



## Community Justice Project and Community Legal Services Supplemental Comments on DHS Final Form Child Care Regulations

In April, 2023, the Community Justice Project (CJP) and Community Legal Services submitted comments on behalf of Success Against All Odds (SAO)<sup>1</sup> and the many low-income families whose interests we represent urging the Independent Regulatory Review Committee (IRRC) to approve the Final Form Subsidized Child Care Regulations submitted by the Department of Human Services on March 23, 2023. As noted in our comments, we were pleased to see that DHS, in the final form regulations, deleted a provision at 55 Pa. Code §3042.14(d) that has allowed child care providers to charge low-income families, on top of their co-payment, the difference between the Department's provider payment rate and the provider's private pay rate -- a practice known as "balance billing."

In the meantime, several child care provider groups have submitted comments opposing DHS's deletion of Section 3042.14(d). We submit these supplemental comments as a rejoinder to the position taken by these provider groups and in further support of DHS's decision to bar balancing billing in the future.

We note, initially, that we have strongly opposed the provision at subparagraph (d) since it was first introduced in the last re-write of Child Care Works regulations in the early 2000s. For many years prior to that balance billing was not allowed by DHS.

While we sympathize with child care providers who struggle to successfully operate their businesses on the Department's provider payment rates, the proper solution to that problem is *not* to force low-income parents to make up the difference. This is a problem that should be addressed through tiered reimbursement along with regular and adequate upgrades to DHS's provider payment rates.

The child care provider groups are extremely well-organized and have for years been extensively engaged in lobbying efforts at both the federal and state level, urging lawmakers to appropriate additional federal and state funds for subsidized child care so that Pennsylvania might increase provider payment rates. We fully support those efforts.<sup>2</sup> However, we agree with DHS that, in good conscience and as a matter of law, the state must draw the line at asking families living in poverty to assume financial responsibility for the provider's rate concerns, legitimate as they may be. Low-income families are supposed to be the beneficiaries of the subsidized child care program, not its funders.

We ask the IRRC to consider the following points in connection with balance billing:

**POINT #1.** The provider groups state that federal law permits states to allow balance billing and that 38 states do so, while 11 states prohibit this practice. Federal Child Care Development Block Grant

<sup>1</sup> SAO is an organization of parents who advocate to improve access to adult and postsecondary education for low-income, single parents, and to ensure access for their families to supports, such as child care subsidies, needed by these parents to succeed in their efforts. The majority of SAO members are themselves either currently seeking to further their education as a means of achieving self-sufficiency or have already attained this goal through such efforts.

<sup>2</sup> So long as this does not involve increasing transfer of funds from the Temporary Assistance for Needy Families (TANF) block grant to Pennsylvania's subsidized child care program. TANF block grant funds are needed to fund a long-overdue increase in families TANF grant amount, which has remained the same since 1990. Child care subsidies should not be funded at the expense of families living below 20% of the federal poverty line.

(CCDBG) regulations do not, however, grant states carte blanche to permit balance billing. All states must certify to the U.S. Department of Human Services (HHS) that its co-payments, based upon a sliding fee scale, are affordable. For states that permit balance billing, this certification must include a demonstration that balance billing, based upon an “analysis of the interaction between any such additional amounts<sup>3</sup> with the required family co-payments,” will promote, and not undermine, affordability and access to child care.<sup>4</sup>

In its Preamble to the Final Form Child Care regulations, DHS indicated that, upon analysis of the factors it is required under federal law to review, the Department could **not** certify that continuing to permit balance billing will promote affordability and access:

*The Department notes that after review of data concerning equal access and affordability, as required by the CCDF, the Department determined there were remaining concerns over being able to demonstrate that by permitting the practice under § 3042.14(d), that doing so promotes affordability and access. See 45 CFR § 98.45 (relating to equal access)<sup>5</sup>*

**POINT #2.** The Department is absolutely correct in its determination that balance billing renders access to quality child care services unaffordable, contrary to the intent of the federal Child Care and Development Block Grant Act. One need only consider the very limited resources available to these families to see this.

In order to qualify for Pennsylvania’s child care subsidy program, a family’s income must be at or below 200% of the federal poverty level. Many families participating in the program are subsisting on incomes substantially below this level. But all families in the program are poor, which by definition means that their earnings from employment are not sufficient to meet basic needs, such as housing, utilities, food, clothing, transportation to work, etc.

While federal law requires that every family receiving subsidy contribute toward the cost of their child’s care, the family’s payment must be based upon a sliding fee scale, calibrated so to ensure that access to quality child care will be affordable to them. Accordingly, DHS has established a co-payment scale, based upon family size and income, that sets the family’s contribution to the cost of care at the limit of what the family can afford to pay. Any additional charges above that amount resulting, for example, from balance billing can only come from funds needed for rent, electric and other utilities, food, clothing, transportation to work, and other basic necessities. There is simply no “fluff” in these budgets.

Subsidy parents who wish to enroll their children in a high quality child care centers have every right to do so under federal law governing CCDF funded state child care subsidy programs. But, in Pennsylvania, for as long as balance billing has been permitted, this choice is financially out of reach for many families if the child care provider they select is one that charges the difference between the DHS payment rate and the provider’s private pay rate, especially for those families with lower earnings. The difference between these two rates can be as much as \$60 to \$100 per week,<sup>6</sup> which is **several times** the amount a

---

<sup>3</sup> The “additional amounts” referred to here is the difference between the state’s provider payment rate and the provider’s private rate.

<sup>4</sup> See, 45 C.F.R. § 98.45(b)(5).

<sup>5</sup> DHS Preamble to March 23, 2023 Final Form Child Care Regulations, p.16.

<sup>6</sup> We base this on discussions with child care providers who have shared their private pay rates with us, one of whom uses balance billing and told us that she charges subsidy families \$40 to \$100 per week in addition to their weekly co-pay.

lower income family is asked to contribute in a weekly co-pay.<sup>7</sup> But, even if it is as little as \$20 per week, the effect is the same for many subsidy families: they cannot afford this and will have to look for less expensive care. This could be family day care or a relative caregiver, but in either case, their children will lose the benefit of the kind of educational and developmental programming they would receive in a high quality, center-based child care setting. That is not how the subsidized child care system is supposed to work.

**POINT #3.** The adverse impact of balance billing on access to quality, affordable care is even more pronounced for Black families. DHS, to its credit, has investigated and reported on racial disparities in access to quality child care. In the “DHS Racial Equity Report, January 2021,” the Department acknowledges that Black children are significantly under-enrolled in the highest quality (STAR 3 or 4) child care programs compared to white children – with only 31% of Black children being enrolled in high quality care compared to 46% of white children.<sup>8</sup> Importantly, DHS pledged in the Report to gain a “better understanding of the racial gaps that exist here.”

We believe that balance billing is a factor in the quality of care gap between Black children and white children. Research indicates that average earnings of Black people are substantially lower than those of whites.<sup>9</sup> It stands to reason, then, that when asked to pay charges over and above their co-pay, Black families are even less able to do so than white families, with the result that Black children are at higher risk of losing the opportunity to benefit from high quality care settings than white children. The DHS report states that “OCDEL is committed to building an equitable and sustainable early care and education (ECE) system.” The Department’s decision to end balance billing is a commendable and necessary step in this effort.

**POINT #4.** A substantial majority of Pennsylvania Child Care providers who participate in the subsidized child care program do **NOT** use balance billing and will, therefore, be unaffected by DHS’s decision to stop permitting this practice. In the Responses to Comments document submitted by DHS with the final form child care regulations, the Department references data from 2019 indicating that over one-third of participating child care providers have private pay rates greater than the DHS payment rate and do, in fact, charge subsidy families the difference.<sup>10</sup> This means, of course, that roughly **two-thirds** of participating providers do **NOT** ask subsidy families to pay the difference.

The provider groups express concern in their comments that the discontinuation of balance billing could result in providers ceasing to serve subsidy families or dropping out of the program altogether. We agree that this would indeed be concerning. But, given that only a minority of providers engage in this practice to begin with, it would seem that anything on the scale of a mass exodus from the subsidized child care program is unlikely. Moreover, it stands to reason that providers who serve significant numbers of subsidy families would lose far more revenue by dropping those families and the DHS subsidies they

---

<sup>7</sup> We note, for example, that the co-pay for a single mom raising a young child and earning \$13 an hour (\$20,000 per year) is \$19 per week. It is very hard to see balance billing making it even remotely possible for this mom to afford high quality child care for her child.

<sup>8</sup> See, Report, p. 10.

<https://www.dhs.pa.gov/about/Documents/2021%20DHS%20Racial%20Equity%20Report%20final.pdf>

<sup>9</sup>See, Department of Labor and Industry, “Earnings Disparities by Race and Ethnicity.”

<https://www.dol.gov/agencies/ofccp/about/data/earnings/race-and-ethnicity>

<sup>10</sup> See, Comment Response Document for Final-Form Rulemaking – #14-545 - Subsidized Child Care Eligibility, p. 12.

receive for them than they would lose by ceasing to balance bill these families -- meaning that it would not be in the financial interests of these providers to stop serving subsidy families.

And the number of providers who do not charge families the difference between the DHS rate and the provider's private pay rate may actually increase in the future as a result of the Department's recent upgrade in provider payment rates. Effective March 2023, DHS increased its provider pay rates from the 40<sup>th</sup> percentile of private market rates to the 60<sup>th</sup> percentile.<sup>11</sup> This means that the private pay rate of 60% of providers is now equal to or less than the Department's payment rate. For those providers, there is no difference between the two rates to make up and, thus, no reason or basis for balance billing. Since the rates were previously set at the 40<sup>th</sup> percentile that should mean that, beginning in March 2023, an additional 20% of providers will now find themselves in a position where the DHS rate and their private pay rate are the same and balance billing will be unnecessary.

The overarching purpose of the Child Care and Development Block Grant Act and, accordingly, the DHS subsidized child care program that it funds, is to ensure access to affordable, quality child care for low-income children. To that end, federal law firmly establishes the right of low-income parents participating in the program to entrust the care of their children to the child care provider, and type of provider, of their choice.<sup>12</sup> For the reasons stated above, we concur in and support the Department of Human Services' conclusion that balance billing runs contrary to these principles and may even present a risk of fiscal sanction by the federal government:

*The Department determined that permitting § 3042.14(d) to remain runs contrary to the intent of CCDF assistance because it permits additional charges to low-income families, thereby undermining the goal of supporting low-income parents to achieve economic stability. The overriding concern with this final-form rulemaking was to align the Department's requirements with the requirements of the CCDBG. The Department notes that compliance with CCDBG requirements is critical to ensure the Commonwealth continues to receive federal funds.*

We thank the IRRC for considering these comments.

Respectfully submitted:

Louise Hayes  
Supervising Attorney, Health & Independence Unit  
**Community Legal Services**  
1410 W. Erie Ave.  
Philadelphia, PA 19140  
(215) 227-4734  
[LHayes@clsphila.org](mailto:LHayes@clsphila.org)

Peter Zurflieh  
Staff Attorney  
**Community Justice Project**  
118 Locust Street  
Harrisburg, PA 17101  
(717) 433-1457  
[pzurflieh@cjplaw.org](mailto:pzurflieh@cjplaw.org)

---

<sup>11</sup> The rates increases are across the board for each type of provider, including center-based providers, for each age category of children, and for each region in the state.

<sup>12</sup> See, 45 CFR §§ 98.30(f)(2); 98.15(a)(5); 98.1(a)(2).