

Comments of the Independent Regulatory Review Commission



Department of Human Services Regulation #14-545 (IRRC #3275)

Subsidized Child Care Eligibility

January 13, 2021

We submit for your consideration the following comments on the proposed rulemaking published in the November 14, 2020 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (71 P.S. § 745.5b). Section 5.1(a) of the Regulatory Review Act (71 P.S. § 745.5a(a)) directs the Department of Human Services (Department) to respond to all comments received from us or any other source.

GENERAL PROVISIONS

1. Section 3042.3. Definitions. – Clarity and lack of ambiguity.

Family

Subparagraph (v) of the definition of “family” includes a child enrolled in post-secondary education. However, this subparagraph does not encompass other types of education and instruction included in the definition of “training.” For clarity, we recommend revising this definition to incorporate all types of training.

Fraud

The definition of “fraud” specifies an “intentional act of a parent or caretaker, **at the time of application or redetermination**, that results in obtaining, continuing or increasing child care subsidy for which the family is not eligible.” [Emphasis added.] Does a parent or caretaker commit fraud when income exceeding 85% of the state median income (SMI) is not reported during the eligibility period and a child continues to receive subsidized care? We ask the Department to explain in the Preamble to the final-form regulation if this is considered fraud and clarify the definition if needed.

Homelessness

The definition of “homelessness” refers only to children and youth. Throughout this chapter, the regulations regarding homelessness also apply to parents and caretakers. For clarity, we recommend revising this definition to include parents and caretakers.

Maternity or family leave

The definition of “maternity or family leave” incorporates by reference the definition of this term in the Family and Medical Leave Act of 1993. 29 U.S.C.A. §§ 2601 – 2654. The statute does not clearly define this term, rather it explains types of leave. We ask the Department to clarify the citation or define these types of leave.

This comment also applies to Sections 3042.19(c)(4) and 3042.143(a)(1) (relating to subsidy continuation; and leave periods at redetermination).

Period of presumptive eligibility

The definition of “period of presumptive eligibility” contains substantive provisions relating to the length of this temporary period and eligibility conditions. Section 2.11(e) of the *Pennsylvania Code & Bulletin Style Manual* states that substantive provisions may not be contained in a definition section. We ask the Department to move the substantive provisions of this definition to the body of the regulations.

This comment applies to the timeframes in the definitions of “prospective work, education or training” and “self-declaration.”

Training

Subparagraph (ii) of the definition of “training” includes examples of postsecondary educational programs. A commentator states that this definition “includes some, but not all forms of adult education, including the two most common” – the general educational development program and high school equivalency degree. Further, the definition includes “a **2-year or 4-year** postsecondary degree program.” [Emphasis added.] Is it necessary to specify the length of time of a postsecondary degree program? We ask the Department to clarify this subparagraph to include additional types of adult education and postsecondary study.

GENERAL BENEFITS

2. Section 3042.12. Parent choice. – Implementation procedures; Protection of the public health, safety and welfare.

Paragraph (4) provides for a “grandparent, great-grandparent, aunt, uncle or sibling of the child” who resides in a separate household to provide subsidized child care. The Preamble states that this “rulemaking supports this goal of ensuring quality of care by requiring that providers providing [Child Care and Development Fund]-funded services to children have background checks, receive basic training in health and safety and are monitored on a regular basis.” How does the Department ensure that relatives who are providing child care meet these standards? The Department should explain in the Preamble to the final-form regulation how it implements the goals of quality of care and how these procedures ensure the protection of the public health, safety and welfare.

3. Section 3042.14. Payment of provider charges. – Protection of the public health, safety and welfare; Reasonableness.

Subsection (h) prohibits “new subsidy enrollments at a provider for whom the Department has issued a revocation or refusal to renew.” As explained in the Preamble, this section does not allow new enrollments “when the Department determines the provider is not meeting health and safety requirements, and revokes or refuses to renew the provider's certificate of compliance.” The Department goes on to say that to “provide continued stability and support already established staff and child relationships, the Department will continue to pay for children who are currently enrolled at the time of the sanction.” We ask the Department to explain in the Preamble to the final-form regulation the reasonableness of this subsection and how it protects the public health, safety and welfare of children currently receiving care at these facilities. We will review the Department’s answer when determining if this regulation is in the public interest.

Further, several commentators suggest that enrollment should be prohibited at a facility when there is a current complaint inspection involving an act that puts children in harms way. We ask the Department to address this suggestion in the Preamble to the final-form regulation.

4. Section 3042.15. Subsidy limitations. – Fiscal or economic impact; Reasonableness of requirements, implementation procedures and timetables for compliance by the public and private sectors.

Subsection (c) states that a child whose parent or caretaker who is the operator of a child care facility is “not eligible to receive subsidized child care” when space is available at the facility to enroll the child. How does the Department determine that space is available for the child of an operator under capacity standards in Chapters 3270, 3280 and 3290 (relating to child care centers; group child care homes; and family child care homes)? A commentator expresses concern with this regulation, noting an employee who was denied subsidized child care. We ask the Department to explain in the Preamble to the final-form regulation how it will implement this section, how a facility will be economically impacted and the reasonableness of this requirement.

5. Section 3042.20. Subsidy suspension. – Clarity and lack of ambiguity; Implementation procedures; Possible conflict with or duplication of statutes or existing regulations.

Subsection (c) requires an eligibility agency to “terminate subsidy for **excessive unexplained absences** after the subsidy has been suspended for a minimum of 60 consecutive days.” [Emphasis added.] Under 45 CFR § 98.21(a)(5)(i)(A) (relating to eligibility determination processes), the Department is required to “define the number of unexplained absences that shall be considered excessive.” We ask the Department to explain in the Preamble to the final-form regulation how it will implement this provision. Further, we ask the Department to clarify this subsection to state the number of days it considers to be excessive to establish a standard that is predictable and enforceable.

ELIGIBILITY REQUIREMENTS

6. Section 3042.31. Financial eligibility. – Implementation procedures; Need.

Subsection (c) specifies that a family’s annual income may not exceed 235% of the Federal Poverty Income Guidelines (FPIG) or 85% of the SMI at redetermination. A commentator states that there is not an “option to continue subsidy for families whose income exceeds 235% of [the FPIG] at redetermination, except in the highly unlikely scenario that 85% of [the SMI] should drop to less than 235% of [the FPIG].” We ask the Department to address this concern in the Preamble to the final-form regulation. Further, we ask the Department to explain how it will implement these income limits and why it is necessary to include both the FPIG and SMI requirements in this subsection.

This comment also applies to Section 3042.97 (relating to use of the Federal Poverty Income Guidelines and State Median Income).

7. Section 3042.35. Immunization. – Clarity and lack of ambiguity; Possible conflict with or duplication of statutes or existing regulations; Protection of the public health, safety and welfare; Reasonableness of requirements, implementation procedures and timetables for compliance by the public and private sectors.

This section requires a child receiving subsidized child care to “be up-to-date with immunizations” unless the eligibility agency grants exceptions. We have the following concerns.

First, subsection (a) refers to immunizations recommended by the American Academy of Pediatrics. The child care facilities regulations in Sections 3270.131, 3280.131 and 3290.131 (relating to health information) cite immunization recommendations by the Advisory Committee on Immunization Practices (ACIP) of the Centers for Disease Control and Prevention, United States Department of Health and Human Services. For consistency and clarity, we recommend that the Department revise this subsection to refer to the ACIP.

Second, subsection (a) requires that “immunizations shall be provided as specified in [Sections] 3270.131, 3280.131 and 3290.131” for certified child care facilities. The exemptions for immunization requirements in this subsection appear to conflict with Sections 3270.131, 3280.131 and 3290.131, including reasons for exemptions, documentation and recordkeeping. This subsection should be revised to align with Sections 3270.131, 3280.131 and 3290.13 or the Department should explain why it is not necessary to do so.

Third, subsection (b) allows a “parent or caretaker **90 calendar days** to obtain immunizations for the child and **self-certify** that the child is up-to-date with immunizations or that the child is exempt from the immunization requirement.” [Emphasis added.] Under Sections 3270.131(e), 3280.131(e) and 3290.131(e), a “facility may not accept or retain an infant 2 months of age or older, a toddler or a preschool child at the facility for more than **60 days** following the first day of attendance at the facility unless the parent provides **written verification**” from a medical professional. [Emphasis added.] The timetables for compliance and documentation requirements in this subsection appear to conflict with those in Sections 3270.131, 3280.131 and

3290.131. We ask the Department to revise this subsection so that it aligns with the child care facility regulations and ensures the protection of the public health, safety and welfare, or explain in the Preamble to the final-form regulation why it is not necessary to do so.

8. Section 3042.37. Eligibility of households including a parent or caretaker with a disability. – Clarity and lack of ambiguity.

Treatment for a disability

Subsections (a)(2) and (b)(3) address parents and caretakers who need to attend treatment for a disability. Commentators state the need for child care for individuals who are in treatment programs, such as mental health services, and drug and alcohol treatment. Do these paragraphs apply to individuals in these treatment programs? We ask the Department to respond to these commentators in the Preamble to the final-form regulation and clarify the regulation if necessary.

Two-parent or two-caretaker family

Subsection (b) addresses a family with one parent or caretaker who is working and one parent or caretaker with a disability. This subsection does not address a family with two parents or caretakers with disabilities. We ask the Department to clarify this section by adding eligibility standards for families with two parents or caretakers with disabilities or explain in the Preamble to the final-form regulation why it is unnecessary to do so.

Further, under subsection (b), a two-parent or two-caretaker family may be eligible to receive subsidized child care if they meet **all** of the conditions in paragraphs (1) – (4). [Emphasis added.] Paragraph (4) prohibits a parent or caretaker from caring for a child under a court order or safety plan. Did the Department intend to require a court order or safety plan as a condition for eligibility? We ask the Department to explain in the Preamble to the final-form regulation the need for all four conditions and clarify this subsection if necessary.

ELIGIBILITY DETERMINATION

9. Section 3042.57. Waiting list. – Clarity and lack of ambiguity; Reasonableness of requirements, implementation procedures and timetables for compliance by the public and private sectors.

Subsection (c) states that a child shall be enrolled with an eligible child care provider within 30 days of notification that funding is available or will be declared ineligible for subsidy. This subsection provides that “[e]xceptions **may** apply with Departmental approval,” including “instances with circumstances that are beyond a family's control, such as . . . not being able to enroll a child in care until a spot opens at the only child care facility in the area.” [Emphasis added.] We have two questions. First, is 30 days a reasonable timeframe for a spot to be available at an eligible provider? Second, why is an exception based upon a circumstance outside of the parent or caretaker’s control a discretionary action? In addition, commentators state that this subsection does not consider parent choice as provided for in Section 3042.12 (relating to parent choice). The Department should explain in the Preamble to the final-form

regulation why the 30-day requirement is reasonable, how parental choice is accommodated and implementation procedures for granting exceptions. Further, the Department should clarify this subsection so that a child maintains eligibility when circumstances beyond a parent or caretaker's control prevent enrollment in child care.

This comment also applies to Section 3042.15(e) (relating to subsidy limitations).

SELF-CERTIFICATION AND VERIFICATION

10. Section 3042.63. Self-certification. – Clarity and lack of ambiguity; Possible conflict with or duplication of statutes or existing regulations.

Subsection (b)(4) allows a parent or caretaker to self-certify a child's immunization status. As explained in Comment # 7, the child care facility regulations in Sections 3270.131, 3280.131 and 3290.131 require written verification of immunizations from a medical professional. This paragraph appears to conflict with the documentation requirements in existing regulations. We ask the Department to clarify this paragraph to align with the child care facility regulations or explain in the Preamble to the final-form regulation why it is not necessary to do so.

11. Section 3042.70. Verification of inability to work due to a disability. – Clarity and lack of ambiguity.

This section explains verification of a disability in a two-parent or two-caretaker family. This section is cross-referenced in Section 3042.37(a)(1) (relating to eligibility of households including a parent or caretaker with a disability), regarding verification of a disability in a family with one parent or caretaker. To improve clarity, we ask the Department to consider revising this section to address the verification of disability for a parent or caretaker without specifying the size of the family.

ELIGIBILITY AGENCY RESPONSIBILITIES

12. Section 3042.86. Processing reported changes. – Implementation procedures; Reasonableness.

Subsection (b) requires a parent or caretaker to "report income in excess of 85% of the SMI no later than 10 calendar days following the date of the change." Under subsection (c), when a reported change "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." We have two questions. First, when determining that a family is no longer eligible, does the eligibility agency consider if the income is an irregular fluctuation or temporary increase that may not cause the parent or caretaker's annual income to exceed the limit as required under 45 CFR § 98.21(e)? Second, does the eligibility agency begin processing the termination as soon as the income change is reported? We ask the Department to explain in the Preamble to the final-form regulation the implementation procedures for these subsections and the reasonableness of the regulation. Further, the Department should consider revising subsection (b) to clarify how increases in income will be assessed.

WAIVERS AND PERIODS OF PRESUMPTIVE ELIGIBILITY

13. Section 3042.141. Domestic and other violence. – Clarity and lack of ambiguity; Implementation procedures.

This section provides for a 92-day waiver period of verification requirements and co-payment. However, this section does not address the redetermination process. We ask the Department to explain in the Preamble to the final-form regulation how this waiver is implemented and clarify this section as needed.

14. Section 3042.143. Leave periods at redetermination. – Clarity and lack of ambiguity.

Subsection (a) lists the circumstances under which an eligibility agency may grant a period of presumptive eligibility. Paragraph (3), which provides for a break in work, education or training, appears to conflict with the definition of “period of presumptive eligibility.” The definition requires a parent or caretaker to be experiencing homelessness or on leave approved by the Department with verified work to begin within 92 days. In the Preamble to the final-form regulation, we ask the Department to explain how this subsection meets the standard in the definition and clarify the regulations if necessary.

APPEAL AND HEARING PROCEDURES

15. Section 3042.163. Subsidy continuation during the appeal process. – Clarity and lack of ambiguity; Reasonableness of requirements, implementation procedures and timetables for compliance by the public and private sectors.

Subsection (a)(1) requires a parent or caretaker to file “an appeal that is postmarked **or received** no later than 10 calendar days after the date of the written notice.” [Emphasis added.] Does this language refer to the date a parent or caretaker hand delivers an appeal? We ask the Department to clarify this paragraph to establish a procedure that the parent or caretaker is able to comply with.

This comment also applies to Section 3042.166 (relating to hearing procedures).

16. Miscellaneous clarity.

- The reference to “subtitle” in the definition of “homelessness” in Section 3042.3 (relating to definitions) should be corrected to the appropriate division of the regulations.
- The reference to “subsection” in Section 3042.21(2) (relating to subsidy disruption) should be corrected to “section.”
- Section 3042.72 (relating to verification of child's incapability of caring for himself) should cross-reference Section 3042.11(d) (relating to provision of subsidized child care). [Emphasis added.]

- The cross-reference in Section 3042.98(a)(2) (relating to co-payment determination) to Section 3042.34(a) (relating to prospective work, education and training) appears to be incorrect.
- In Section 3042.112(a)(3) (relating to general requirements for former TANF families), “(a)” should be deleted in the cross-reference to Section 3042.12.
- The cross-reference in Section 3042.131(a) (relating to general provisions for Head Start) to subsection (d) appears to be incorrect.
- The cross-reference in Section 3042.161(1) (relating to appealable actions) to Section 3042.142(c) (relating to homelessness) appears to be incorrect.