Introduction

The Empire Justice Center is a not for profit law firm that provides training, litigation support and policy analysis to legal aid and legal services offices across New York State. In addition, we assist hundreds of community groups that serve low-income clients, and also represent low-income clients in individual matters as well as class action litigation. We have offices in Rochester, Albany, White Plains and Central Islip.

Our work focuses on a wide range of civil issues facing low income New Yorkers. In the public benefits area a large part of our work is devoted to subsidized child care. We have written many reports on the state of child care in New York State, the most recent of which, *Mending the Patchwork* ([http://onlineresources.wnyc.net/EJC/Reports/MendingPatchwork.pdf](http://onlineresources.wnyc.net/EJC/Reports/MendingPatchwork.pdf)), outlines the broad county by county variations in the administration of child care across the state. In addition, in conjunction with the National Center for Law and Economic Justice, we obtained class relief in a case called *Torres v. Blass* *(USDC EDNY 12-cv-3603(JS)(WDW))*, resulting in clear and comprehensive notices for recipients of child care subsidies when social services districts lower eligibility levels. In *Williams v. Carrion*, we represent a statewide class of low income working parents in New York who pay more than 10% of their income as a parent copayment, challenging New York’s inequitable parent share regulation as a violation of state law and equal protection.
The Child Care Council of Suffolk and the Child Care Council of Nassau are not for profit agencies on Long Island that work with parents, providers and businesses so that every child can be in a quality child care program. They provide child care counseling and referrals to families, professional development and technical assistance to active and potential providers, and services to employers interested in the child care needs of employee's families. The Councils also serve as an informational resource and public voice for child care issues facing Long Island’s diverse communities.

I. General Comments

We are especially appreciative of the emphasis in the proposed regulations on family friendly policies and this section will be the focus of our comments. Before we address particulars, we have four overarching comments regarding these proposed regulations:

- Cost
- The need for data on unmet need
- The need for certain rules to be a condition of federal funding
- The need for regulations related to language access

Additional costs

These proposed regulations will impose significant additional costs for states, communities, and child care providers. Our state agency, the Office of Children and Family Services (OCFS), has estimated that it will cost between $72 million and $113 million to implement these regulations and that if the cost of implementation is paid from subsidy dollars, it will result in case closings of between 21,000 and 51,000 active child care slots.\(^1\) The proposed regulations require use of fingerprints for state checks of criminal history records and use of fingerprints for Federal Bureau of Investigation (FBI) criminal history records, as well as checks of the child abuse and neglect records and the sex offender registry. Proposed regulation 98.41(a)(2)(i).

New York already performs criminal history checks with our state Division of Criminal Justice Services for any operator, employee or volunteer in a day care center, group family child care or family child care home. Each fingerprint based criminal background checks costs New York $85.75 per scan, and does not include an FBI check.\(^2\) The proposed regulations would require that a large segment of New York’s legally exempt providers be included in

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\(^1\) E-mail from Janice Molnar, Director, Bureau of Child Care Services, New York State Office of Children and Family Services to Susan Antos, dated 8/2/13.

\(^2\) E-mail from Jim Hart, Bureau of Child Care Services, New York State Office of Children and Family Services to Susan Antos, dated 7/29/13.
these criminal history checks. Nearly 40% of child care in New York is provided by legally exempt providers.\textsuperscript{3} Although some legally exempt providers could be exempt from these background checks because they are relatives, it is clear that additional federal financial investments are critical to the implementation of these regulations.

We support enhanced quality initiatives, but not at the cost of losing tens of thousands of slots. Low income working families in New York already struggle as counties lower eligibility levels because of insufficient funding for all children who need care. For example:

- More than one-third of New York’s 58 Social Services Districts have lowered eligibility levels below 200% of the federal poverty level, the state’s official eligibility standard.\textsuperscript{4}
- Seneca County has lowered eligibility by half, to 100% of the federal poverty level for a family of three.
- Niagara County only serves those at or below 120% of the federal poverty level.
- Albany, Dutchess and Essex Counties only serve families at or below 125% of poverty.
- Although New York City has technically retained its eligibility levels at 200% of poverty, data shows that few families over 135% of poverty are being served.
- Six social services districts have lowered eligibility to 150%: Fulton, Oneida, Ontario, Orange, Saratoga, Schenectady and Suffolk.

If New York is required to divert subsidy funds to comply with these new regulations, we will have less funding available to provide child care assistance to families—and those families who lose or are denied child care assistance may end up leaving work or using poor-quality care because they cannot afford better options.

\textit{TANF work rules and effective utilization of child care funding}

In New York State, over half of the families in receipt of child care subsidies are recipients of public assistance. In 2010, there were an average of 120,625 children receiving subsidies in New York State and 54%, or 65,472,

\textsuperscript{3} Children’s age and modality of care of children receiving subsidized child care in NYS FFY2008. Data source: ACF-801 sample data.
were public assistance recipients. Because federal law provides a lifetime work exemption of only one year for mothers on public assistance, in New York, parents who receive public assistance are exempt from work rules only for the first three months after they give birth. They then are required to participate in job search and workfare programs and their children are cared for by providers paid for with CCDF funds. These parents are assessed no copayment, and utilize a significant portion of CCDF funding since infant care is the most expensive care. Although the rationale for the short exemption from the work rules is the importance of attachment to the workforce, the cruel reality is that if these parents actually find work, as indicated above, there may be no money to support a child care subsidy to allow their continued employment after they leave public assistance.

We urge the Office of Child Care (OCC) to assess the interplay between the welfare work rules and how well the CCBG is serving working low-income families. What good are job search and work experience programs if there is not funding to support work when TANF recipients with young children are successful in finding a job and leave the welfare rolls? We know from economic studies, including the self-sufficiency standard (http://www.selfsufficiencystandard.org) that working parents need a wage of at least $20 per hour (more in New York City and Long Island) to meet basic expenses for shelter, food, transportation and child care.

The Self-Sufficiency Standard for Select New York Counties, 2010
Family Type: One Adult, One Preschooler, and One School-age Child

<table>
<thead>
<tr>
<th></th>
<th>albany COUNTY</th>
<th>ALLEGANY COUNTY</th>
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<th>MONROE COUNTY</th>
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In New York State, if parents with children under the age of two were exempted from the TANF work rules, over $44 million would be freed to support low income working families with real jobs. This number assumes that 40% of parents with children under the age of two would opt not to take the exemption because they had a good job or a meaningful training opportunity that offered them a career path.

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5 Average number of children per month receiving subsidized child care (NYS CCBG and ARRA) in 2009 and 2010 per district per case type (Temporary Assistance and non-TA). Data sources: NYC ACF-801 monthly files, WRTS Rest of State child care payments.

6 42 USC 607(b)(5).


8 Cite to how we calculated this.
When child care funding is inadequate, families leaving welfare for work are being set up for failure in a system that is putting their children at risk. We must engage in a comprehensive analysis of the child care needs of low income workers who find jobs and leave TANF. If we cannot provide child care subsidies until welfare leavers earn a self-sufficiency wage, then we need to examine our welfare to work strategies. We urge the OCC to work within the larger structure of the United States Department of Health and Human Services to examine this issue and develop policies that provide continuity of care and the subsidies to support that care for the children of working parents.

**Data**

The OCC maintains an incredible array of helpful data which is accessible on its web page. What is not measured, however, is how many eligible working families need child care assistance, but remain unserved. The regulations should be amended to require more data from states to determine:

- How many families under the state’s chosen eligibility level are denied or turned away at application because of lack of funds;
- How many counties/states have “closed intake” to new applications because they have run out of funds?
- How many eligible applicants were turned away because intake was closed?

This information is necessary to establish the parameter of funding allocations, and is helpful planning for meeting the needs of working families, children and child care providers.

**Limited English Proficiency**

The regulations should also guide states on their obligations to applicants and recipients of child care services, as well as providers who have limited English proficiency – particularly as to when notices and applications must be provided in languages other than English and when interpretation services must be offered. The Supplemental Nutrition Assistance Program (SNAP) regulations provide a model by clearly delineating the obligations that administering agencies have with respect to providing materials in appropriate languages and interpreters. See 7 CFR 274.4(b). In light of Executive Order 13166 (http://onlineresources.wnylc.net/pb/orcdocs/LARC_Resources/EO13166/EO13166lep.htm), and the 2013 language access plan of the United States Department of Health and Human Services (HHS) (http://www.hhs.gov/open/execorders/2013-hhs-language-access-plan.pdf), these proposed regulations should set forth rules regarding the obligations of states to provide translated documents and interpreters.
Accountability

As we set forth in more detail below, in some areas, such as advance written notice, the time limit for making eligibility determinations and the definition of affordable copayments, OCC should impose parameters on state policy and make that a condition of funding. Alternatively, OCC could provide financial incentives to states that adopt certain policies. The Child Care and Development Fund provides $5 billion in funding for child care and states transfer an additional $1.5 billion of TANF funds into the child care block grant. Another $3.5 million of TANF funds is spent directly on child care, which results in over $10 billion in federal dollars being spent on child care every year. The federal government has a responsibility to assure that this funding is spent in a way that assures affordability, access and due process. It can do this by making the implementation of the rules set forth below a condition of receiving federal funds.

II. Comments on particular provisions:

98.16(b(2): Plan amendments – advance written notice to parents and providers

We strongly support the proposed regulation which would require lead agencies to provide advance written notice to affected parties (i.e. parents and child care providers) when there is a substantial change in income eligibility, payment rates or sliding fee scales. We suggest that this regulation have more specificity for the reasons set for below. Particularly, we recommend that if individualized notice is provided less than 30 days in advance of a proposed change, then public notice must be given at least 60 days in advance in addition to individualized notice. Additionally, we recommend that the regulation provide specific guidance as to what information is required in the notice. Finally, we recommend that these advance written notice requirements be a condition of receiving federal child care funding.

Advance written notice to individual recipients prior to adverse action is guaranteed by concepts of due process. Goldberg v. Kelly, 397 US 254 (1970). New York State has due process requirements in regulation for all public assistance benefits, including child care assistance, requiring that a notice of adverse action be mailed at least 10 days in advance. 18 NYCRR § 358-2.23. To the extent that any state does not require individualized notice, they are violating precepts of fundamental due process and should be required to do so.

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A notice period of 10 days may be adequate in cases where the parent has had an increase in income or has reported some other change in circumstances, since the parent is likely to expect that an increase in income will affect eligibility or copayment amount. However, where the state or county lowers eligibility levels or increases copayments, parents may be completely blindsided and will need sufficient time to find an alternative work plan or find another affordable provider to watch their children while they work.

In New York, the 10 days’ notice to parents is measured from the date of mailing, meaning that when parents learn that a social services district is going to lower eligibility, there is little practical time for parent to plan or for providers to fill unexpected vacant slots in their program. Many families quit their jobs and/or place their children in unsafe child care settings, due to lack of time to adjust to the change.

Pending legislation in New York provides a good model for ways that states could meet a 60 day public notice requirement that would complement a shorter individualized notice. The New York State Legislature just passed a bill (A. 3498-a/S.5743, available at: http://assembly.state.ny.us/leg/?default_fld=&bn=A03498&term=&Summary=Y&Actions=Y&Votes=Y&Memo=Y) that if signed by the Governor, will require local social services districts to notify New York’s Office of Children and Family Services at least 60 days prior to a proposed change in eligibility levels or increase in parental co-payment for child care assistance. The OFCS, will in turn, post the information on its website within 5 days of receiving the information and will notify all child care resource and referral organizations, licensed, registered and legally exempt child care providers, and the unions representing them, within 20 days by email or by regular mail. In turn, child care providers are asked to post the proposed changes within their place of business and their websites, to inform parents of the impending change. New York’s 60 day notice provision, if enacted, will allow both child care providers and parents to make the necessary adjustments to their schedules, arrange for alternative transportation needs, adjust staffing levels and complete any other required changes.

We recommend that the proposed regulations specifically require states to provide both an advance individualized notice period of 30 days and an extended public notice period of at least 60 days, if individualized notice is less than 10 days. We also recommend that implementing these time frames be a condition of receipt of federal funding.

As an additional precaution against unnecessary disruption in care when parents are faced with sudden changes in eligibility levels, the regulations should provide that where a state lowers eligibility levels, written notices to parents and child care providers should contain:
• The numerical values of the new eligibility levels for the household size of the affected family
• The income of the parent receiving the notice
• The methodology used by the local district to compute the parent income.

In *Torres v. Blass*, which was brought when Suffolk County, New York lowered eligibility to 100% of poverty, the plaintiffs consisted of parents who were still eligible even under the lower standard but who had received a discontinuance because of either agency error or because the parent had not notified the agency when their income had decreased. The United States District Court for the Eastern District of New York directed that notices in Suffolk County contain this information and subsequently our state agency, OCFS, issued a directive requiring all social services districts to provide this detailed information. [Link](http://ocfs.ny.gov/main/policies/external/OCFS_2013/LCMs/13-OCFS-LCM-04%20Revised%20Client%20Notification%20Forms%20for%20Child%20Care%20Subsidy%20(Rev%20%20April%202018%202013).pdf)

98.16(g) – Job search

Recent studies have documented the adverse effect of parental job loss on the academic achievement of children.\(^\text{10}\) Parents with a recent attachment to the workforce have a strong motivation to maintain their standard of living to maintain their family well-being. We therefore strongly support the requirement in the proposed regulation that the definition of “working” include a period of job search. We recommend that the regulations require that the definition of “working” include a period of job search of at least six months or alternatively, provide financial incentives to states that adopt this definition.

Allowing states to determine the length of the job search will certainly lead to inconsistent policies across the country. This is illustrated by the current practice in New York State which permits, but does not require, counties to use child care block grant funds for job search for up to 6 months. Nearly half of our 58 social services districts (including New York City where over half of children receiving subsidies reside) have not adopted job search as an option at all, and of the counties that have adopted the option, many unreasonably limit the hours or period of time that child care is available (two week limit, three week limit, once per lifetime, no more than 5 hours per week, or only for recipients of public assistance). Only 8 districts have adopted the 6 month option with no limitations.

98.16 (k), 98.42 and 98.43 - Affordable Copayments, Sliding Fee Scales and Equal Access

We support the expanded authority of states to waive parent contributions for families meeting certain criteria. We thank you for making clear commentary to the regulations that affordable copayments are a key element in assuring equal access (78 Fed. Reg at 29472). We also strongly support the requirement that lead agencies must include a description in their plan describing how copayments are affordable and that lead agencies may not use cost or price of care as a factor in setting copayment amounts.

We urge OCC to go further and define affordability in the regulations, setting upper limits on what is an affordable copayment. In the preamble to the 1998 federal child care regulations, this agency recommended that to be considered affordable, the “appropriate upper limit” for parental copayments is ten percent of household income (63 Fed Reg 39960-39961(1998)). We urge OCC to include this upper limit as a regulation and a condition of receiving CCDF funding. Such a provision would provide relief to many working families in New York State, where the statutory eligibility level is 200% of poverty, and families in some counties at the upper end of the eligibility scale have parent fees that consume 17.5% of their income, while families of the same size and income in other counties pay no more than 5% of their income. This is because the counties have chosen different copayment multipliers. In counties where pilot programs have expanded eligibility to 275% of poverty (approaching state median income), participation is often low because copayments can reach 22.3% percent of parental income. One of our clients had a copayment that exceeded her cost of care!! The chart appended at the end of these comments illustrate the broad range of copayments assessed against families in New York State based on the multiplier chosen by the county in which they live.

98.20(b). One-year eligibility certification period

We support the regulatory amendment that allows states to adopt a one-year eligibility period for families receiving child care assistance, with an option for states to permit families who initially meet the eligibility criteria to remain eligible for the full year without reporting changes (even if the family’s circumstances relevant to eligibility change during that one-year period). This provision will ease burdens on parents, who often do not have time to repeatedly recertify their continued eligibility for child care assistance while balancing work and family demands. It helps limit disruptions in care for children, who greatly benefit from stability in their child care arrangements. It also reduces administrative burdens and administrative costs for states as well. Finally, it allows for greater coordination between child care assistance programs and other programs providing support to families and children.
We urge OCC to make the regulations very clear, that if this provision is adopted, changes in income during the eligibility period will not result in overpayments subject to recovery. If that is not the intention, then OCC should be very clear what the rules are. Does OCC intend to make this similar to simplified SNAP reporting, where changes in income will not affect eligibility or copayment amounts unless income goes over a certain threshold? 7 CFR 273.12(a) (5). If that is what is envisioned, we recommend that the regulations require that states that adopt one year certification be required to set forth in their state plan what that threshold will be and that they provide recipients with the dollar amount of the threshold that will trigger reporting for their household size.

Flexibility in reporting is important because the income of low income workers is often hourly and subject to fluctuation. It is unrealistic to expect that every change in income will be reported to the social services district. In at least one county in New York State, parents who are found to have failed to report changes in income “immediately” are bullied by fraud investigators and threatened, not only with overpayments but with criminal prosecution. When there is an alleged failure to report a change in income, the parents are summoned by the fraud investigator. The investigator relies on a document that applicants are required to countersign when they apply, warning them that they must “immediately” report any changes that would affect eligibility and that failure to do so will result in criminal prosecution. Even non-English speakers receive these notices - in English. It would be a welcome supplement to family-friendly policies if OCC were to allow continuing eligibility, despite reasonable changes in income. Additionally, the regulations should issue specific reminders to states reminding them of their obligations under Executive Order 13166: Improving Access to Services for Persons with Limited English Proficiency, which requires each federal agency to “work to ensure that recipients of Federal financial assistance… provide meaningful access to their LEP applicants and beneficiaries.” http://www.usdoj.gov/crt/cor/Pubs/eolep.htm

The proposed regulations do require state plans to “set forth the requirements for families to report changes in circumstances that may impact eligibility.” If it is the intent of OCC that a family can experience some changes in income without affecting subsidy eligibility, the regulations should provide guidance with examples. Additionally, the regulations should require that the rules and consequences be set forth in the state plan.

98.20(d). Developmental needs of children

We strongly support this provision which provides that states are not restricted to limiting authorized child care services to the work, educational or training schedule of the parent. In New York State, we have had disputes over whether students attending school can use child care while they do homework and parents have been charged with overpayments for keeping their children in
care while they go to doctor’s appointments after work. Too much time is spent comparing school and work records to hours of attendance and computing overpayments to parents when a more flexible policy would inure to the benefit of both the child and the parent.

Because the language of this regulation is permissive, OCC should monitor whether this voluntary language results in any change and actively monitor and highlight states that take advantage of this option so that other states can similarly model their programs.

98.30(h). Parental choice and high-quality care

We support the proposed language indicating that ensuring parental choice does not preclude providing information and incentives to encourage the selection of high-quality child care. We also believe that this is an area where OCC should work closely with the section of HHS that develops TANF policies, because it has been the experience of welfare applicants and recipients in some counties that they are placed in work programs and job search shortly after submitting their application and are told to find their own child care with little or no guidance.

Low income parents themselves are often not happy with the quality of care that they can find in such a short time. They are pressured to approach neighbors and relatives by public assistance examiners. In one of our cases, our client was sanctioned for refusing to go to a job search program, as the agency insisted that her brother was available as a child care provider. She did not want to tell the agency that her brother had a drug abuse problem.

At one time, New York State had a statute that required that all parents must be provided two choices of regulated care before a parent could be required to participate in a work program. This statute was repealed as part of a welfare reform package, but it assured that all parents were aware of the availability of regulated care for their children. Parents were free to determine their provider and could choose exempt care, but the law assured that all parents had the option to choose regulated care. We would like to see the federal regulations impose such a requirement to provide all possible assistance to TANF parents and their young children.

98.41(a)(2)(i). Health and safety requirements—background checks

We support the proposal to strengthen background checks for child care providers to ensure children’s well-being and safety in child care. However, we agree with the National Women’s Law Center that the final rule should make clear that states must provide appropriate protections for child care providers, including the right to appeal findings, to ensure that they are not permanently
penalized as the result of inaccurate information. While waiting for the results, providers should be permitted to work under the supervision of an employee who has been cleared by a background check. In addition, the preamble to the final regulations should emphasize the importance of timely processing of background checks and encourage Lead Agencies to work closely with state entities responsible for such checks to ensure that the process is as efficient as possible. States should also be required to provide up to three months retroactive pay for family child care and license-exempt providers that care for children while waiting for the background checks to be completed and are then cleared.

Thank you for the opportunity to comment on these regulations.

Very truly yours,

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Empire Justice Center

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### Child Care Copayments as a Percentage of Household Income 2013-14

#### Family size = 1*

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<th>Eligibility</th>
<th>FPL (100%)</th>
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<th>140%</th>
<th>150%</th>
<th>167%</th>
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*Child only families are those where the care giver is not financially responsible for the child, such as if a child lives with a grandparent who has custody or guardianship but has not adopted the child.

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### Family size = 2

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<td>4.0%</td>
<td>$1,039.17</td>
<td>4.3%</td>
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<td>0.0%</td>
<td>$581.63</td>
<td>3.0%</td>
<td>$930.60</td>
<td>4.3%</td>
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<td>5.0%</td>
<td>$1,551.00</td>
<td>7.1%</td>
</tr>
<tr>
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<td>0.0%</td>
<td>$775.50</td>
<td>4.0%</td>
<td>$1,240.80</td>
<td>5.7%</td>
<td>$1,551.00</td>
<td>7.1%</td>
<td>$2,078.34</td>
<td>8.3%</td>
</tr>
<tr>
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<td>0.0%</td>
<td>$969.38</td>
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<td>$1,551.00</td>
<td>7.1%</td>
<td>$1,924.58</td>
<td>8.3%</td>
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<td>$1,861.20</td>
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<td>$2,326.50</td>
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<td>$1,357.13</td>
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<td>$2,171.40</td>
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<td>$2,908.13</td>
<td>11.7%</td>
<td>$5,026.88</td>
<td>15.0%</td>
</tr>
</tbody>
</table>

*Child only families are those where the care giver is not financially responsible for the child, such as if a child lives with a grandparent who has custody or guardianship but has not adopted the child.