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Ordonez, Michael

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From: Sands, Jessica
Sent: Monday, December 14, 2020 1:34 PM
To: PW, OCD Subsidized Child Care
Subject: FW: [External] CLS/CJP/SAO Comments on DHS Proposed CCW Regulations
Attachments: 2020.12.14 CLS-CJP-SAO Comments on PA's Proposed Child Care Subsidy Regulations.pdf

Mike – this comment was sent directly to Trace, Karen GT and me. Please process as usual. Thanks!

From: Peter Zurfileh <pzurfileh@cjplaw.org>
Sent: Monday, December 14, 2020 1:29 PM
To: Sands, Jessica <jsands@pa.gov>; Campanini, Tracey <trcampanin@pa.gov>
Cc: Louise Hayes <LHayes@clsphila.org>; Sforrest@keystonehumanservices.org; Grimm-Thomas, Karen <kggrimmth@pa.gov>
Subject: [External] CLS/CJP/SAO Comments on DHS Proposed CCW Regulations

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Dear Tracey and Jessica

Attached are comments from Community Legal Services and the Community Justice Project, on behalf of Success Against All Odds and the many low-income working families we represent, on DHS's proposed Child Care Works regulations that were published for public review and comment on November 14, 2020. These regulations implement changes in federal law pursuant to the 2014 reauthorization of the CCDBG Act by Congress, while also seeking to improve the program through modifications to other DHS regulations not affected by the reauthorization.

We strongly support the majority of the changes in this new chapter of regulations and commend the Department for exercising family friendly federal options. We also like many of the changes not mandated by federal law.

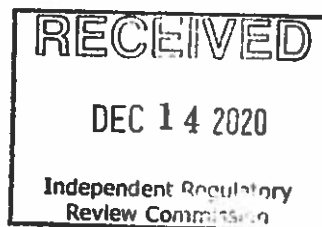
There are, however, some areas in which we think DHS fell somewhat short of compliance with federal changes or could have better aligned its proposed regulations with the federal rules. Similarly, we think there are some additional improvements that could be made in DHS's CCW regulations unaffected by federal reauthorization. This is all set forth in the attached comments and recommendations.

We would welcome the opportunity to meet with you to discuss the comments we have submitted. Please let us know if you think that is possible and, if so, when it might be convenient for you to do so.

Thank you for consideration of our comments.

Peter Zurfileh, Community Justice Project
Louise Hayes, Community Legal Services
Sheila Forrester, Success Against All Odds

Peter Zurfileh
Community Justice Project
118 Locust Street



Harrisburg, PA 17101
(717) 236-9486, ext. 210 or
(800) 322-7572, ext. 210
Fax (717) 233-4088

pzurflieh@ciplaw.org

Community Legal Services and Community Justice Project Comments on the Department of Human Services November 14, 2020 Proposed Child Care Works Regulations

(December 14, 2020)

Introduction

Community Legal Services (CLS) and the Community Justice Project (CJP), on behalf of Success Against All Odds (SAO)¹ and the many low-income, working families we represent, submit these comments on the Pennsylvania Department of Human Services (DHS) proposed regulations governing the Department's Child Care Works (CCW) subsidized child care program. The Child Care Works program provides critical child care assistance to low-income, working families in Pennsylvania.

The rulemaking proposes to rescind the entire chapter of Child Care Works regulations at 55 Pa Code Chapter 3041 and replace it with Chapter 3042.

While the primary purpose of the proposed rewrite of CCW regulations is to implement new federal requirements set forth in the federal Child Care and Development Block Grant Act of 2014 (CCDBG) (42 U.S.C.A. §§ 9857—9858r, as reauthorized by Pub.L. No. 113-1), DHS has also taken the opportunity to further improve the program by proposing changes to regulations not affected by the 2014 CCDBG reauthorization.

CLS, CJP, and SAO strongly support the majority of the regulatory changes proposed by DHS in Chapter 3042. We believe that these changes will further the central goals of Congress in its reauthorization of the CCDBG Act in 2014, which were to: (i) ensure continuity of care for children in quality early learning child care settings; and (ii) enable working parents to achieve and maintain financial stability, knowing that their children are being cared for in a stable, nurturing environment.

Specifically, we commend DHS and support the Department's proposals for the following changes:

Changes Required by or to Further the Purposes of Federal CCDBG Reauthorization

- Establishing a 12-month period of eligibility for children by conducting eligibility redeterminations on an annual basis, rather than semi-annual basis, as under current regulations;
- Continuing subsidy for children during the 12-month eligibility period, regardless of changes in the family's circumstances, including:

¹ 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.

- Increases in income, so long as income does not exceed 85% of state median income -- an income level that is actually higher than the 235% of the Federal Poverty Income Guidelines upper income limit in Pennsylvania for subsidized child care applicable at redetermination.
 - Loss of or reduction in hours of employment, education, or training;²
 - Onset of a disability that precludes work;
 - Change in household composition;
 - Change in a child's primary parent or caretaker; or
 - Beginning of maternity or family leave under the FMLA.
- Limiting required change reporting in between redeterminations to increases in income in excess of 85% of SMI, and just a few other circumstances, substantially reducing the list of changes that parents and caretakers must report under current DHS regulations.
 - Establishing special rules to accommodate homeless families, including a 92-day period of presumptive eligibility, a provision for waiver or modification of certain eligibility requirements, and temporary relaxation of verification requirements.
 - Permitting suspension of subsidy at the parent's request for as long as needed and for any reason, thus removing both time limits on suspension and a limited list of circumstances for which suspension could be requested.
 - Expanding the number of paid absence days from 25 days to 40 days.
 - Eliminating redeterminations for former TANF families on the 184th day after TANF ends.

Other Changes Intended to Improve the CCW Program

- Expanding the definition of caretaker to include the child's great-grandparent and a sibling who is 18 years of age or older.
- Allowing a 92-day period of presumptive eligibility for parents/caretakers who:
 - Are on maternity, family, or disability leave at the time of redetermination;
 - Have experienced the onset of a disability; or
 - Have had a break in work, education, or training.
- Removing the requirement that self-employed parents/caretakers have earnings above the minimum wage.
- Expanding the hours of sleep time for which the parent/caretaker is eligible for subsidy for parents who work the night shift.
- Permitting the parent or caretaker to hold a child back from attending kindergarten for 1 year and continue to receive full subsidy payments.
- Permitting families to postpone enrollment for more than 30 calendar days if the child does not immediately need care at the time funding becomes available.
- Permitting the eligibility agency to substitute a telephone contact for a face-to-face meeting if the eligibility agency cannot schedule a face-to-face meeting without the parent or caretaker experiencing a hardship.

² We note that in allowing subsidy to continue until the next redetermination, notwithstanding loss of, or reduction in hours of, employment or training, DHS has commendably declined to exercise the option under federal CCDBG rules to limit subsidy continuation in such circumstances to a period of three months.

- Allowing additional opportunities for a parent or caretaker to self-certify information that is not likely to change within the 12-month eligibility period, such as the inclusion of an adult child in the family composition and the days and hours for which the child needs care.
- Removing the requirement for a parent or caretaker who previously received TANF benefits to pay an equivalent advance co-payment to the child care provider when a child is enrolled in care.

As stated, we support the above proposed revisions to CCW regulations, but we also think there are areas in which DHS either must or could do even better. Below are comments and recommendations that we think would better align the Department's proposed Child Care Work regulations with federal law and advance the purposes of CCDBG reauthorization, along with recommendations that we think would further improve the CCW program beyond the changes mandated by federal law.

Recommended Changes to Pennsylvania's Proposed Child Care Subsidy Regulations

While we generally support the Department's implementation of federal CCDBG requirements, and applaud DHS for exercising options available under the federal CCDBG regulations that will best ensure continuity of care for children and support their parents' ability to work, there are a number of areas where the DHS proposed regulation fall short of compliance with the CCDBG requirements. We address these provisions in Part A of our comments and recommended changes.

In Part B we offer comments and recommendations on DHS regulations not impacted by the federal CCDBG regulations, but which we think can be improved in order to better meet the needs of low-income working families with children.

In each section we offer our comments first, followed by recommended changes and/or edits to the regulation in question.

A. Changes Needed to Align or Better Align Pennsylvania Regulations with Federal CCDF Regulations

§ 3042.11. Provision of subsidized child care.

COMMENT: For the sake of clarity, we recommend adding the highlighted language below from 45 CFR Section 98.20(a)(1)(ii).

(d) Subsidized child care is available to an otherwise eligible child who is 13 years of age or older but under 19 years of age and who is physically or mentally incapable of self-care.

§ 3042.19. Subsidy continuation.

COMMENT: The proposed regulation, at subsection (c), omits two important circumstances from 45 CFR Sections 98.21(a)(1)(i) and (ii)(G) in which subsidy must be continued in the period in between redeterminations. We recommend adding these as subsections (c)(5) (Income in excess of 85% of SMI) and (6) (change of residence within the Commonwealth).

The proposed regulation also omits important provisions that specify certain circumstances in which subsidy must be terminated in between 12-month redeterminations, pursuant to 45 CFR Section 98.21(a)(5). The first of these circumstances, pertaining to child absences, would not arise in Pennsylvania, given how DHS proposes to handle absences in its proposed regulations. But the other two circumstances could arise and should be covered in the proposed regulations. We recommend inserting them in at new sections (d)(1)-(3). Given the ever presence of a waiting list, it is not in anyone's interest for subsidy to continue being paid to families who do not need it. We believe that is the intent of the federal regulation.

(c) Subsidized child care will continue at the same level until the family's next scheduled annual redetermination in the following circumstances, unless the parent or caretaker requests the eligibility agency suspend care:

- (1) A parent or caretaker has a break in work, education or training.
- (2) A parent or caretaker experiences a decrease in work, education or training hours.
- (3) A parent or caretaker experiences the onset of a disability.
- (4) A parent or caretaker is on maternity or family leave, as defined under the Family and Medical Leave Act of 1993 (29 U.S.C.A. §§ 2601—26
- (5) A family's income changes but does not exceed 85 percent of SMI for a family of the same size.
- (6) A child's residence changes within the Commonwealth.

(d) Notwithstanding subparagraphs (a)-(c), the eligibility agency shall terminate subsidy prior to the next re-determination in limited circumstances where there has been:

- (1) A change in residency outside of the Commonwealth.
- (2) Substantiated fraud or intentional program violations that invalidate prior determinations of eligibility.
- (3) The parent or caretaker voluntarily requests discontinuance of subsidy.

§ 3042.37. Eligibility of households including a parent or caretaker with a disability.

COMMENT: This regulation is not in sync with the federal CCDBG regulations, as implemented in Pennsylvania, that waive compliance with work requirements in between redeterminations for families experiencing a range of changes in circumstances, including onset of a disability, that result in job loss or reduction of hours. (Federal law requires states to waive work requirements for at least three months, but permits states to waive them until the next redetermination. As stated in the Introduction to these comments, we commend DHS for exercising this option.)

As written, proposed subsection (a) imposes verification and other conditions not authorized under federal CCDBG regulations on parents who have experienced the onset of a disability in order to have subsidy continue. Under 45 CFR Section 98.21(a)(1)(ii)(e), states are required to continue subsidy in between redeterminations notwithstanding a "change in the ongoing status of the child's parent as working or attending a job training or educational program." Under this regulation, such changes in status would include loss of employment due to onset of disability.

Requiring parents to verify that their disability precludes employment in order to continue to receive subsidy between redeterminations places a significant burden on them that parents who lose employment for other reasons do not have to meet, raising a serious issue of unlawful discrimination.

Lastly, subparagraph (a), as written, is in conflict with proposed Section 3042.19(c)(3), which provides that subsidy will continue when a parent experiences onset of a disability – without mention of any verification requirement or other conditions. We think that proposed Section 3042.19(c)(3), not subparagraph (a) of Section 3042.37, reflects DHS' actual intent. We say this, in part, because of the clear statement on page 7 of the Preamble that the Department proposes, pursuant to federal CCDBG regulations, to waive the work/training requirement for parents who experience the onset of disability between the initial eligibility determination and redetermination.

We also suggest that subparagraph (a) not be limited to families headed by single parents, as Section 98.21(a)(1)(ii) of the federal regulations is not limited to single parent families. This change would also help address the problem posed by subparagraph (b)(2).

A similar problem arises under subparagraph (b), as written. A parent in a two parent household who experiences the onset of a disability between application and redetermination should also be excused from the work/training requirement, as per 45 CFR Section 98.21(a)(1)(ii) of the federal regulations, as well as DHS proposed Section 3041.(c)(3).

We recommend the following changes to this proposed regulation:

(a) Following the determination of eligibility for subsidized child care, a single parent or caretaker ~~who meets all of the following conditions~~ who experiences the onset of a disability is excused from the work, education and training requirements until the family's next scheduled annual redetermination:

~~(1) Experiences the onset of a disability that is verified as specified in § 3042.70 (relating to verification of inability to work due to a disability).~~

~~(2) Is unable to continue work, education or training due to the disability or the need to attend treatment for the disability.~~

(b) A two-parent or two-caretaker family may be eligible for subsidized child care if all of the following conditions are met:

(1) One parent or caretaker is working.

(2) The parent or caretaker that is not working has a disability that is verified as specified in § 3042.70 at the time of application, ~~or at the time the parent or caretaker becomes disabled~~ and at each subsequent redetermination.

SELF-CERTIFICATION AND VERIFICATION

COMMENT: The preamble to these regulations states that the eligibility agency will not ask parents for information that "is available from other electronic data sources (for example, verified data from other benefit programs)." This indeed is the direction that DHS has taken with regard to other public benefit programs, such as TANF, MA, and SNAP.

Yet, the proposed verification regulations do not reflect such an approach and, in fact, appear to be virtually unchanged from current verification regulations.

We strongly urge DHS to modify this entire section of the proposed regulations to reflect a 21st century approach to the verification process. This should begin with a clear statement that eligibility agencies must attempt to obtain needed information from trusted electronic sources before asking the parent or caretaker to provide verification.³ Below are our suggestions as to how this might be done:

§ 3042.61. General verification requirements.

~~(a) The parent or caretaker shall be the primary source of verification in establishing and maintaining eligibility for subsidized child care.⁴~~

(a) In situations where self-certification is not permitted, the eligibility agency will attempt to verify information through trusted electronic data sources or from the existing case record, before requesting verification from the individual.

(b) The requirements of subparagraph (a) apply at application, redetermination, and whenever a change in circumstances occurs, in order to avoid unnecessary verification requests for information from the parent or caretaker when it can be obtained and verified by the eligibility agency.

(c) The eligibility agency will request information from the parent or caretaker only if it is unable to verify information through electronic data sources or if information obtained through electronic data sources is not reasonably compatible with the information reported by the parent or caretaker.

³ While it is not necessary to include this in the proposed regulations, eligibility agencies should be informed of the electronic data sources available to them. The most important data source should be the County Assistance Office e-CIS system, which shows the income the CAO uses in determining SNAP and Medicaid eligibility. The information used by the CAO for SNAP or Medicaid should be usable by the ELRC unless the family states that the information is outdated. Below are some of the sources that DHS provides to the CAOs. If there are sources on this list that are not currently available to the ELRCs, DHS should take whatever steps are necessary to make these sources available.

- Data matches from the Social Security Administration
- Income Eligibility Verification System (IEVS), which includes a variety of sources
- Quarterly wage information from the Department of Labor and Industry
- Unemployment Compensation Information
- PACSES child support information
- TALX-Equifax, which provides real-time verification of wages from many employers including most large ones
- State on-line Query Internet (SOLQ-I)
- MCI interface with SSA to verify citizenship and identity from SSA's records.

⁴ This is outdated provision is the antithesis of the approach DHS claims in the Preamble to be taking toward verification of eligibility for the CCW program.

~~(d)~~ The eligibility agency will give the parent or caretaker the chance to provide other proof if he or she disagrees with the automated information obtained by the eligibility agency.

~~(b)~~(e) When it is necessary to request information from the parent or caretaker the eligibility agency shall assist the parent or caretaker in obtaining verification, including making a collateral contact.

~~(e)~~(f) The eligibility agency may not impose requirements for verification beyond the requirements of this chapter.

~~(d)~~(g) At the time of application for subsidized child care, the eligibility agency shall obtain consent from the parent or caretaker and the parent's or caretaker's spouse permitting the eligibility agency to obtain verification of eligibility information.

~~(e)~~(h) The eligibility agency shall retain the signed consent in the family's file.

~~(f)~~(i) The consent shall remain in effect for as long as the family receives subsidy.

~~(e)~~(j) The eligibility agency may not deny or terminate subsidy to a family when the parent or caretaker has cooperated in the verification process and needed verification is pending or cannot be obtained due to circumstances beyond the parent's or caretaker's control.

~~(h)~~(k) The eligibility agency may not require a parent or caretaker to re-verify information unless the eligibility agency has information that indicates the subsidy status of the family has changed.

§ 3042.62. Collateral contact.

(a) When it is necessary to request information from the parent or caretaker, the eligibility agency shall make a collateral contact on behalf of the parent or caretaker.

§ 3042.63. Self-certification.

No changes needed to this section.

§ 3042.64. Self-declaration.

(a) If attempts by the eligibility agency to verify eligibility through electronic data sources or by documentary evidence or collateral contact are unsuccessful, the eligibility agency shall proceed without delay to determine the family's eligibility based upon a self-certification as specified in § 3042.63 (relating to self-certification) or by written self-declaration by the parent or caretaker.

§ 3042.65. Verification of income.

(a) If attempts by the eligibility agency to verify earned income through electronic data sources are not successful, other acceptable verification of earned income from employment includes one of the following:

* * * *

(b) Acceptable verification of income from self-employment includes:

(1) Tax returns, including schedules related to self-employment, filed for the preceding Federal tax year and which document profit for that year.

(2) The Department's self-employment verification form that includes a statement of gross earnings, minus allowable cost of doing business, and that shows a profit.

(c) If attempts by the eligibility agency to verify unearned income through electronic data sources are not successful, other acceptable verification includes one of the following:

* * * *

(c) If attempts by the eligibility agency to verify unearned income through electronic data sources are not successful, other acceptable verification includes one of the following:

* * * *

§ 3042.66. Verification of residence.

(a) ~~The parent or caretaker shall submit~~ Verification of residence shall be verified at the time of application.

(b) If attempts by the eligibility agency to verify residence through electronic data sources are not successful, other acceptable verification includes any of the following:

* * * *

§ 3042.67. Verification of work, education or training.

If attempts by the eligibility agency to verify hours of work, education, or training through electronic data sources are not successful, other acceptable verification of the number of hours of work, education, training or enrollment in education or training includes one of the following:

* * * *

§ 3042.68. Verification of circumstances relating to a decrease in co-payment.

If attempts by the eligibility agency to verify circumstances relating to a decrease in co-payment through electronic data sources are not successful, other acceptable verification includes any of the following:

§ 3042.69. Verification of identity.

No changes needed to this section

§ 3042.70. Verification of inability to work due to a disability.

If attempts by the eligibility agency to verify disability other through electronic data sources are not successful acceptable verification includes one of the following:

* * * * *

§ 3042.71. Verification of family size.

If attempts by the eligibility agency to verify circumstances relating to family size through electronic data sources are not successful, other acceptable verification includes one of the following:

* * * * *

§ 3042.72. Verification of child's incapability of caring for himself.

No changes needed to this section.

§ 3042.73. Verification of care and control.

No changes needed to this section.

§ 3042.86. Change Reporting and Processing of reported changes.

COMMENT: A provision specifying the few changes that *must* be reported is needed to comply with 45 CFR Section 98.21(e)(2)(i). It is important for parents, eligibility agencies, and advocates to know what kinds of changes must be reported in between redeterminations, especially considering that this list of changes is far more limited than what they are accustomed to under current regulations. We recommended revising subparagraph (a) to accomplish this. The caption of this regulation should be changed to reflect that it covers change reporting, as well as change processing.

Note that in subparagraph (a) we also recommend that DHS allow the same period of time for change reporting that it does for TANF, SNAP, and MA, i.e., by the 10th day of the month of the month following the month in which the change occurred. This allows parents to total their income for the entire month and determine whether the income has gone over the threshold for required reporting.

We recommend that new text listing the various ways in which parents *may* report changes be added to subparagraph (b) in order to comply with 45 CFR Section 98.21(e)(2)(ii). The text proposed by DHS for this subsection should be moved to subparagraph (a), as reflected in our recommended revision of that subsection.

As written, subparagraph (c) of this provision contravenes 45 CFR Section 98.21(e)(4)(ii), which expressly prohibits the agency from terminating subsidy based on reported changes for any reason other than an income increase in excess of 85% of SMI.⁵ Our recommended revision to this subparagraph would limit authorization of terminations based upon information reported by the parent to increases in income above 85% of the SMI.

The language we have supplied at subsections (d) and (d)(i) and (ii), is required in order to comply with federal regulations at 45 CFR Sections 98.21(e)(4)(i) and (ii). The requirement that the eligibility agency act upon reported changes that would result in a reduction of their co-pay and the prohibition on agency action that would reduce or terminate subsidy based upon reported changes are two of the most important protections for families mandated in the federal CCDBG regulations. They should not be omitted from these proposed regulations.

⁵ Once again, we applaud DHS for exercising the option under federal child care regulations to continue subsidy throughout the 12 month eligibility period for virtually any other changes in family circumstances, including loss or reduction of hours of employment.

(a) A parent or caretaker ~~must~~ may report the following changes in circumstances no later than the 10th day of the month following the month of the change: ~~whenever a change occurs~~.

(b1) ~~A parent or caretaker shall report if income in excess of 85% of the SMI, no later than 10 calendar days following the date of the change.~~

(2) A new address.

(3) A change of child care provider.

b) An office visit is not required in order for the parent or caretaker to report a change. A change may be reported by phone, mail, hand-delivery, facsimile or electronically.

(c) ~~If the parent or caretaker reports a change an increase in income in excess of 85% of SMI that results in the family or a child in the family becoming ineligible for subsidy, the eligibility agency shall take the necessary steps to terminate the subsidy with proper notification to the family as specified in § 3042.155 (relating to notice of adverse action).~~

(d) Parents and caretakers may voluntarily report changes on an online basis.

(i) The eligibility agency must act on information reported by if the parent or caretaker if it would decrease the co-payment or increase the family's subsidy. reports a change that may result in a decrease in the family copayment. ~~The eligibility agency shall review the change and decrease the co-payment as specified in § 3042.94 (relating to parent or caretaker co-payment requirements).~~

ii) The eligibility agency is prohibited from acting on information that would reduce the family's subsidy unless the information provided indicates the family's income exceeds 85 percent of SMI for a family of the same size.

§ 3042.91. General co-payment requirements.

COMMENT: Federal CCDBG regulations at 45 CFR Section 98.21(a)(3) prohibit agencies from increasing co-pays during the 12-month eligibility period. This is another one of the most important protections for families in the federal regulations and should be expressly stated in DHS's proposed rulemaking. We recommend a new subsection (c) to accomplish this.

(a) The eligibility agency shall determine the amount of the parent's or caretaker's co-payment during the eligibility process based on the parent's or caretaker's ~~actual or verified~~ anticipated income and family size.

(b) The eligibility agency will set the co-payment at an initial determination of eligibility for subsidized child care and re-establish it at each successive redetermination of eligibility.

(c) The eligibility agency shall not increase family co-payment amounts within the 12-month eligibility period

§ 3042.171. Overpayment.

COMMENT: We propose adding a new subsection to this regulation that we believe is required in order to comply with federal regulation 45 CFR Section 98.21(a)(4). The additional provision would clarify that

payments received by families during the 12-month eligibility period shall not be considered an overpayment due to a change in the family's circumstances during that period of time.

Note that in Section B of our comments, below, we recommend a change to subsection (3) of this regulation that is not required by federal law, but which we think would remove an impediment to parents filing good faith appeals with subsidy continuing.

- (a) The parent or caretaker may not be required to repay an overpayment except for an overpayment resulting from one of the following:
 - (1) Fraud.
 - (2) Failure to comply with this chapter.
 - (3) Subsidy continuation pending an appeal when the parent or caretaker did not win the appeal.
- (b) Because a child meeting eligibility requirements at the most recent eligibility determination or redetermination is considered eligible between redeterminations, any payment for such a child shall not be considered an error or improper payment due to a change in the family's circumstances.

B. Other Recommended Changes

§ 3042.3. Definitions.

COMMENT: A "general educational development" program, listed in the definition of "education" is better known as a "GED," so we think it would helpful for the sake of clarity to include this well-known acronym. The term "High School Equivalency" is now often also used and should be included, as well.

The definition of "training," as written, includes some, but not all forms of adult education, including the two most common -- GEDs and HSE. An OCDEL email from policy staff supports our belief that GEDs and HSE were intended to be considered training for purposes of the work requirement. We have attached a redacted version of this email to our comments, as Exhibit A.

Alternatively, DHS, for the sake of simplicity, could simply combine the definitions of education into one definition -- maybe Education/Training -- that would include all of the types of programs listed below.

Education—An elementary school, middle school, Junior high or high school program including a general educational development program (GED), High School Equivalency (HSE) degree, charter school, cyber school and any other program approved by the school district or the Department of Education.

Training—

- (i) Instruction that provides the skills or qualifications necessary for a specific vocation or field of employment.
- (ii) The term includes adult basic education, English as a second language, general educational development program (GED), High School Equivalency (HSE) degree, a 2-year or 4-year postsecondary degree program, an internship, clinical placement, apprenticeship, lab work and field work required by the training institution.

§ 3042.14. Payment of provider charges.

COMMENT: 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.

While we sympathize with child care providers who struggle to make ends meet on the Department's payment rate, the proper solution to that problem is *not* to force low-income parents 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 rate.

Allowing providers to bill low-income parent for the difference between the DHS payment rate and the private pay rate effectively imposes a "super" copay on parents. The whole purpose of a co-pay scale based upon family size and income, capped at 11% of family income for most families and 8% for those with incomes below 100% of poverty, is ensure that child care costs for these families are affordable. The "super" co-pay permitted by this regulation flies in the face of DHS's equitable and carefully constructed co-pay scale.

It also undermines parent choice of providers, arguably in violation of DHS and federal policy establishing the right of parents to entrust the care of their children to the child care provider of their choice. Because of their limited means, parents who would opt to select a particular provider based upon location, quality of care, and reputation, among other factors, may well be precluded from doing so, if that provider charges a "super" co-pay, pursuant to this regulatory provision.

We recommend that DHS return to its former policy of prohibiting charges to the family over and above the Department's payment rate, as the Department has always in done in a very parallel situation with medical providers who participate in the Medicaid program, where "balance billing" is prohibited.

(c) The Department may provide tiered-reimbursement based on the availability of funding:

~~(d) If a parent or caretaker selects a provider whose published rate exceeds the Department's payment rate, the provider may charge the parent or caretaker the difference between these two amounts, in addition to the weekly co-payment.~~

§ 3042.18. Absence.

COMMENT: The language we suggest adding to subsection (a) comes from current DHS regulations, but was deleted from the proposed regulation. We think it should be included, so as to prevent premature or unnecessary triggering of subsidy suspension.

We are also very concerned that this proposed regulation, at subsections (a) and (b), would strip families faced with suspension of the right to an adverse action notice giving them the opportunity to appeal with subsidy continuing pending a hearing decision. This is a change from current regulations with significant consequences for families; current regulations require that an adverse action notice be sent when the eligibility agency proposes suspension of benefits. We note, as well, that suspension of subsidy without an adverse action notice is inconsistent with DHS's notice requirements for TANF, SNAP, and MA (see for example 55 PA Code Section 133.4(b)(1)(II)), and may violate due process.

(a) Upon notification from the provider that a child has been absent more than 5 consecutive days for which the child is scheduled to attend child care, not including days of a child's illness, injury or impairment that precludes a child from attending child care -- the eligibility agency

shall send the parent or caretaker an adverse action notice proposing confirming the suspension of the child's enrollment and payment to the provider.

(b) Upon notification from a parent or caretaker that a child has been or will be absent more than 5 consecutive days for which the child is scheduled to attend child care, the eligibility agency shall send the parent or caretaker an adverse action notice proposing confirming the suspension of the child's enrollment and payment to the provider. If the parent requests the subsidy suspension, the eligibility agency may send a confirming notice instead of an adverse action notice, beginning the suspension on the date the parent requests it.

§ 3042.20. Subsidy suspension.

COMMENT: The "for any reason" language we suggest adding is implicit in the elimination of regulatory provisions stating the reasons subsidy may be suspended, but we think ought to be stated explicitly.

(a) The eligibility agency shall suspend subsidy if a child is unable to attend child care for more than 5 consecutive days for which the child is scheduled to attend.

(b) At the parent's or caretaker's request, the eligibility agency shall suspend subsidy for a child who is expected to be absent more than 5 consecutive days for any reason.

§ 3042.31. Financial eligibility.

COMMENT: Subsection (c) is not accurate as written. There is no option to continue subsidy for families whose income exceeds 235% of poverty at redetermination, except in the highly unlikely scenario that 85% of state median income should drop to less than 235% of poverty. As written, this provision would allow eligibility agencies to continue subsidy to families with income well in excess of 235% of poverty. Considering that there are normally long waiting lists for subsidy, such a scenario would be very unfair to much lower income families on the waiting list.

(b) Following an initial determination of eligibility, a family shall remain financially eligible for subsidized child care as long as the family's annual income does not exceed 85% of the SMI.

(c) At redetermination, the family's annual income may not exceed 235% of the FPIG or 85% of the SMI whichever is less.

§ 3042.33. Work, education and training.

COMMENT: Here we recommend the same modification of the definition of education we suggested in our comments on the definition section.

(c) The eligibility agency shall consider a parent or caretaker as meeting the work-hour requirement specified in subsection (a), under the following circumstances:

(1) A parent or caretaker is under 22 years of age and does not have a high school, or general educational development (GED), or High School Equivalency (HSE) diploma, but is enrolled in and attending education on a full-time basis.

§ 3042.95. Delinquent co-payment.

COMMENT: Generally, this regulation, as written allows no room for parents/caretakers to work out payment plans with their providers when they have been unable to make co-pays. We suggest that a

provision be added to inform providers and parents that they may enter into arrangements for make-up payments in this scenario and avoid the harsh consequences for both if subsidy termination procedures are triggered.

Along these same lines, the new provision, at subsection (d) seems rather harsh to us, as it does not take into account financial crises that families may experience that could temporarily make it difficult for them to keep up with their co-pays. Shouldn't there be some allowance here for the family to enter into a payment plan with the child care provider that would allow them to maintain eligibility? We recommend this section include a provision that allows subsidy to be maintained if a payment plan between the provider and the parent has been agreed upon. Doing so would still allow the eligibility agency to terminate subsidy, but would, at the same time, allow for these matters to be worked out between the provider and the parent.

(a) The parent or caretaker and the provider may work out a payment plan when co-payments are late or unpaid.

(b) A co-payment is delinquent if it is not paid by the last day of the service week and there is no payment plan between the provider and the parent or caretaker or the parent or caretaker has failed to make payment pursuant to the plan.

(c) On the day the provider reports the co-payment is delinquent, the eligibility agency shall notify the parent or caretaker in writing that action will be taken to terminate subsidy for the child.

(d) If a co-payment is delinquent, the eligibility agency will apply the first payment paid during a week to the current week's co-payment. The eligibility agency will apply subsequent payments during a week to the delinquent co-payment.

(e) To maintain eligibility for subsidized child care when a parent or caretaker incurs a copayment delinquency, the parent or caretaker shall pay all of the following, or provide evidence of a payment plan with the provider and payments pursuant to the plan, prior to the expiration of the notification period:

- (1) The current weekly co-payment.
- (2) The delinquent co-payment.
- (3) The amount of any additional delinquencies accumulated during the notification period.

§ 3042.97. Use of the Federal Poverty Income Guidelines and State Median Income.

COMMENT: We suggest making subsection (e) parallel to subsection (d) by requiring that the eligibility agency also advise the parent of the dollar amount of income that will make them ineligible in the period between 12-month redeterminations. That is important because this figure will be higher than 235% of the FPIG.

(d) The eligibility agency shall explain that 235% of FPIG and the specific dollar figure are the highest annual income amounts permitted at the time of redetermination.

(e) ~~A family is ineligible at any time if its annual income exceeds 85% of the SMI. The eligibility agency shall explain that 85% of SMI 225% of FPLG and the specific dollar figure are the highest annual income amounts permitted in between redeterminations at the time of redetermination.~~

§ 3042.141. Domestic and other violence.

COMMENT: DHS should add to subsection (b) the "unfairly penalize" language from the federal Family Violence Option⁶ waiver standard to align child care regulations with TANF domestic violence regulations at 55 Pa Code Section 108.8. Over the years, we have found that the "unfairly penalize" prong of the waiver test comes into play at least as often as the other two prongs of the test. DHS should treat DV survivors who utilize subsidized child care in the same manner it treats survivors in the TANF program. Providing less protection to one group than the other is not acceptable.

As written, subsection (c)(4) omits language in current regulations that we think is still necessary. We presume this was done because of the new proposed provisions generally authorizing continued eligibility during the 12-month eligibility period which at first glance might seem to obviate the need for the language in question. But there is still a problem here for parents who lose work due to domestic violence within 6 months of their redetermination. Without the modification we recommend, those parents would no longer get the six months of protection they get under the current regulations.

(b) The eligibility agency may grant a waiver if compliance with a requirement of this chapter would ~~either make it more difficult for a family or household member to escape domestic violence; or place a family or household member at risk of domestic violence; or~~ unfairly penalize the individual or family member because of domestic violence.

(c) The following requirements of this chapter may not be waived:

(4) The minimum number of hours of work, education or training as specified in § 3042.33 (relating to work, education and training), ~~except for a parent or caretaker who meets the hours of work, education or training at the time of application. The parent or caretaker shall continue to participate in some but not all hours of work, education or training. This waiver shall continue until the next redetermination or for at least 183 days whichever is longer.~~

§ 3042.57. Waiting list.

COMMENT: It was our understanding based upon OCDEL training materials that "Babies born to families receiving subsidy" were to be placed on the prioritized waiting list. Subsection (b) does not appear to allow for that.

(b) If a parent or caretaker requests subsidized child care for an additional child following the date the family was initially determined eligible for subsidized child care, the eligibility agency shall place the additional child on the waiting list according to the date and time that the parent or caretaker requests care for the additional child.

§ 3042.132. Eligibility determination for Head Start.

⁶ The "FVO" is a key provision in the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996 that established the Temporary Assistance to Needy Families program.

COMMENT: It was our understanding based upon OCDEL training materials that Head Start and Early Head Start kids were to be placed on the prioritized waiting list. Subsection (4) does not appear to allow for that.

Upon program entry and continuation in the Head Start special eligibility program, a parent or caretaker shall meet the following conditions:

(4) Compliance with the waiting list conditions specified in § 3042.57 (relating to waiting list).

§ 3042.151. General notification requirements.

COMMENT: DHS should expand the period between notice and action on the case to 13 days, as it did with MA, SNAP, and TANF, in recognition of significant mailing delays. The same change should be made in various other regulations, as specified below.

(a) The eligibility agency shall notify the parent or caretaker in writing no later than ~~13~~ 10 calendar days prior to taking an action that affects the family's eligibility status for subsidized child care or a change in the amount of the family's subsidized child care benefit.

§ 3042.163. Subsidy continuation during the appeal process.

(a) Subsidy continues at the prior level until the Department hears the appeal and makes a final decision, if the parent or caretaker does the following:

(1) Files an appeal that is postmarked or received no later than ~~13~~ 10 calendar days after the date of the written notice.

§ 3042.164. Parent or caretaker rights and responsibilities regarding appeal.

(d) If the parent or caretaker wants subsidy to continue pending a hearing decision, subject to § 3042.163 (relating to subsidy continuation during the appeal process), the parent or caretaker shall submit a written appeal no later than ~~13~~ 10 calendar days following the date the written notice is postmarked or hand-delivered to the parent or caretaker by the eligibility agency.

§ 3042.165. Eligibility agency responsibilities regarding appeal.

(d) The eligibility agency may not take the proposed adverse action until ~~13~~ 10 calendar days following the date the written notice is postmarked or hand-delivered to the parent or caretaker and then only if the parent or caretaker has not filed an appeal.

(e) The eligibility agency may take the proposed adverse action before ~~13~~ 10 calendar days following the date a provider closes for financial difficulties or loss of certification or if funding is not available to continue subsidized care to the child.

§ 3042.173. Delaying recoupment.

(a) Recoupment shall be delayed until after a hearing decision, if the family files an appeal of the overpayment decision no later than ~~13~~ 10 calendar days after the date the written notice is postmarked or hand-delivered to the parent or caretaker by the eligibility agency.

§ 3042.155. Notice of adverse action.

COMMENT: Subsection (a) proposes to strip families of the right to an adverse action notice when the eligibility agency proposes to suspend or disrupt benefits or to increase the family's co-payment. This is a change from the current regulations with serious consequences for families. Except where the parent requests suspension of subsidy, the removal of advance notice protections for families raises due process concerns and is inconsistent with DHS notice requirements for TANF, SNAP, and MA. (See, for example, 55 PA Code Section 133.4(b)(1)(ii)).

(a) ~~Except where the parent or caretaker has requested suspension of subsidy, the eligibility agency shall send a notice to a parent or caretaker currently receiving subsidy when the eligibility agency proposes to terminate, suspend, or disrupt subsidy payment or to increase the family co-payment.~~

§ 3042.157. Notice confirming a change in benefits.

COMMENT: As argued above, we think that an adverse action notice should be used when the eligibility agency proposes to suspend or disrupt subsidy, as required in the current regs.

(a) ~~The eligibility agency shall, by written notice to the parent or caretaker, confirm a change in the parent's or caretaker's subsidized child care benefits when the change does not affect the family's eligibility. Changes in benefits include a change in the number of days or hours during which the child is enrolled and suspension of subsidy at the request of the parent or caretaker.~~
subsidy suspension and subsidy disruption.

§ 3042.158. Notice confirming a change in co-payment.

COMMENT: As argued above, this regulation would strip families of their due process right to an adverse action notice when the eligibility agency proposes to increase the family co-pay, as is required under current regulations.

(a) ~~The eligibility agency shall, by written notice to the parent or caretaker, confirm a decrease change in the family co-payment amount.~~

§ 3042.162. Discontinuation of subsidy during the appeal process.

COMMENT: We think this regulation could be improved by allowing for resumption of subsidy pending a hearing decision if the parent catches up on co-pays.

(b) ~~Subsidy is suspended pending a hearing decision if the parent or caretaker fails to make timely payment of the co-payment.~~

(c) ~~Subsidy will be reinstated pending the hearing decision if co-payments are brought up to date.~~

§ 3042.171. Overpayment.

COMMENT: We are concerned that there are many circumstances in which a parent might inadvertently fail to comply with one of the many subsidy rules in this chapter of regulations. We suggest that pursuit of a subsidy overpayment be limited to fraudulent receipt of benefits and intentional program violations.

We also believe that the possibility of incurring an overpayment, as provided in subsection (3), discourages parents with good faith claims from exercising their Constitutional right to file an appeal with subsidy continuing. We recommend that DHS provide for such overpayments to be waived if the appeal was filed in good faith.

The parent or caretaker may not be required to repay an overpayment except for an overpayment resulting from one of the following:

(1) Fraud.

(2) Intentional failure to comply with this chapter.

(3) Subsidy continuation pending an appeal when the parent or caretaker did not win the appeal, except where the appeal was filed in good faith.

§ 3042.176. Collection.

COMMENT: Given that child care overpayments, due to the cost of care, can be very large, it is not realistic to think that a one-time payment in full, as provided in subsection (b)(1)(i), is feasible for most CCW families. We recommend that the regulations also provide for a reasonable payment plan to be negotiated by the parent/caretaker and the Department/eligibility agency.

For the same reason, we recommend that DHS add to these proposed regulations a provision allowing the eligibility agency or the Department, except in cases where fraud has been determined, to waive collection of an overpayment if it finds that collection of the overpayment would cause significant financial hardship to the family.

(b) If the Department, eligibility agency or other entity identifies an overpayment unrelated to fraud, subject to repayment as specified in § 3042.171 (relating to overpayment), related to a family whose child continues to receive subsidized child care, the eligibility agency shall:

(1) Notify the parent or caretaker by a letter that a repayment is required, the amount of the repayment and the following repayment options:

(i) A one-time payment of the full amount owed or a reasonable payment plan has been agreed upon by the parent or caretaker and the eligibility agency or the Department.

(ii) A one-time partial payment and an increase in the co-payment to be paid until repayment is complete.

(iii) An increase in the co-payment until the repayment is complete.

(2) Automatically implement an increase to the co-payment until the repayment is complete when the parent or caretaker does not select an option as specified in paragraph (1) no later than 10 calendar days following the date of the letter.

(3) Notify the parent or caretaker by a second letter of failure to choose a repayment option as specified in paragraph (1), the amount of the increased co-payment and the number of weeks the increased co-payment will continue.

(c) Except in cases where fraud has been determined, the eligibility agency or the Department may waive collection of an overpayment if it finds that collection of the overpayment would cause significant financial hardship to the family.

(ed) When the Office of Inspector General has determined fraud in an active case, the eligibility agency shall determine collection methods in conjunction with the Office of Inspector General.

§ 3042.177. Co-payment increase related to overpayment.

COMMENT: As argued above, this regulation would strip families of their due process right to an adverse action notice when the eligibility agency proposes to increase the family co-pay, as is required under current regulations and due process.

(c) The eligibility agency shall issue a written notice of adverse action before implementation of an increase in the co-payment.

RECOMMENDED STATEMENT OF POLICY

COMMENT: DHS Hearings and Appeals regulations at 55 Pa. Code Chapter 275.5 includes a Statement of Policy implementing the Commonwealth Court's decision in *Juras v. DPW*. The statement of policy instructs County Assistance Offices (CAOs) and other administering agencies to settle cases in which the agency denied or terminated assistance based upon the client's failure to provide verification of eligibility; the client files a timely appeal; and the client, at or before the hearing, provides the CAO with verification establishing her eligibility for the period of time at issue in the appeal. This policy provides for efficient settlement of appeals and has averted countless unnecessary hearings over the decades it has been in effect.

Chapter 275, including this Statement of Policy, applies to the Child Care Works program and the eligibility agencies that administer it. Nevertheless, advocates for CCW clients have historically had a great deal of difficulty convincing eligibility agencies to comply with the *Juras* principle, meaning that appeals that should have been settled had to go to a hearing, causing unnecessary expenditure of time and energy by clients, their advocates, the eligibility agencies, and the Bureau of Hearings and Appeals.

To address this problem, OCDEL issued Policy Communiqué #08-03: "Clarifications Related to Appeal and Fair Hearing and the *Juras* Principle." Unfortunately, advocates have continued to experience problems with eligibility agencies refusing to follow the *Juras* Principle, as instructed by the Communiqué. We, therefore, recommend that DHS elevate the Communiqué to the level of a regulatory Statement of Policy and include it in these proposed. The following is a suggested Statement of Policy based largely on the content of the Communiqué.

STATEMENT OF POLICY

§ 3042.167 Settling appeals and paying retroactive benefits—statement of policy.

(a) This statement of policy provides a means for eligibility agencies to settle appeals in cases where verification provided to the eligibility agency subsequent to its adverse action on the case shows that

the appellant, in fact, met the substantive conditions of eligibility during the period of time at issue in the appeal. The question on appeal, therefore, is not whether the eligibility agency acted properly based upon the information then available, but whether the appellant was eligible for the period of time at issue based upon evidence of eligibility the client is able to provide at or before the hearing.

(b) When a client files a timely appeal from an adverse action, the eligibility agency shall determine whether the appellant subsequently provided acceptable verification of eligibility relating back to the effective date of the denial or adverse action. If this requirement is met, the eligibility agency shall restore benefits retroactive to the effective date of termination, reduction or suspension of benefits. In the case of a denial of assistance, benefits will be restored retroactive to the date a signed application was submitted.

(c) If the verification subsequently provided by the appellant does not relate all the way back to the effective date of adverse action, but does establish eligibility as of a later date, the eligibility shall restore assistance to the date on which the eligibility factor at issue in the appeal was met.

EXAMPLE #1:

Mary Jones was sent a Notice of Adverse Action dated January 7, 2020, advising her that her subsidy would be terminated effective January 20, 2020, based upon her failure to provide verification of her employment income. On January 25, 2020, Ms. Jones filed a timely appeal. On February 4, 2020, prior to the hearing, Ms. Jones provided the eligibility agency with acceptable verification of her employment income dating back to January 7, 2020, and establishing her continued eligibility for subsidy. Since the verification established that Ms. Jones was eligible for subsidy as of the date subsidy was terminated, the eligibility agency must rescind its January 7, 2020, termination action and restore benefits retroactive to January 20, 2020. In this case, the verification provided by Ms. Jones subsequent to the closing action proved her eligibility for the period of time at issue in the appeal.

EXAMPLE #2:

Julia Smith submitted income verification during her redetermination that indicated she was receiving overtime pay and the addition of the overtime pay caused the family to be over the income limit. The eligibility agency spoke with Ms. Smith about the overtime pay. Ms. Smith stated she continued to receive overtime pay but did not know for how much longer. The eligibility agency explained that the family was over the income limit and generated a Notice of Adverse Action dated January 7, 2020, advising Ms. Smith that her subsidy would be terminated effective January 20, 2020. On January 25, 2020, Ms. Smith filed a timely appeal. On February 11, 2020, prior to the hearing, Ms. Smith provided the eligibility agency with verification that her overtime ended February 4, 2020, and establishing eligibility for subsidy. The verification did not establish that Ms. Smith was eligible for subsidy as of the date subsidy was terminated. However, the verification did establish eligibility as of February 4, 2020. Therefore, the eligibility agency must restore benefits retroactive to February 4, 2020, the date when Ms. Smith first met the eligibility condition at issue in the appeal.

EXHIBIT A

From: Mercadante, Karen <kmercadant@pa.gov>
Sent: Thursday, October 26, 2017 2:34 PM
To: Peter Zurflieh <pzurflieh@cjplaw.org>
Subject: RE: GED as training

Yes, I think we will. I didn't realize that the CCISs were not permitting parents over the age of 21 to enroll in GED classes. We need to clear this up for them.

From: Peter Zurflieh [<mailto:pzurflieh@cjplaw.org>]
Sent: Thursday, October 26, 2017 2:17 PM
To: Mercadante, Karen <kmercadant@pa.gov>
Subject: RE: GED as training

Thanks so much, Karen!! The client will be very excited about this.

Have you decided whether to do a policy clarification on this?

From: Mercadante, Karen [<mailto:kmercadant@pa.gov>]
Sent: Thursday, October 26, 2017 1:56 PM
To: Peter Zurflieh
Subject: RE: GED as training

Hi Peter, I apologize for not getting back to you sooner. I've been traveling and training the CCISs on the regulations.

I spoke with the subsidy coordinator who was aware of this case. I believe Ms. A____ is eligible to receive child care while she attends her GED classes. The coordinator will contact the ____ CCIS to advise them to contact Ms. A____ and enroll her children for the hours she is in class.

Thanks for bringing this to our attention. Enjoy the rest of your afternoon.

From: Peter Zurflieh [<mailto:pzurflieh@cjplaw.org>]
Sent: Wednesday, October 18, 2017 12:44 PM
To: Mercadante, Karen <kmercadant@pa.gov>
Subject: GED as training

Karen

It was very helpful, as always, talking to you this morning. Thanks for taking the time to delve into this interesting question raised by the Berks County case. The name of the client in question is RA. Her CAO case record # is _____. R is in Community College. She works 20-30 hours per week and is also getting GED instruction at CC. The CC is a certified adult education provider overseen by PDE. The question we discussed is whether R can get child care coverage through the CCIS program for the hours

she attends GED in addition to the hours she works. This seems to hinge on the question of whether the definition of the term, "training," includes or was intended to include GED instruction.

* * * * *

Peter