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Alejandra Rebolledo Rea
Early Childhood Education and Care Department
P.O. Drawer 5619
Santa Fe, NM 87502-5169

Via Email: ECECD-ECS-PublicComment@state.nm.us

Re: 8.15.2 NMAC Public Comment

Ms. Rebolledo Rea:

Please accept the following comments on the proposed revisions to 8.15.2 NMAC regarding the Early Childhood Education and Care Department's (the Department) child care assistance program.

The undersigned organizations have extensive experience working with families in New Mexico to ensure they have access to opportunities that improve the lives of children, particularly low-income families that face the largest barriers. We also have first-hand experience assisting families in accessing child care assistance in New Mexico. We have seen the benefits to families who are able to access affordable child care and are aware of administrative barriers that prevent eligible families from receiving assistance.

We applaud the Department's regulatory response to the COVID -19 pandemic. The April 7, 2020 emergency rule changes that allowed the secretary to waive co-payments and the work or education requirement during a public health emergency were meaningful steps to provide child care access during a difficult time and reach the Governor's goal of universal child care. We thank the Department for promulgating these emergency rules and for making these emergency provisions a permanent part of the child care regulations.

Additionally, we support the Department's proposed rules which will increase access to this dramatically underutilized, but effective program. While we support the proposed rules, we urge the Department to take the additional steps outlined below and promulgate a final rule which incorporates our specific suggestions.

Section 8.15.2.13(H) NMAC – We support eliminating child support enforcement requirements

We applaud the Department's decision to eliminate the assignment of child support enforcement rights as a condition of receipting child support enforcement. Tying child care assistance with child support enforcement prevents many families from enrolling and remaining enrolled in the program, and assigning rights is often not be in the best interests of the custodial parent and child. Federal law permits states to set their own policy regarding child support enforcement in the child care assistance program, and 27 states do not require child support enforcement to participate in the child care

program.¹ We thank the Department for its proposal to eliminate this burdensome administrative process that blocks access to benefits.

Section 8.15.2.11(C)(3), (5), and (6) NMAC – We support the elimination of certain income for eligibility and co-payment calculation.

The Department’s proposal regarding which sources of income are counted for eligibility and copayment calculations are positive changes. The elimination of various sources of income that is not derived from employment will increase access and lower co-payments. One purpose of the Child Care Development Block Grant Act (“CDBG Act”) is to “increase the number and percentage of low-income children in high-quality child care settings.”² The elimination of some sources of income from the co-payment calculations is consistent with this purpose and is a step in the right direction toward the HHS recommendation to cap co-pays at 7 percent of family income.³

Section 8.15.2.10(A) NMAC – We Support Eliminating the In-person Application Requirement

We commend the Department’s decision to eliminate the in-person application requirement. Even before the pandemic made in-person interactions a public health problem, the in-person application requirement presented a barrier to families in accessing child care assistance. Many child care offices are not located conveniently to public transportation routes. This made it difficult for many families to travel to child care field offices and apply in-person. Additionally, the in-person application requirement forced parents to take off from work just to apply for care. The elimination of this requirement will increase program access.

Section 8.15.2.11(E) NMAC – Rename this section “Citizenship and Eligible Immigration Status”

A child’s citizenship *or eligible immigration status* determines eligibility to receive child care.⁴ This is because noncitizen children in eligible immigration statuses can receive child care.⁵ Therefore, we support the Department’s proposed amendments to 8.15.2.11(E) NMAC which incorporate the HHS definition of qualified immigrants.

However, the title of this section, “Citizenship,” implies that United States citizenship is required for receipt of child care assistance. In adopting its final rule, we urge the Department to retitle this section to read “Citizenship and Eligible Immigration Status.”

Section 8.15.2.16(A) NMAC – We Support eliminating the mid-certification checks.

¹ The states that do not require child support enforcement in their child care assistance programs are Alabama, Alaska, Arizona, California, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Louisiana, Massachusetts, Missouri, New Hampshire, New Jersey, Nevada, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Washington, and Wyoming.

² Sec. 658A Child Care Development Block Grant Act

³ Child Care and Development Fund (CCDF) Program, Preamble, 81 Fed. Reg. 67,438 (Nov. 29, 2016)

⁴ <https://www.federalregister.gov/documents/2016/09/30/2016-22986/child-care-and-development-fund-ccdf-program>

⁵ 45 C.F.R. § 98.20(c)

⁶ 8 U.S.C. § 1641 (Defining who is a “qualified alien” eligible to receive public benefits and listing eligible immigration statuses)

Federal regulations require that child care assistance contracts have a duration of at least 12 months and that agencies “shall re-determine a child’s eligibility for child care services no sooner than 12 months following the initial determination or most recent redetermination.”⁶ Therefore, we applaud the Department’s decision to eliminate the mid-certification communication in Section 8.15.2.16(A) NMAC. Since the Department contracts with clients for 12 months, the mid-certification communication is unnecessary and uses valuable department resources. Additionally, we thank the Department for amending Section 8.15.2.12 NMAC state that if a family meets the recertification requirements, the certification period will be for 12 months.

Section 8.15.2.11(C) NMAC – Add provisions that ensure grandparents are exempt from the work or education requirement and can receive child care assistance without having to apply for TANF.

The Department should make additional changes to ensure that children being raised by grandparents have access to care. The proposed regulations specify that only grandparents who are legal guardians must qualify under the program’s income limits and when they qualify, can have their co-payments waived. This is a positive change that we support. However, grandparents who are retired should not be subject to the work or educational requirements for child care. Current New Mexico law for the TANF cash assistance recognizes this and does not impose a work requirement on participants who are 60 or older.⁷ In its final regulation, we ask the Department to amend its rules to allow for waiving the work or educational requirement for grandparents raising grandchildren.

Additionally, when grandparents do work, their income should not be counted towards the eligibility limit. Again, the TANF cash assistance program also provides that grandparents can participate in that program regardless of income level.⁸ Current child care assistance regulations provide that TANF families are eligible for child care regardless of income level.⁹ However, we should not ask grandparents to apply for and participate in TANF to qualify for child care assistance. Instead, the Department should mirror the child care regulations to reflect the TANF program, and qualify children being raised by grandparents without regard to income.

Section 8.15.2.10(A) – Include all Verifications

We support the Department’s proposal to include documentation of TANF participation or eligibility and proof of incapacity in the verification list at Section 8.15.2.10 (A) NMAC. However, the regulations still do not contain a full list. The Department requires custody documents and documentation of identification, and relationship in some instances. These requirements must be detailed in regulation.

Section 8.15.2.11(I) NMAC - We support Graduate Student Eligibility

The Department’s proposal to open eligibility to families in graduate school aligns with the purposes of the CDBG Act to provide access to children to quality child care and recognizes the

⁶ 45 C.F.R. § 98.21(a)

⁷ NMSA 1978 §27-2B-5(I)(2); 8.102.420.11(A)(1) NMAC

⁸ 8.102.400.11 NMAC

⁹ 8.15.2.9(A) NMAC

economic realities of parents who are furthering their educations. We support this proposal and thank the Department for addressing this issue.

Policies Impacting Family Eligibility and the State Rules Act

State law requires ECECD to comply with the administrative procedures in the State Rules Act, because it is an “agency” under the Act.¹⁰ The State Rules Act defines a “rule” as “any rule, regulation, or standard” that affects “one or more agencies besides the agency issuing the rule,” “persons not members or employees of the issuing agency,” or “persons served by the agency.”¹¹ Any policy that meets this definition of a rule must be promulgated into regulation.

Include the Income Calculation Formula in Regulations

Currently, the Department’s monthly income calculations are in the worker manual, but they are not promulgated into regulation. The calculations in the manual include a formula that considers how frequently a family receives their paychecks. Since this is not in regulation, a family has no way of knowing how their income is calculated or if the determination as to their income is correct. Without this information, families cannot accurately determine which income bracket they fall into when using the co-pay formula. Therefore, the Department must include the formula for calculating income based on different payday frequencies in its final regulations. This change is also required by the Court’s Order in the *Torres v. Jacobson* case, which states that the Department must include in regulations “how the Department calculates monthly family income to determine child care assistance eligibility.”¹²

All new material proposed above is within the scope of the proposed regulation

Provisions included in a final regulation must be “within the scope” of the proposed rule to be valid.¹³ In its final rulemaking, the Department can make all the changes suggested in these comments since the scope of the proposed regulations encompass our suggested amendments, and the proposed rules provided notice to the public of the scope of the rule changes made by the final rule.¹⁴

For example, the proposed rules include changes in how income is counted for eligibility and copayments. Including the income calculation formula in the final regulations falls within the scope of the proposed rules, since it shares subject matter with the proposed rules. The changes between the proposed and final rules would not change how the Department calculates the income of program participants. This change to the final rule also would not change the effect of the proposed rules since the Department is already using this formula to determine income. Additionally, since this calculation

¹⁰ NMSA 1978 §14-4-2(A)

¹¹ NMSA 1978 §14-4-2(F)

¹² Order ¶ 3(a)

¹³ 1.24.25.14(C) NMAC (“amendments to a proposed rule may fall outside the scope of the rulemaking based on the following factors: (1) any person affected by the adoption of the rule, if amended, could not have reasonably expected that the changes from the published proposed rule would affect that person’s interest; (2) subject matter of the amended rule or the issues determined by that rule are different from those in the published rule; or (3) effect of the adopted rule differs from the effect of the published proposed rule.”)

¹⁴ The purpose of the State Rules Act is to provide notice. *State v. Joyce* 1980-NMCA-086 ¶ 8.

affects people served by the Department, the State Rules Act mandates its inclusion within the child care regulations, and the Department must make the suggested change to comply with state law.¹⁵

Other Important Changes

We commend the Department for the following additional proposed changes to regulations that comply with the State Rules Act:

- Defining “demonstration of incapacity” and the provision for exempting eligibility requirements upon submission of a demonstration of incapacity.
- Adding an explanation of how it will calculate and consider fluctuations in earnings.
- Putting into regulation policy that overpayments will not be issued to a client except in cases of substantiated fraud.
- Clarifying that the Department issues 12-month contracts in most instances and eliminating the mid-certification communication requirement that wasted valuable Department resources and created confusion for clients about the length of their contracts.
- Amending Section 8.15.2.13(G) NMAC to allow for multiple ways to report the changes will provide convenience and transparency for participating families since the Department’s prior policy of requiring reporting of changes in writing was not promulgated into regulation and violated the State Rules Act.
- Including TANF diversionary payment clients in the priorities list in Section 8.15.2.9 NMAC. This makes the eligibility standard for TANF diversionary participants part of the regulations and brings the Department’s eligibility policy regarding this group into compliance with the State Rules Act.

Conclusion

We thank the Department for its commitment to making childcare more accessible and affordable for New Mexico’s families. While we support all the changes, we ask the Department to include our suggested amendments in the final rule including the income calculation formula, the changes to regulations affecting grandparents raising grandchildren, and the regulations listing verifications. All of these are discussed above.

Sincerely,

NM Center on Law and Poverty
Strong Families New Mexico
Save the Children Action Network (SCAN)
Youth Development, Inc. (YDI)
New Mexico Asian Family Center
Center for Civic Policy (CCP)
Ngage New Mexico
Lutheran Advocacy Ministry – New Mexico
New Mexico Conference of Churches
New Mexico Comunidades en Acción y de Fé (CAFé)
New Mexico Working Families Party

¹⁵ NMSA 1978 §14-4-2(F)