AGENDA ITEM or FINAL CONTRACT REVIEW SUBMITTAL FORM

Agenda Item: Colorado Works/Child Care Assistance Programs Annu

Action Requested:

Parties to the Agreement:

Term Begins: **Term Ends:** **Grant Contract #:**

Summary:

Please see the attached for consideration

Fiscal Impact:

Submitted by: Josh Ost **Submitter's Email Address:** jost@gunnisoncounty.org

Finance Review: ○ Required ◉ Not Required

Comments:

Reviewed by: Discharge Date:

County Attorney Review: ◉ Required ○ Not Required

Comments:
ok to put on agenda. db 2/9/18

Reveiwed by: GUNCOUNTY1\dBaumgarten Discharge Date: 2/9/2018 Certificate of Insurance Required Yes ○ No ◉

County Manager Review:

Comments:

Reveiwed by: GUNCOUNTY1\jost Discharge Date: 2/9/2018

○ Consent Agenda ◉ Regular Agenda ○ Worksession Time Allotted: 5

Agenda Date: 2/13/2018

Revised April 2015

Joshua Ost

Subject: FW: Colorado Works/CCAP MOU position statement from Weld County
Attachments: CCAP MOU Position Statement 2-7-18.docx

From: Allison Daley [ADaley@ccionline.org]
Sent: Thursday, February 08, 2018 4:09 PM
To: Allison Daley
Subject: Colorado Works/CCAP MOU position statement from Weld County

Good afternoon Commissioners,

I've attached Weld County's draft position statement for the State Board of Human Services' hearing in May on the Colorado Works/CCCAP MOU.

If your county is interested in signing on to this position statement, please email me approval from your BOCC or the chair of your BOCC by **Wednesday, Feb. 14**. I will add your county's name to a signature sheet to be attached to the position statement.

If you have any questions, please email me or Weld County's Jamie Ulrich, ulrichjj@co.weld.co.us.

Thank you!
Alli

Allison Daley
Legislative & Policy Advocate
Colorado Counties, Inc.
800 Grant Street, Suite 500
Denver, CO 80203
(o) 303-861-4076 ext. 234
(f) 303-861-2818
(c) 303-885-1434
www.ccionline.org

BEFORE THE STATE BOARD OF HUMAN SERVICES

DEPARTMENT OF HUMAN SERVICES

STATE OF COLORADO

In the matter of the Colorado Works/Child Care Assistance Program Annual Performances Contract

POSITION STATEMENT

In the matter of the Colorado Works/Child Care Assistance Programs Annual Performance Contract, set for hearing on March 2, 2018, please see the following information:

FACTUAL BACKGROUND:

In August 2016, Weld County submitted a letter to CDHS outlining significant concerns with the annual MOU, including: antiquated content, lack of clear, equitable and binding expectations and the lack of clear expectations for collaboration between CDHS and Counties to meet performance outcomes. Between August 2016 and October 2017, all efforts were made to collaborate with CDHS to ensure the MOU was updated to make it clear, relevant and robust.

After several meetings, numerous updates and multiple versions of the MOU in circulation, Counties and CDHS agreed on all but three items. CDHS conceded to one of the three items, and on October 17, 2017, submitted their final draft of the MOU, with the following statement included:

"If counties agree to the attached version, then CDHS will work with counties to get the agreement put in place. If counties reject the attached version, then the matter will go before the Human Services Board on November 3, in Grand Junction."

CDHS ceased all negotiations with Counties at this time and, subsequently, Counties have not had the opportunity to resolve technical issues between the two documents. In addition, Counties maintain that the MOU must include the two remaining unresolved issues: Federal Preemption and Improper guidance language.

ISSUES

(a) Procedures to be employed during the hearing; Whether the State Administrative Procedure Act should apply.

The Administrative Procedure Act should not govern this hearing. This should not be a quasi-judicial proceeding. The general statutory purpose of the Human Services Board is to promulgate rules for the Colorado Department of Human Services under Section 26-1-107, C.R.S. It is not a quasi-judicial body and should not act in this way. Although, the Human Services Board has authority to hear this matter under Section 26-2-715 and 26-1-107, C.R.S., neither of these sections give it quasi-judicial powers.

DRAFT

(b) The binding or nonbinding nature of the Board determination.

The State Board decision should not be binding because a binding decision violates common law contract principals; assumes the State Board has jurisdiction over County Commissioners; and ignores the intent in which the Counties entered into the negotiations with CDHS as further described below.

(1) Common Law Contract Principals: Section 26-2-715, C.R.S., Performance Contracts, states that if a party asks for Board review, the decision will be binding, however, the statute conflicts with common law contract principals. A court may enforce an agreement between two parties, but enforcement, first requires the two parties to reach an agreement. There must be a meeting of the minds to get to an agreement or at least an offer and acceptance. These two parties never had a complete meeting of the minds or full acceptance and common law principals do not allow a party to be forced to enter into a contract it finds unreasonably biased to its best interest. The statute section is titled "Performance Contracts." This title along with the initial language of the statute indicates the parties will come to an agreement on the terms of the MOU. Forcing a party to agree to specific terms of an agreement it does not find appropriate goes against basic principles of contact law.

(2) Authority over County Commissioners: If the Board decides the "final" terms of the agreement and holds its decision is binding, it still has no authority to require an independently elected official to enter into the agreement under those required terms. Additionally, making a determination over the terms of the agreement will not move this negotiation forward. A County Commissioner is not required to enter into the agreement. The terms may be settled, but the Counties can still refuse to sign an agreement that is not in the best interest of the Counties and the program will be at an impasse.

(3) Prior MOU Language and Negotiation Strategy: The Counties entered into the MOU negotiation under the pretense the Board decision would not be binding. For years, Counties have operated under agreements that stated if a Board review was necessary it would not be binding on the parties. The provisions of the previous MOUs, saw the State Board as an instrument of mediation between the two parties but not as a final arbitrator of the agreement. When the negotiation with CDHS began many Counties still had MOUs containing this language in place governing their agreements with CDHS. After months of negotiation and movement, CDHS unexpectedly moved for Board review without any further communication to the Counties of its intent. This assumption by the Counties affected the openness of negotiation and the ability to compromise. That assumption should not be ignored in this review and decision upon its binding effect.

(c) Whether a county may be sanction if it fails to meet a state rule that conflicts with or exceeds federal regulation.

The Counties should not be sanctioned for not complying with a state rule which conflicts or exceeds requirements of the federal regulations governing this program. Federal pre-emption is a basic constitutional concept. The Counties certainly should not be sanctioned for something in conflict with requirements of the federal agency charged with implementing this program. Whether the rule has been legally challenged should not be required. If CDHS knows a rule conflicts with federal law it should be working diligently to amend or repeal the rule. Moreover, the federal requirements of the program are sufficiently onerous that even additional requirements should not be enforced. CDHS opposition to this language is unreasonable. The language should affect a very narrow group of rules if any at all.

DRAFT

Additionally, the language specifically targets sanctions. Sanctions should only be imposed on Counties for failing to satisfy rules that comply with federal law.

(d) Whether a county may be sanction if the Department provides inaccurate guidance, training or data with regards to the performance agreement.

The Counties should not be sanction for relying on improper guidance, poor training or inaccurate or incorrect data provided by CDHS which results in the State being sanctioned. The Counties are administering this program for CDHS. CDHS is in charge of communicating with the federal government and communicating the priorities of the program to the Counties. Counties have previously relied on guidance given by CDHS for which elements of the program should be a priority and that guidance now appears to be incorrect and could result in sanctions to the State for not meeting certain standards. The Counties admit this guidance was not provided in bad faith, however, it was still relied on by the Counties in implementing their programs. The Governor's budget now includes a mention of the sanction that could be imposed on the State for not meeting certain benchmarks. With this in mind, the Counties do not feel they should be held financially responsible if they rely on guidance from CDHS and they can prove the guidance provided was improper.

(e) Any other disagreement between the parties regarding the performance agreement.

The Counties believe language in the MOU that governs general contract conduct should remain. These sections include: Discretionary Matters, Severability, Integration of Understanding, and No Third Party Beneficiary clauses. These are good contracting or agreement standards that protect both parties to the agreement and clarify the scope of the agreement. These are not meant to be the "teeth" of the agreement. Both parties in the negotiation previously agreed this language would be left in the agreement, however, in the CDHS draft it is now removed. CDHS has offered no reason for reversing its decision and taking the language out. This is an improper action of not honoring what was previously agreed to and the language should remain in the document.

CONCLUSION

The Counties ask the Board to determine that its decision is not binding on the parties. If the Board makes recommendations as to which disputed terms should be included in the agreement, the Counties request the Board recommend that both the improper guidance term and federal preemption term be added to the MOU and that the general contract provisions also remain in the agreement.

Submitted on Behalf of _____

DRAFT