire project  
7 period, Your Honor.

8 THE COURT: But isn't the government correct that  
9 none of that is for certain? I mean, you -- right? What if  
10 the money isn't appropriated?

11 MR. SHERMAN: Yes, Your Honor. If -- it's always  
12 contingent on appropriations. Absolutely. But when the  
13 agency is soliciting the non-competing continuation  
14 applications, it's not saying, Just tell us about one year  
15 and one year only because these are one-year grants. The  
16 agency has operated and designed -- the grantees have always  
17 designed their grants to extend across the entire five-year  
18 project period and the agency has, for the entire life of  
19 these grants and the first cohort, you know, accepted those  
20 applications, all of which provide a five-year project --

21 THE COURT: That's interesting. So you're saying  
22 these are not one-year grants. Just because we're getting  
23 the money on a year-to-year basis, they weren't ever  
24 structured or conceived of to be one-year projects --

25 MR. SHERMAN: Your Honor --

1 THE COURT: -- all along?

2 MR. SHERMAN: These were programatically approved  
3 for five-year project periods.

4 THE COURT: Yeah.

5 MR. SHERMAN: That is exactly right. And, Your  
6 Honor, just -- whatever Your Honor wants to call the action  
7 that the agency took when it shortened the project period,  
8 it's reviewable under State Farm, is the most important  
9 point. Even if it wasn't a termination, they shortened the  
10 project period. It was final agency action. We all agree  
11 it was final agency action and it's reviewable under the  
12 State Farm standard.

13 THE COURT: All right.

14 MR. SHERMAN: Thank you, Your Honor.

15 THE COURT: Thank you. Very interesting. Late  
16 night for me, but I will hear from -- I -- you will hear  
17 from me tomorrow morning at 9:30.

18 Thank you.

19 THE DEPUTY CLERK: All rise. Court is now  
20 adjourned.

21 (Proceedings concluded at 11:54 a.m.)

22 \* \* \* \* \*

23 CERTIFICATE OF OFFICIAL COURT REPORTER

24 I, TIMOTHY R. MILLER, RPR, CRR, NJ-CCR, do hereby certify  
25 that the above and foregoing constitutes a true and accurate

1 transcript of my stenographic notes and is a full, true and  
2 complete transcript of the proceedings to the best of my  
3 ability, dated this 19th day of April 2018.

4 /s/Timothy R. Miller, RPR, CRR, NJ-CCR  
5 Official Court Reporter  
6 United States Courthouse  
7 Room 6722  
8 333 Constitution Avenue, NW  
9 Washington, DC 20001  
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