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Legislative Performance Audit Committee

Legislative Audit Office
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To: Nebraska Legislature
From: Legislative Performance Audit Committee
Date: October 25, 2023
Re: LIHEAP Preaudit Memo

Following is the Legislative Audit Office's preaudit memo regarding why Low Income Home Energy Assistance Program (LIHEAP) American Rescue Plan Act funds were not used to provide weatherization assistance to low-income households as intended by the Legislature. At this time, the Committee is not recommending a full audit of LIHEAP.

After reviewing the memo, the Committee requested that the Department of Health and Human Services put in place a policy regarding the expenditure of weatherization funds, which DHHS agreed to do by the end of the year.

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Memorandum

To: Legislative Performance Audit Committee
From: Legislative Audit Office
Katelyn Abraham and William Hertzler, Auditors
Date: October 25, 2023
Re: Low Income Home Energy Assistance Program American Rescue Plan Act Funds

The Legislative Performance Audit Committee directed the Legislative Audit Office to conduct a preaudit of the Low Income Home Energy Assistance Program (LIHEAP). Specifically, the Committee directed the Audit Office to determine why LIHEAP American Rescue Plan Act (ARPA) funds were not used to provide weatherization assistance to low-income households as intended by the Legislature.

To answer the Committee's question, the Audit Office requested and reviewed agency emails pertaining to LIHEAP ARPA funds to assess what—and when—information was available to Department of Health and Human Services (DHHS), as well as when that information was communicated to the Nebraska Department of Environment and Energy (NDEE).

Based on the information reviewed, the Audit Office questions DHHS's decision-making process and ultimate determination of the final expenditure date for LIHEAP ARPA funds. Months of confusion and delay by DHHS resulted in the funds being used as additional utility payments for low-income households rather than for weatherization as intended by LB 306 (2021). At this time, we do not recommend a full audit, but the Committee may want to consider revisiting the implementation of LB 306 in a few years.

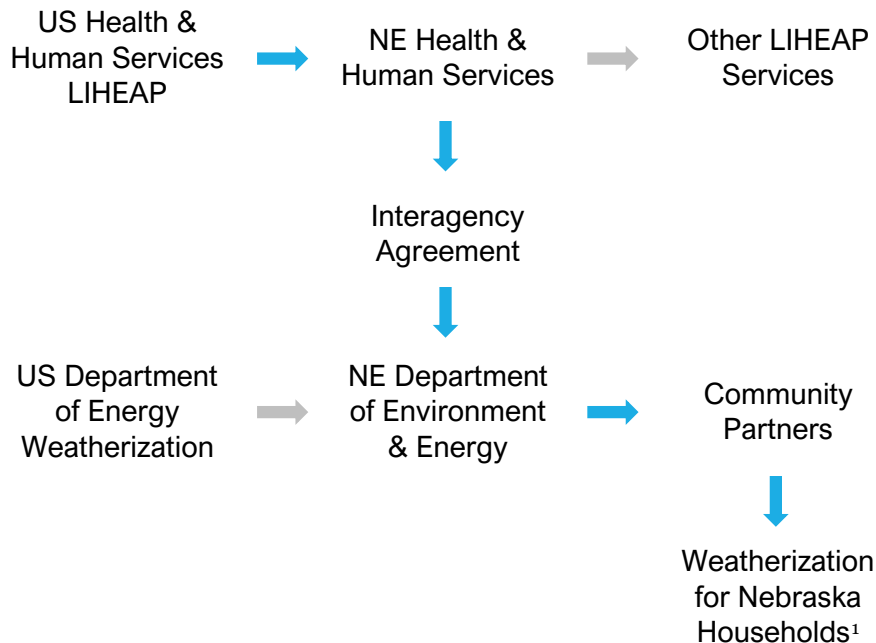
Program Overview

Since 1981, LIHEAP has assisted low-income households in meeting their home energy needs, predominantly assisting with utility bills to ensure continued heating and cooling in homes. The program can also be used to provide home weatherization services which help reduce energy consumption by improving energy efficiency. The program is administered at the federal level by the U.S. Department of Health and Human Services and at the state level by the Nebraska DHHS.

To limit the duplication of administrative costs and services related to weatherization programs, DHHS contracts with NDEE who also administers the U.S. Department of Energy's Weatherization Assistance Program. Each year, DHHS and NDEE complete an interagency agreement governing the weatherization program. Under the agreement, NDEE is responsible for awarding the funds equitably to community partners, as

determined by a Department of Energy formula. The distribution is approved by the federal and state Health and Human Services agencies. Although NDEE is primarily a pass-through entity for the funds, they are responsible for administrative activities to ensure community partners are in compliance with federal law.

Federal LIHEAP award funds move through DHHS to NDEE, then to the community partners who provide weatherization services.



Source: Audit Office analysis of federal and state program design.

Background and Analysis

Under federal law, states are not required to utilize any LIHEAP funds for weatherization but are allowed to use up to 15%.² LB 306 requires the weatherization program be allocated at least 10% of available LIHEAP funds. Prior to LB 306, there were no state rules governing the allocation of LIHEAP funds. As such, DHHS had discretion to set priorities for LIHEAP funds, including supplemental emergency funds. For example, in May 2020, the CARES Act awarded just under \$8 million to DHHS for LIHEAP. Because LB 306 was not in place, DHHS was able to allocate CARES Act funds at their discretion and awarded no funds to weatherization.

The enactment of LB 306 in May 2021 signaled the Legislature’s intent to guarantee funding for weatherization services. Because ARPA also became law in spring 2021, these emergency funds became subject to the new requirements of LB 306. ARPA awarded Nebraska just over \$41 million in additional available LIHEAP funds. As a result of LB

¹ Most Nebraskans receiving services are homeowners but renters are also eligible for services.

² States can make a special request for up to 25% of an award be available for weatherization services.

306, 10% (\$4.1 million) should have been available for the weatherization program, in addition to 10% of the regular LIHEAP funding.³

We requested emails on the topic of ARPA funds from DHHS in order to assess why funds were not used to provide weatherization services. Focusing on the DHHS emails allowed us to review communications with the federal government and with NDEE. The following analysis relies heavily on the emails we reviewed. It is also supported by public documents where possible.

Central to the discussion is the “obligation” and “expenditure” of federal funds. For federal block grants like LIHEAP, there is an obligation deadline and an expenditure deadline. An obligation is a commitment for payment, while an expenditure is the actual payment.

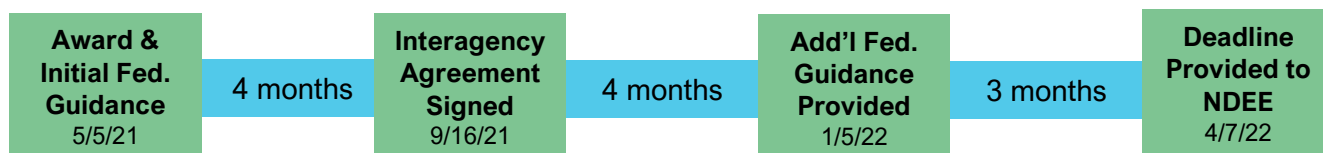
Timeline

The federal contact notified DHHS of their ARPA award on May 5, 2021. Along with the award amount, the federal contact provided guidance for the use of the funds. According to the guidance, funds could “not be carried into FY 2023 or beyond, for obligation purposes.” It did not include an explicit expenditure deadline.

In late May, DHHS had a series of discussions with their federal contact about the expenditure deadline. In one email, DHHS sought confirmation that the following statement was true: “LIHEAP ARPA funds must be obligated by 9/30/22 using Nebraska’s definition of obligation. The funds can continue to be expended for three years after the obligation period.” The federal contact replied, “Funds must be expended in accordance with state rules; however, you are correct, the funds will be available for draw down in [the Payment Management System] even after 9/30/22. They must be obligated by that time, though.”

When asked why this was not sufficient to make a decision on the expenditure deadline, DHHS stated they needed an official guidance document to rely on. At this time, the award and the guidance discussed above were the only official documents available. DHHS’s decision to wait for additional guidance led to an 11-month delay in providing an expenditure deadline to NDEE.

Following award notice, DHHS took 11 months to determine the funds’ expenditure deadline.



Source: Audit Office analysis of program documents and agency emails.

³ LB 306 increased the 2021 weatherization funds from \$2.61 million to \$3.21 million. In effect, this increased individual community partner weatherization budgets by 20.8%.

On September 16, 2021, DHHS and NDEE signed an interagency agreement for the ARPA funds that contained the following language: “All funds must be expended or obligated by 9/30/22. Any unobligated funds after 9/30/22 must be returned to DHHS.” This was significantly different from previous, and subsequent, agreements.⁴ All other agreements (including the new program year agreement signed in August 2021) contain the same language about expenditure: “obligated funds must be spent within 180 days of the end of each federal fiscal year.” New agreements signed after LB 306 also include an option for extending the expenditure period with DHHS approval.

While “expend or obligate by 9/30/22” is consistent with the ARPA funding award, it does not provide an expenditure deadline. Additionally, the deviation from standard language in agreements before and after the ARPA agreement is unexplained, despite an Audit Office request for clarification. There is nothing in the award notice or guidance that we interpreted to necessitate the removal of the “spent within 180 days” requirement. In fact, the federal contact told DHHS via email that states should use their regular LIHEAP policies for the ARPA funds. Further, we found no reason why the option to extend the expenditure deadline (adopted in the August 2021 agreement) could not also be used in the September ARPA agreement.

After the agreement was signed, NDEE asked DHHS for a concrete expenditure deadline to complete the awards to community partners. Without an expenditure deadline from DHHS, NDEE could not obligate the funds. At the time, and throughout the process, NDEE was anticipating using the funds at least into 2024, as they are typically able to expend annual LIHEAP funding for a total of two years. Based on the ARPA budget provided to DHHS by NDEE, an estimated 217 homes could have received weatherization services and another 150 homes could have received emergency HVAC services.

On October 13, 2021, DHHS emailed their federal contact with several questions about the ARPA funds, including the expenditure deadline. After a series of back-and-forth emails, the federal contact provided a response on January 5, 2022. The response did not explicitly respond to each of DHHS’s questions but instead provided a copy of a December 17, 2021 guidance document.

According to this document, ARPA recipients were required “to expend their award of federal LIHEAP funding according to the same rules, including timeframe, required of their own funding.” It further specifies that “recipients have the normal expenditure deadline as they would with any federal LIHEAP funding they received for that corresponding year.”

Conversations about the expenditure deadline did not involve DHHS executive-level staff with decision-making authority until March 2022. Emails show that DHHS discussed multiple options for the expenditure deadline at that time, centering the discussion on what state rules, if any, applied to the expenditure of ARPA funds.

⁴ The Audit Office reviewed the two agreements before LB 306, the agreement for 2021 non-ARPA funds, and the two agreements following LB 306.

On March 14, LIHEAP staff sent an internal email summarizing a previous meeting with agency finance staff to discuss the ARPA deadlines. LIHEAP staff wrote, “Nebraska does not have an obligation policy or a policy regarding when funds must be expended after obligation.” According to that email, DHHS was interested in creating “a policy to allow LIHEAP ARPA funds that are required to be obligated by 9/30/22 to be expended through 9/30/25.” On March 23, LIHEAP staff asked their legal counsel if a policy could be written specific to ARPA funds allowing expenditure through September 2025.

While LIHEAP staff did not receive an answer on whether this policy was allowable, on April 1, legal staff communicated the General Counsel’s suggestion that LIHEAP apply the two-year biennium budget rules.⁵ However, the email said legal was unclear on whether this meant LIHEAP ARPA funds were to be obligated OR obligated *and* expended by the end of the biennium. On April 5, the Deputy Director of Finance explained that some programs do expend previously obligated funds after the biennium ends.

After this exchange, on April 6, DHHS’s comptroller emailed LIHEAP staff telling them the ARPA funds must be obligated by September 30, 2022 and then expended within 90 days of the obligation deadline.⁶ In response, LIHEAP staff asked finance and legal for documentation supporting the 90-day rule, but received no answer.

Despite the various policy options discussed, on April 7, DHHS told NDEE the deadline for expenditures—not just obligation—was September 30, 2022. Because the decision was not communicated in writing, we do not know the exact language DHHS used. Ultimately, NDEE notified DHHS that the full ARPA allocation would be returned because the community partners would not be able to expend the funds in time. The ARPA interagency agreement was mutually terminated and the funds were returned to DHHS on June 3, 2022.

While there were numerous emails between DHHS staff about possible expenditure deadlines for the LIHEAP ARPA funds, our review found no emails regarding DHHS’s ultimate decision: using the federal *obligation* deadline of September 30, 2022 as Nebraska’s *expenditure* deadline. The Audit Office asked DHHS for additional documentation supporting each of the expenditure deadlines considered, including the final decision, but DHHS did not provide it.

We also found no emails suggesting that the customary interagency agreement language allowing expenditure for 180 days past the end of the federal fiscal year was discussed as a possible guide for the expenditure deadline. In the absence of a formal written policy, it would have been reasonable to follow the precedent set by previous agreements, especially in light of the formal guidance instructing states to follow their normal expenditure timeline and the repeated instructions from the federal contact to use regular LIHEAP policy. Additionally, we found no email discussion of the language allowing for an extension of the expenditure deadline by request. At the time of this memo, DHHS still has no written policy regarding expenditure deadlines.

⁵ Although unclear, the biennium budget rules referenced by DHHS Legal could describe the typical processes and procedures state agencies follow to spend funds appropriated by the Legislature.

⁶ It’s not clear why this timeframe was considered, it may have been a misapplication of a federal LIHEAP reporting requirement.

Conclusion

There were 17 months from the ARPA award notice to the obligation deadline. DHHS used 11 of those 17 months to deliberate on an expenditure deadline. The September 30, 2022 expenditure deadline, communicated to NDEE in April, left community partners less than six months to spend the available funds. This would have been incredibly difficult because most projects take a minimum of six months from applicant approval to completion of the service due to the complexity of weatherization projects and compliance with federal regulations. Even if ARPA funds had been used for those six months, spending only ARPA funds would have stymied the expenditure of regular program funds, potentially jeopardizing future federal allocations.

DHHS has stated the department was in full compliance with the law because their responsibility is to allocate the funds, while the obligation and expenditure of the funds is NDEE's responsibility. Based on the evidence reviewed, we disagree. DHHS's understanding would allow them to allocate the funds without consideration for the length of time to complete a project, effectively preventing expenditure. DHHS has decision-making authority for LIHEAP weatherization funds. NDEE does not. Because of this, NDEE relies on DHHS and their interpretations to understand the federal rules for the expenditure of LIHEAP funds.

By failing to determine the expenditure deadline until April 2022, DHHS made planning by NDEE and the community partners impossible, resulting in \$4.1 million in weatherization funds being reallocated to utility payments for low-income households. Without any policy changes, the Audit Office is concerned DHHS will continue to have the power to delay the timely obligation of funds and effectively prevent future LIHEAP weatherization assistance.