Comments on Child Care and Development Fund (CCDF) Program Notice of Proposed Rulemaking (NPRM)

Office of Child Care
Administration for Children and Families
330 C Street SW
Washington, DC 20201
Attention: Office of Child Care Policy Division

Agency/Docket Number:
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The undersigned organizations are grateful for the opportunity to comment on proposed regulations to implement the Child Care and Development Block Grant (CCDBG) Act of 2014. CCDBG is a critical support for low-income families that can help parents get and keep a job while their children are in safe, nurturing settings that foster their learning and development. Provisions in the bipartisan reauthorization offer the opportunity to improve the health, safety, and quality of child care and make child care assistance more accessible and stable for families.

We commend the Administration for Children and Families (ACF) for this comprehensive and thoughtful NPRM, which provides much needed guidance and clarity for states on implementation of many important provisions of the CCDBG Act. We urge ACF to finalize these regulations as soon as possible to ensure that the reauthorization moves forward efficiently to benefit children, families, and child care providers. These comments were informed by conversations and listening sessions with stakeholders across the country, including child care advocates and state child care policymakers.

We note that CCDBG has been severely underfunded in recent years, resulting in large numbers of eligible children unserved and low provider payment rates, among other consequences. Achieving the goals of the CCDBG Act to improve the health, safety, and quality of child care and the stability of child care assistance will require additional resources. Congress made a down payment on funding in the recent FY 2016 omnibus budget; however, additional investments will be necessary to ensure the success of the new law and to address the gaps that already exist in the system. Because of this, in some instances our recommendations are intended to minimize the costs of compliance of certain proposed provisions.

Please find below our comments on specific sections of the proposed rule. While not a comprehensive list of provisions we support, we begin by expressing support for the following provisions in the NPRM:

- **On page 80515, first column, §98.45 (preamble)**, establishing a new federal benchmark of affordability of copayments at 7 percent of a family's income.
- **On page 80564, first column, §98.14(a)(1)**, expanding the list of agencies with which the Lead Agency should coordinate provisions of services.
- **On page 80564, second column, §98.14(d)**, requiring states to make their State Plan and Plan amendments publicly available.
- **On page 80567, second column, §98.19**, limiting waivers to two types: transitional and legislative waivers and waivers for extraordinary circumstances.
- **On page 80569, first column, §98.21(f)**, requiring Lead Agencies to take into consideration children's development and learning and promote continuity of care when authorizing child care.

- **On page 80569, second column, §98.21(g)**, clarifying that states are not required to limit child care services based on a parent's work, education, or training schedule or the number of hours the parent spends in work, education, or training.
- **On page 80571, first column, §98.41**, adding "recognition and reporting of suspected child abuse and neglect" to training requirements for caregivers, teachers, and directors.
- **On page 80572, first column, §98.42**, permitting the use of differential or risk-based monitoring for annual inspections.
- **On page 80574, first column, §98.44(a)(3)**, articulating the components of a professional development framework.
- **On page 80574, first column, §98.44(a)(7)**, addressing the quality, diversity, stability, and retention of caregivers, teachers, and directors.
- **On page 80574, first column, §98.44(b)**, allowing providers three months after they begin caring for children to complete required pre-service or orientation training.
- **On page 80574, second column, § 98.44(b)(1)**, adding training in child development to pre-service or orientation training requirements.
- **On page 80574, third column, §98.45(b)(2)**, requiring states to use the most current market rate survey or alternative methodology to set payment rates.
- **On page 80574, third column, §98.45(c)**, requiring alternative methodologies to be approved in advance by ACF.
- **On page 80575, second column, §98.45(k)**, prohibiting copayments based on the cost of care or subsidy amount and allowing for waiving of copayments for families that meet criteria established by Lead Agencies.
- **On page 80576, second column, §98.51**, improving access to quality child care services for children experiencing homelessness.
- **On page 80578, first column, §98.53(d)**, clarifying that quality improvement funds are not limited to activities affecting children receiving CCDBG and may benefit all children.
- **On page 80579, third column, §98.68**, ensuring program integrity and clarifying key eligibility and payment policies as they relate to improper payments and continuity of care provisions in the NPRM.
- Additionally, we support the attention to language access and provisions throughout the NPRM to make CCDBG more accessible for families and providers with limited English proficiency.

Definitions (Section 98.2)

- **We propose amending the proposed definitions of teacher and director in order to better reflect the professional role of family child care providers.** We propose the definition of teacher be changed as follows*:* a lead teacher, teacher, teacher assistant or teacher aide who is employed by a child care provider for compensation on a regular basis, *or a family child care provider*, and whose responsibilities and activities are to organize, guide and implement activities in a group or individual basis, or to assist a teacher or lead teacher in such activities, to further the cognitive, social, emotional, and physical development of children from birth to kindergarten entry and/or school-age children. We propose the definition of director be changed as follows: a person who has primary responsibility for the daily operations management for a child care provider, *which includes a family child care home provider*, and which may serve children from birth to kindergarten entry and/or school-age children.

Eligibility for Services (Subpart C)

We strongly support most provisions in Subpart C, as these provisions would make it easier for families to access and retain more stable child care assistance and increase continuity of care for children. Prior to the CCDBG reauthorization, states had the discretion to set their maximum eligibility period for child care assistance and to adopt burdensome interim reporting requirements and other policies affecting families' ability to retain child care assistance.[1] These policies commonly resulted in children experiencing short periods of assistance of usually less than a year, and families cycling on and off assistance.[2] Modest increases in earnings or brief periods of unemployment or reductions in work hours caused families to lose child care assistance.

The comprehensive set of eligibility policies put forth in the NPRM will reduce burdens for families trying to get and keep child care assistance. By minimizing reporting requirements and complexity that can result in families unduly losing their assistance, these improvements will help families have the stable, continuous child care that parents need to succeed on the job and that children need for their healthy development. These improvements can also facilitate partnerships between child care and other programs such as Early Head Start, Head Start, or prekindergarten that increase low-income families' access to high-quality early learning opportunities. In addition to the benefits for children and families, more streamlined subsidy policies can allow public agencies to operate more efficiently and effectively and better ensure program integrity.

We recognize that some of these policies to achieve greater continuity for families may result in increased costs for states or longer state waiting lists for assistance. However, we believe that the benefits for parents and their children justify the potential impacts. We urge Congress and states to allocate more funding for child care assistance so that these changes do not result in fewer families receiving child care assistance.

Our comments below offer ideas for clarifying and improving the NPRM to further strengthen continuity of receipt of child care assistance.

On page 80568, first column, §98.20: Eligibility

- **We commend ACF for strengthening CCDBG's eligibility rules in order to ensure that families have access to more stable child care assistance.** Specifically, we offer our strong endorsement of the following provisions:
  - clarification that once eligibility is established, children are to be considered eligible until the next redetermination;
  - self-certification of family assets;
  - state flexibility to expand the definition of children in need of protective services to include specific populations of vulnerable children;
  - limiting the applicability of state eligibility criteria to the time of eligibility determination or redetermination; and
  - clarification that a child's eligibility for services may not be conditioned on a parent's citizenship or immigration status.

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[1] Gina Adams and Hannah Matthews, *Confronting the Child Care Eligibility Maze: Simplifying and Aligning ith Other Work Supports*, The Urban Institute and CLASP, 2013, http://www.clasp.org/resources-and-publications/publication-1/wss-cc-paper.pdf.

[2] Kendall Swenson, *Child Care Subsidy Duration and Caseload Dynamics: A Multi-State Examination, U.S. Department of Health and Human Services*, Office of the Assistant Secretary for Planning and Evaluation, 2014, http://aspe.hhs.gov/hsp/14/ChildCareSubsidy/rpt_ChildCareSubsidy.pdf

- **We commend ACF for proposing to set the maximum eligibility limit of 85 percent of state median income (SMI) based on the most recent SMI data that are published by the Bureau of the Census in order to ensure that states do not set their income limits using outdated data.** We recommend a clarification to address cases where a state's median income decreases; in such cases, a state should be required to maintain its income limit, rather than reducing it. On a few occasions in recent years, states that set their income limits for child care assistance based on SMI have experienced reductions in their median income levels, and have lowered their income limits in response. A declining median income signals economic challenges that should be addressed by expanding families' access to assistance, not limiting it. Additionally, we recognize that states may want to use multi-year estimates, especially for the purpose of aligning income definitions across programs. We recommend the addition of the following italicized words:

  § 98.20(a)(2) (i) Reside with a family whose income does not exceed 85 percent of the State's median income (SMI), which must be based on the most recent SMI data published by the Bureau of the Census, *or on the 3-year estimates derived from the American Community Survey (ACS) conducted by the Bureau of the Census Bureau and most recently published in the Federal Register for use in the Low Income Home Energy Assistance Program (LIHEAP),* for a family of the same size, *unless the most recent SMI, or most recent 3-year estimate of the SMI, demonstrates a decline in the State's median income*.

On page 80568, second column, §98.21: Eligibility Determination Process

- **We commend ACF for the strong commitment to minimum 12-month eligibility for all families established in the CCDBG Act of 2014. We strongly support §98.21(a)(1)(i-ii), which clarifies the conditions under which eligible families should continue to receive assistance.** We believe that defining temporary changes in parents' status of working or attending education or training programs is critically important to clarify language in the Act and ensure that 12-month eligibility is implemented appropriately. We also support the clarification that any payments for children, once determined eligible, should not be considered errors or improper payments due to changes in the family's circumstance prior to the end of the authorization period. Research shows that the same families frequently return to the subsidy programs after they exit, often within the same year.[3] Continuous 12-month eligibility will allow children to remain in child care settings and reduce the churn that currently exists in state subsidy programs.

- **We strongly support the provision to ensure that 12-month eligibility is protected regardless of changes in where a family resides within the state in order to uphold a central goal of the Act to ensure continuity of care for children and stability of assistance for parents.** In many states, moving within a state can result in the ending of child care assistance prior to the established eligibility period. For example, in Florida, if a family moves from an area under the direction of one local Early Learning Coalition to another, the parents must apply for assistance with the new local Coalition with no guarantee of continuing assistance. Similarly, families in Texas that move must reapply to their new local Workforce Investment Board, and may go on a waiting list if they are not in a priority category. The law recognized the importance of continuity for parents and children and that continuity should not be interrupted by a parent's need to move. In particular, parents who have the opportunity to move in order to access a better job or improved housing conditions should not be held back from opportunity for fear of losing child care assistance. States should be permitted to decide

[3] Kendall Swenson, *Child Care Subsidy Duration and Caseload Dynamics: A Multi-State Examination, U.S. Department of Health and Human Services*, Office of the Assistant Secretary for Planning and Evaluation, 2014, http://aspe.hhs.gov/hsp/14/ChildCareSubsidy/rpt_ChildCareSubsidy.pdf.

how this requirement is implemented—for example, whether the initial community continues paying for the subsidy until the next redetermination or whether funds at the state level can be allocated for inter-community transition.

- **We strongly support §98.21(a)(3) prohibiting Lead Agencies from increasing family copayments during the eligibility period.** This policy is consistent with the law's intent to provide stability for low-income families and with language added in the reauthorization that cost sharing should not be a burden for families. In most states, when a family's income increases, the family must pay higher copayments. However, a five-state study of child care subsidy policies found that high copayments are a major reason that families leave the subsidy program.[4] Holding copayment amounts constant will support families' economic stability as they progress in the labor market and prevent copayment increases from inhibiting 12-month eligibility as established in the law. In the Senate Health, Education, Labor, and Pensions Committee Report on the CCDBG Act, the Committee notes that "The committee does not want to discourage families engaged in work from pursuing greater opportunities in the form of increased wages or earnings….The committee strongly believes that if families are truly to achieve self-sufficiency that CCDBG cannot perversely incentivize families to forgo modest raises or bonuses for fear of losing assistance under the CCDBG program." In addition, increasing copayments essentially lowers the value of the child care assistance provided to families, making it inconsistent with the principle cited above – that families should receive continuous support at the same level as initially authorized.

On page 80568, third column, §98.21(b): Graduated Phase-out

- **We strongly support the provision requiring states to adopt 85 percent of SMI as the exit income in order to implement the graduated phase-out provision of the law.** In reauthorizing CCDBG, Congress maintained the federal income threshold of 85 percent of SMI and clearly established that during the initial 12-month eligibility period, children remain income eligible for CCDBG unless their household income exceeds 85 percent of SMI. It would be incongruous to establish a lower income eligibility threshold in subsequent eligibility periods. The graduated phase-out provision will strongly support families' economic security and advancement. Under current practice in many states, a small increase in earnings can cause a parent to lose child care assistance well before they are able to afford the full costs of care. In such circumstances, parents have sometimes passed up promotions or raises so as to not jeopardize the reliable child care that they would not be able to access without help. That "cliff effect" is counter to the CCDBG Act's goal of increasing families' financial stability. States will retain the flexibility to establish initial income thresholds for qualifying for child care assistance, while the graduated phase-out will support continuity for families once they access assistance.

- **We strongly object to any provision that allows or encourages states to set arbitrary time limits on child care assistance and recommend the removal of the option under §98.21(b)(1)(ii). We believe that income, rather than time spent in the program, is a far better measure of families' need for continued assistance.** We recommend removing the option for states to end assistance after one year of graduated phase-out. In states that would select this option, families whose income exceeds the state income eligibility threshold would essentially be subject to a two-year time limit on assistance (the initial 12-month eligibility period and one year of graduated phase-out). CCDBG has never had federal time limits and, in fact, those families who are working their way up the economic ladder are just the families that CCDBG is designed to help. Moreover, initial state income eligibility

[4] Roberta B. (Bobbie) Weber and Elizabeth E. Davis, *Continuity and stability: Dynamics of child care subsidy use in Oregon*, 2002, http://www.researchconnections.org/childcare/resources/2886/pdf.

is currently at or below 150 percent of the federal poverty level in 17 states,[5] which means many families who would initially qualify for assistance could lose assistance after two years (subject to the state taking this option) and likely before they have achieved economic stability or could afford the full costs of child care. This would leave families earning little more than $30,000 (150 percent of the federal poverty level for a family of three) without child care assistance. We believe this would be contrary to the goals of reauthorization and disruptive to continuity of care for children.

ACF requests comments on the impacts of the proposed graduated phase-out provision. Currently, 18 states have two-tier income eligibility systems (although their exit income-eligibility levels are typically set well below 85 percent of SMI).[6] In those states, families do not lose assistance based on an arbitrary length of time but instead are allowed to retain assistance as their earnings rise until they reach a certain level of income. As proposed, the state option to end assistance after a minimum one year of graduated phase-out would result in the loss of assistance for families whose incomes are within a state's current two-tier income eligibility system and are currently receiving assistance (without regard to time). This would disrupt children's continuity of care and families' economic stability. Even at 85 percent of SMI, child care costs remain burdensome. At 85 percent of SMI, or approximately 272 percent of the federal poverty level as averaged across states, cost of child care would be between 12 percent and 15 percent of a families' income on average, depending on the age of the child, or approximately twice the proposed federal benchmark for affordable care.[7]

Finally, we note that low-wage workers, on average, see very little change in their earnings over time,[8] which makes it unlikely that the income of program participants would change dramatically over time. Conversely, allowing those families that do experience wage growth to continue to receive assistance until they reach the 85 percent of SMI limit would serve as a meaningful work support for families trying to move towards economic stability.

On page 80569, first column, §98.21(e): Reporting Changes in Circumstance

- We suggest a clarification on the term "non-temporary" and suggest revising **§98.21(e)(1)(ii)** by adding the phrase in italics below:

  > At the option of the Lead Agency, the family has experienced a cessation of work, training, or education *that is not in accordance with the changes listed at 98.21(a)(1).*

- **We strongly support the provisions to limit interim reporting requirements for families and to prohibit acting on changes that would decrease assistance during the eligibility period.** These provisions are critically important to ensuring that the 12-month eligibility period is meaningful for families and results in increased stability. Currently, many states require parents to report on any of a long list of changes—in income, work schedule, employment, residence, household composition, child care provider, etc.—even if the change produces little or no impact on their benefit. This places significant burden on parents; on agencies, which have to process even minimal changes; and on child

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[5] Karen Schulman and Helen Blank, *Building Blocks: State Child Care Assistance Policies 2015*, National Women's Law Center, 2015, http://nwlc.org/resources/building-blocks-state-child-care-assistance-policies-2015/.
[6] *Building Blocks: State Child Care Assistance Policies 2015*.
[7] CLASP analysis of Child Care Aware of America child care cost data (http://usa.childcareaware.org/wp-content/uploads/2015/12/Parents-and-the-High-Cost-of-Child-Care-2015-FINAL.pdf) and NCCP income converter data (http://www.nccp.org/tools/converter/) based on U.S. Census Bureau estimates of state median income by family size from the most recently available, one-year American Community Survey (ACS) file.
[8] Elise Gould, *2014 Continues a 35-Year Trend of Broad-Based Wage Stagnation*, Economic Policy Institute, 2015, http://www.epi.org/publication/stagnant-wages-in-2014/.

care providers, which must keep track of multiple adjustments to their client's status. Other benefit systems, such as the Supplemental Nutrition Assistance Program (SNAP) and Medicaid, have made efforts to simplify reporting requirements; therefore, this proposal would put CCDBG in line with those other programs. This approach allows for more constancy for low-income families, who frequently experience high levels of instability in employment, income, residence, and family composition.

- **Any use of six-month interim reporting should be subject to the same limitations on interim reporting as proposed at §98.21(f).** ACF has asked for input on whether states should have the option for six-month interim reporting forms and if so, the best way to structure them so as to promote continuity of services for the minimum 12-month eligibility period for eligible families, consistent with the law (p. 80488, column 2, preamble). Some states require families to confirm at an interim period, commonly six months, that their circumstances have not changed and they remain eligible for child care assistance. The use of a six-month reporting form, especially a pre-populated form, can reduce the burden of interim reporting requirements on families. Rather than expecting families to report changes and/or keep track of what changes require reporting, an interim report form can be sent to families halfway through an eligibility period in order to capture any changes that may affect a family's eligibility. Many states use interim reporting forms to align with other programs, such as the simplified report in SNAP. States that have aligned child care assistance and SNAP may use the simplified reporting form at six months to verify household information for families for both programs. We understand the benefit to families, and to state agencies, of aligning requirements across programs in order to reduce administrative and family burden. However, states should not be permitted to undermine the 12-month eligibility period established by the law through de facto redeterminations at interim periods. If a state wishes to use a six-month simplified report, it should be permitted to do so with the same constraints as apply to other interim reporting requirements (limiting change reporting to factors that affect eligibility and/or contacting families). The regulation should specify that states may use a six-month interim report so long as that state does not act on information that would negatively affect eligibility for child care assistance and so long as a full redetermination is not conducted.

- **States should not be able to act on information obtained from other systems if the result would be to reduce the family's subsidy.** ACF asks whether or not states should be permitted to act on verified information (e.g., updated income information) received from other programs or sources (p. 80488, column 2, preamble). We recognize that some states have data sharing in place across benefit programs and this can be a useful tool for reducing burdensome reporting requirements for families. States should be permitted to keep data sharing in place; however, they should be required to adjust what changes they are permitted to act on under the revised CCDBG Act. For example, a state would be permitted to act on information indicating that a family's income was above 85 percent of SMI, but would not be permitted to reduce benefits or increase copayments in response to information indicating an increase in a family's income if that income remained below 85 percent of SMI.

On page 80569, third column, §98.32: Parental Complaints

- **We recommend that the maintaining of records of substantiated parental complaints be fair to providers and include a process for providers to review and appeal information.** States should also be required to provide a detailed description in the State Plan at §98.16 of the process by which providers can review and appeal such information. Given that this information is available to the public it is appropriate to ensure protections for providers from erroneous information being released. We recommend adding the following to §98.32:

(e) The Lead Agency shall provide a detailed description in the Plan of the process by which providers may review and appeal records of substantiated parental complaints available to the public.

Consumer and Provider Education (Section 98.33)

Low-income parents should have access to information about child care quality and available child care services in their community. For information to be understood, it should be written in plain language and provided in multiple languages, when possible. While consumer education via a website can provide increased access to information about child care health, safety, and quality standards, it is not the only way—or the most common way—that parents select child care. Parents choose care based on a number of factors, including affordability, proximity to home or to work, and referrals from friends or relatives. Our comments below are intended to balance the extent of information parents have available and the burden on state agencies to produce such information.

On page 80569, third column, §98.33(a): Consumer Education Website

- **We recommend that ACF permit state flexibility in determining which providers are included on the consumer education website.** We have concerns about the inclusion of license-exempt providers on state consumer education websites. We believe that including license-exempt providers would serve to advertise their services for parents looking for child care. Sometimes license-exempt care is provided by relatives or friends. These providers are often not in the business of child care and only caring for individuals with whom they have a prior relationship. Therefore, it would be a poor use of resources for states to post and update information on these providers with full monitoring reports in plain language. Moreover, states have raised privacy concerns with listing information about an individual's home, particularly when those providers are not operating a business. Finally, it is our understanding that whether or not child care resource and referral agencies refer families to license-exempt providers differs across the country. Where decisions have been made to not make such referrals, information on a public website should not undermine that approach.

  We recognize that states vary dramatically in which providers they exempt from licensing or regulation. Therefore, we recommend that each state determine the universe of providers to include on its consumer education website. For those providers not listed on the website, states could be required to ensure that states make available to individual families information about the specific provider they are using or plan to use, rather than requiring that the information be posted publicly.

- **We recommend that provider-specific information on the consumer education website <u>not</u> include information on serious injuries and deaths that occur in child care or occurrences of child abuse and neglect, due to privacy concerns related both to caregivers and children.** As noted in the NPRM, not all serious injuries and deaths that occur in child care are the fault of a child care provider. Including information on the full context for the incident would be labor intensive for states and could potentially infringe on families' privacy; yet, failing to provide the full context would be unfair to providers. We agree that states should review the circumstances of child deaths and injuries; however, listing provider-specific information is unlikely to be useful for families without all of the information, and may be unfair to providers who may no longer have staff involved in the incident working there, have a new director, or have taken other steps to eliminate risks to children. With increased health and safety standards and the state's review of reported incidents of serious injuries and deaths, we feel that there are better ways to protect children, including investigating incidents and, if appropriate, closing child care facilities, or barring child care facilities with such histories from receiving CCDBG funds.

- **We recommend a clarification to §98.33(a)(2)(iii) that the monitoring inspection report be posted "either in plain language or with a plain language summary *or interpretation*."** The addition of the italicized words better reflect language in the preamble that suggests that a full monitoring report that is not in plain language can be accompanied by a plain language summary or interpretation. Permitting states the alternative of posting an interpretation—for example, a plain language glossary of terms that could help parents interpret monitoring results—will enable states to avoid the burden of summarizing each individual report, while still preserving transparency for parents.

- **We recommend that preamble language (page 80494, second column) encouraging Lead Agencies to implement policies that are fair to providers, including protections related to the consumer education Web site, be included in regulatory language and read as follows:**

  §98.33(a)(2)(iii) Results of monitoring and inspection reports for child care providers, including those required at § 98.42 and those due to major substantiated complaints about failure to comply with provisions at § 98.41 and Lead Agency child care policies. Lead Agencies shall post in a timely manner full monitoring and inspection reports, either in plain language or with a plain language summary *or interpretation*, for parents and child care providers to understand, *and shall establish an appeals process for providers that receive violations*.

On page 80570, first column, § 98.33(a)(2)(iii)(C): Monitoring Reports

- **We recommend states be permitted to select the number of years of full monitoring reports that are posted on the website, provided that it is more than a single year of data.** The NPRM proposes that providers' licensing reports remain on the website for five years. This is longer than the amount of time several states currently post reports. We acknowledge that one year of results is likely not enough to provide sufficient provider history. However, it is not clear that there is a precise number of years that is exactly right for providing parents with sufficient and accurate information. Over the course of years, staff involved in violations may leave child care providers or providers may make quality improvements. Moreover, maintaining complete records over time would entail additional IT costs for states.

On page 80570, third column, §98.33(d) Consumer Statement

- **We oppose the requirement to provide a consumer statement to parents receiving CCDBG.** We support the increased attention to consumer education in the law and the NPRM. All parents deserve access to information on the standards met by their child care provider, as well as basic information on child care quality and child development. However, we believe the proposed consumer statement requirement goes beyond the law and would be overly burdensome for states, particularly given resource constraints. Under the proposed requirement, states would have to send revised consumer statements to parents every time a new provider is used, and perhaps multiple statements for multiple children. Given that families are unlikely to select child care providers on the basis of this information, we think this is an undue burden on states with little to gain. The consumer education website will contain sufficient information for parents and they should be directed to it and to other resources, such as child care resource and referral organizations and similar agencies.

Monitoring and Inspections (Section 98.42)

- **We recommend that the pre-licensure visit for CCDF providers already caring for CCDF children, and those in states without pre-licensure visits, be met through the first annual inspection.** The preamble of the NPRM (first paragraph on p. 80501, column 3) states that for licensed providers already receiving CCDF funds, "we will consider the Lead Agency to have met the pre-licensure requirements through completion of the first, annual on-site inspection." We believe this is an appropriate interpretation of the pre-licensure inspection requirement (provided that ACF cannot require states to conduct pre-licensure visits for all licensed providers, whether or not they receive CCDF funds, which we would support). The third paragraph goes on to propose that an on-site inspection is necessary for licensed child care providers prior to providing CCDF-funded child care and recommends that licensed providers who were not subject to a pre-licensure inspection should be inspected prior to caring for a child receiving CCDF. These two statements are inconsistent. Meeting the pre-licensure visit for all CCDF providers through the first annual visit will ensure that families receiving CCDF will not be limited in their access to licensed providers or their choices of providers if a state has not inspected a facility prior to the family needing care. States could be encouraged to prioritize providers that have not received a pre-licensing visit but not required to visit prior to the provider caring for CCDF children.

- **We recommend that the final rule include a requirement for states to conduct inspections in response to complaints received about incidents in child care that impact children's health and safety (page 80491, third column and page 80502, first column).** Inclusion of such a requirement would be a logical step given that states are required to have a hotline in place for the public to report complaints. States should have in place a system to determine those complaints that indicate a risk to children's health and safety and investigate accordingly.

- **We believe that on-site inspections for all providers for compliance with health and safety standards are critically important to safeguard the wellbeing of children in child care (page 80501, third column, preamble).** We are concerned that all states do not currently require annual, unannounced inspections for all licensed child care centers and family child care homes. We also share ACF's concerns expressed in the preamble that requiring inspections only of licensed CCDBG providers, and not all licensed providers, could result in a bifurcated system in which children receiving CCDBG do not have access to the full range of licensed child care providers. While we believe that all states should conduct at least annual inspections of all providers, we are concerned that current CCDBG funding levels are not sufficient to support a requirement to conduct annual visits of all providers and do not believe that the quality set-aside should be used primarily for inspections. We suggest that ACF encourage States to devote additional state funding to cover additional costs of any monitoring requirement and that ACF limit the amount of quality funds permitted to be used for inspections.

On page 80572, second column, §98.42: Monitoring of In-Home Care

- **We strongly encourage ACF to exempt care provided in a child's home from on-site monitoring.** We are concerned about the provision that would require on-site monitoring of CCDBG-funded child care provided in a child's home. According to 2014 data, only 3 percent of CCDBG care is provided in the child's own home. The 2013 CCDF NPRM proposed to exempt care in the child's home from health and training requirements and on-site monitoring. The NPRM noted this flexibility was necessary because compliance with building, health, and fire codes may not be appropriate for those care settings. Similarly, the 2015 NPRM preamble notes that monitoring the quality of in-home

care poses special challenges for Lead Agencies. We believe such monitoring raises privacy concerns for families, as well as the potential for unintended consequences. Moreover, we believe that imposing monitoring requirements on in-home care may lead states to further restrict the use of in-home care by families' receiving assistance (as permitted by §98.16(i)(2)), including among those who need it. The few families that use care in the child's own home may do so because of circumstances that severely limit their access to other options—circumstances such as a child's serious disability or a parent's work schedule that requires overnight care.

Our primary recommendation is that Lead Agencies be permitted to exempt in-home child care providers from health and safety and on-site monitoring requirements, just as relative providers may be exempt. If ACF determines that the language of the law necessitates monitoring, we recommend that ACF limit this monitoring to ensuring the health and safety requirements specified in the law and final rule are met. Monitoring could ensure compliance with required health and safety training (such as safe sleep practices). Moreover, Lead Agencies should be encouraged to consider appropriate entities for monitoring this type of care, such as resource and referral or other community organizations, as opposed to licensors who monitor on licensing standards.

Background Checks (§98.43)

- **We recommend either 1) states be given additional time to comply with the federal background check requirements pending clear guidance from the Federal Bureau of Investigations (FBI) or 2) ACF clarify that the FBI finger print check is sufficient to comply with the requirement to check the National Sex Offender Registry (NSOR)**. We support the streamlining of the background check requirements and efforts to reduce duplication among the required checks but believe there is more work for ACF to do to help states comply with the requirements as proposed. We have concerns about the feasibility of conducting a search of the NSOR files of the National Crime Information Center (NCIC) given the uncharted territory as noted in the NPRM. We recommend that states be given additional time to comply with this requirement pending guidance from the FBI on partnering with law enforcement agencies to conduct the search, including on how states that use third-party vendors for background checks can comply with this requirement.

  Further, the NPRM notes that an FBI finger print check will provide both an individual's criminal record and a search of the NSOR. We believe this should be sufficient for complying with the requirement to check the NSOR and suggest that ACF clarify this in regulation. As the NPRM notes, searching the NCIC NSOR record would only retrieve a very small number of individuals who would not be retrieved through the FBI check or state-based checks. Moreover, if states are encouraged to check the National Sex Offender Public Website, that would provide an additional check even beyond the statutory background check requirement. A key value of the background check requirement is that undergoing such a check can prevent individuals with criminal histories from applying to be a child care provider in the first place. Given these factors and the overlap between federal checks and state checks, we recommend that ACF consider the NSOR requirement to have been met through an FBI fingerprint check. We do not believe it is feasible to require states to conduct the NCIC check without very specific written guidance from the FBI and a clear mechanism for obtaining NCIC records.

- **We recommend clarification of the state-based check requirement**. As noted in the NPRM, access to information in child abuse and neglect central registries and department records is limited in some states and would not currently allow states to use these registries or databases for verifying employability. The law does not require states to create a central registry and states should not be penalized for failure to check a registry or database that is nonexistent or inaccessible. Therefore, we recommend one clarification to §98.43(b)(3)(iii) by adding the following in italics:

State-based child abuse and neglect registry and database, *if one exists and such a search is allowable for such purposes under state law and practice*.

- **We urge ACF to provide further information to states on the feasibility of cross-state background checks prior to the effective date for this provision.** We are concerned about the feasibility of cross-state background checks as proposed in the NPRM. We understand that states have expressed concerns about their ability to comply with the requirements due to a number of challenges, including how to interpret results (in particular child abuse and neglect findings) from another state. We recommend that ACF study and report on the viability of the cross-state background check requirement, as proposed, prior to requiring state compliance with this provision and provide guidance to states. ACF should also clarify in regulations that states that have submitted requests for background checks and have not received responses from other states should not be subject to the penalty in the law for other states' non-cooperation.

- **We support the recommendation to include adult household members in family child care homes in the background check requirements.** The majority of states already have policies in place to require background checks of family members in the child care home that are18 years and older. We do not support extending the background check requirement to any other individuals, including juveniles under age 18.

- **We recommend that ACF clarify that states be allowed to use CCDBG funding to cover the cost of the background checks for legally-exempt and family child care providers, and their household members, so that the cost of the background checks is not a barrier for these providers.**

- **We agree with ACF's preamble language (p 80506, column 2) encouraging Lead Agencies to ensure a waiver and appeals process that conforms to the recommendations of the U.S. Equal Employment Opportunity Commission for any state-imposed additional disqualifying crimes and recommend this protection be required in regulatory language at 98.43(h).** This would include an individual assessment and ability to waive findings based on factors as inaccurate information, certificate of rehabilitation, age when offense was committed, time since offense, and whether the nature of offense is a threat to children. An individualized assessment does not guarantee employment. Rather, it simply provides an opportunity for an employee or prospective employee to explain why they are qualified for the position and do not pose a risk to children's safety and well-being. Individualized assessments are particularly important for victims of domestic violence, who often face and are convicted of a broad range of charges, many of which are directly related to the abuse they experience rather than criminal intent. Individualized assessments are also important for communities of color, who are disproportionately impacted by the criminal justice system.

- **We recommend that ACF redact preamble language (p. 80506, column 3) that suggests that Lead Agencies require self-disclosure of criminal history for child care staff prior to the conducting of a background check.** Given the complexity of the background checks as prescribed and the specific disqualifying crimes established in statue, we recommend that ACF not encourage self-disclosure as it could prevent a qualified child care staff member or prospective staff member from employment. Individuals with criminal history completely unrelated to their ability to care for and have responsibility for the safety and well-being of children as well as those with no record whatsoever that might be intimidated could inaccurately assume that they would not be eligible for employment. It could also violate a child care staff member's right to privacy with his or her employer.

Training and Professional Development (§98.44)

- **We recommend that ACF explicitly address the low levels of compensation among child care caregivers, teachers, and directors (on page 80574, first column).** The NPRM requires states, in their framework for training and professional development, to improve the quality, diversity, stability, and retention of the child care workforce, but falls short of calling for states to address low levels of compensation and instead includes a reference to financial incentives. We recommend the following change in italics:

  > 98.44(a)(7) Improves the quality, diversity, stability, and retention (including *through higher compensation)* of caregivers, teachers, and directors.

Equal Access (§98.45)

- **We strongly support the retention of the 75th percentile of current market rates as a federal benchmark for provider payments to ensure that families receiving CCDBG assistance have access to substantial proportion of the child care market.** As the NPRM notes, almost all states set their rates below the 75th percentile and in some cases far below that level. This historical marker was introduced to ensure that low-income families have equal access to the child care market and remains an important determinant of equal access.

- **We support §98.45(b)(3) requiring that, at a minimum, base payment rates support the health, safety, and quality requirements of the law and rule.** Providers need resources to come into compliance with increased health and safety standards and states should be expected to pay providers *at least* a level that guarantees a minimal level of quality, and ideally higher given the requirements for considering the costs of higher-quality care and increasing access to high-quality care for underserved populations in the NPRM.

- **We support the inclusion of information on child care providers' participation in CCDBG and barriers to participation in the market rate survey (MRS) and recommend that all states be required to solicit this information, whether or not they chose to conduct a MRS or alternative methodology**. ACF should ensure that states collect this information in a way that yields meaningful results—for example, they should survey providers to determine not just whether they serve any children who receive CCDBG subsidies, but how many children receiving CCCBG subsidies they serve and whether they set any limits on the number of such children they serve.

- **We recommend eliminating §98.45(b)(4), which would require states to show how payment rates provide families receiving CCDBG subsidies access to care that is of comparable quality to care that is available to families with incomes above 85 percent of SMI.** While we support the efforts of ACF to hold states accountable for ensuring equal access to child care for families receiving child care assistance, we do not believe this data comparison would be meaningful enough to justify the additional burden on states. Moreover, we do not believe such data on quality exists or would be practical for states to provide. As noted in the preamble, this benchmark is an imperfect proxy for the affordability of higher-quality care. There is little evidence that families with incomes above 85 percent of SMI are indeed accessing higher-quality care as compared to those families under 85 percent of SMI. In some cases, low-income families may in fact qualify for high-quality, comprehensive early education programs, such as Head Start, while moderate-income families cannot qualify for these programs and cannot purchase equivalent services on their own. Moreover, existing data on child care quality, such as that available through QRIS, do not provide sufficient information.

For example, there is little evidence to date that QRIS tiers are predictive of school readiness and not all states have a fully implemented QRIS, with provider participation rates varying greatly among states. Given that the statute already requires states to include a summary of facts on how payment rates allow for equal access, this additional requirement is unnecessary. Other regulatory additions (the survey of barriers to subsidies within the MRS and the requirement to demonstrate that base rates support health, safety, and quality standards) will go further to support equal access.

- **We recommend that the regulations clarify that states are permitted to pay the state's maximum payment rate *even if it is higher* than the amount a provider charges to private-paying parents in areas where rates are significantly depressed.** The preamble references a principle from the 1998 CCDF Final Rule that federal subsidy funds cannot pay more for services than is charged to the general public for the same service and asserts that this principle is still in effect. While the preamble clarifies that states may pay amounts above the provider's private-pay rate to support quality, it does not address the circumstances in which child care markets are so depressed that even a base rate (before considering quality differentials) would need to be higher than the amount charged to private-pay parents to support minimal health and safety standards (as proposed in the NPRM).

  In poor communities, child care providers often charge private-paying parents far below necessary costs because parents cannot afford to pay any more. Some states, such as California or Colorado, have worked to address this issue by creating regional rates to help raise the payment rates available in poor communities. However, this approach does not address the problem in all cases—for example, in a region that is mostly poor, regional rates may still be depressed. The final rule should clarify that providers can be paid above the rate charged to parents when the local or regional market does not support the costs of even basic care. This assessment could be tied to the share of low-income families in the community. For example, if a majority of young children in an area live in low-income families, this could be used as evidence that there is not a viable market for adequate child care—much less high-quality child care—in that area and states would be permitted to pay their maximum payment rate without regard to the provider's private rate.

- **We recommend removing the provision that prohibits providers from charging families additional mandatory fees above the copayment (**on page 80575, second column, §98.45(l)**.** We believe this provision is well-intentioned; however, we have significant concerns that it has the potential to severely restrict families' access to child care assistance by reducing the number of providers who serve families with subsidies. We think this will be a serious impediment to low-income parents' accessing high-quality care and a severe restraint on parental choice. As noted in the NPRM, provider payment rates across the country are extremely low. Given those low rates, the only way that some high-quality providers can serve families with subsidies and maintain quality is to charge additional fees. Providers, particularly providers with higher costs to support higher-quality care, may be reluctant to serve these families if they have no way to fill the gap between the state payment rate and program costs. While the preamble to the NPRM suggests that the impact of this provision would be lessened by states' increasing their payment rates, there is no guarantee that states will in fact increase rates or increase rates sufficiently. Advocates in at least one state (Maine) that currently prohibits providers from charging parents additional fees reported that when the state paid rates at the 75th percentile, this approach did not discourage providers from serving children receiving child care assistance; however, as the state payment rate declined relative to updated market rates, the number of providers accepting children with subsidies also fell. Moreover, given the new requirements in the law and the lack of resources, it is possible that states will further reduce their rates, leaving providers with few resources to serve low-income families.

On page 80575, second column, §98.45(m): Provider Payment Practices

- **We strongly support the proposed provider payment practices at §98.45(m).** Congress established a principle that payment practices under CCDBG should not differ from common practices for private-pay parents. Under current policy in most states, provider payment practices for subsidized care look very different from generally accepted payment practices for private-paying parents, who typically pay their provider a set fee based on their child's enrollment, often a month in advance of when services are provided. In the subsidy system, however, there is often a significant lag between when care is provided and when a provider is paid, and payments are often tied very closely to the exact days, or hours, a child attends child care. As a result, gaps in attendance often leave providers with gaps in revenue, making it difficult for them to meet the fixed costs (rent, utilities, salaries) of running a business. Therefore, we support the benchmarks included in the NPRM requiring states to pay prospectively or within no more than 21 days of the receipt of invoice for services; paying based on a child's enrollment rather than attendance; providing full payment if a child attends at least 85 percent of the authorized time or is absent for five or fewer days in a month (regardless of the reason for the absence); paying on a part-time or full-time basis; and paying for mandatory fees charged by providers.

On page 80576, third column, §98.50(a)(3): Grants and Contracts

- **We strongly support the provision to require Lead Agencies to use grants and contracts for direct services tied to high-quality standards, as grants and contract can be an effective means of ensuring that child care providers have the stable funding that they need to meet high-quality standards.** While we strongly support this requirement, we recognize that grants/contracts do not necessarily increase the supply of high-quality care, and that doing so requires thoughtful implementation. Given the large reauthorization implementation task ahead of states, this provision would be most effective with a longer phase-in period, allowing time for ACF to collect and disseminate best practices in designing contracts and for states to thoughtfully plan for contracts.

Services for Children Experiencing Homelessness (Sec. 98.51)

- **We recommend modifying this section to address services for children experiencing homelessness and services for children in foster care.** Given that statutory language in several places includes references to both children experiencing homelessness and children in foster care, we believe it is appropriate that the needs of both groups of children be addressed through the activities described in §98.51. Given that both of these groups are highly vulnerable, we believe that ACF should clarify the importance of serving both of these groups of children.

Activities to Improve the Quality of Child Care (Sec. 98.53)

- **ACF should clarify that states are not required to conduct annual needs assessments for quality initiatives.** We support the idea that states should make quality expenditure decisions based on an assessment of need. Data-informed decision-making is likely to yield the greatest impact of quality dollars. However, we suggest that ACF clarify that the Lead Agency's assessment of need not be required annually. Quality improvement strategies are often multi-year initiatives and in many cases areas targeted for improvement will not change dramatically from year to year. We do not think it is a

good use of limited state resources to update needs assessments more often than once every three years (in line with the state plan period).

- **We recommend clarifying that scholarships and compensation initiatives are allowable uses of quality funds (**§98.53(a)(1)(vii))**.** While we agree that connecting child care caregivers, teachers, and directors with available federal and state financial aid, or other resources is an important activity, this section should clarify that these resources are presented as additional funding options, but in no way preclude the use of CCDBG funds for such purposes, by adding the following language in italics:

  > *Providing scholarships or financial aid directly to child care caregivers, teachers, and directors or c*onnecting child care caregivers, teachers, and directors with available Federal and State financial aid, or other resources, that would assist these individuals in pursuing relevant postsecondary education, such as programs providing scholarships and compensation improvements for education attainment and retention.

- **We recommend ACF clarify that the supporting rate differentials or enhancements is an allowable use of quality funds, such as to cover the higher costs of providing infant-toddler care.** The preamble discusses differential payment rates as a strategy for expanding high-quality care and addressing the needs of particular underserved populations (such as infants and toddlers, families needing non-traditional hour care, etc.). It also references the use of quality dollars to support tiered payment rates through QRIS. Because the base cost of providing quality care for infants and toddlers is higher than that for older children, regulations should clarify that enhanced rates, even if not connected to a QRIS, are an allowable quality improvement strategy.

Thank you again for the opportunity to offer input on the proposed regulations to implement the Child Care and Development Block Grant (CCDBG) Act of 2014. We hope these comments are helpful. Please contact Hannah Matthews at hmatthews@clasp.org or Helen Blank at hblank@nwlc.org if we can provide any additional information.

Center for Law and Social Policy (CLASP)
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