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**New York's State's Draft
Child Care Development Fund Plan
FFY 2019-2021**

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This testimony is presented by Empire Justice Center, a support center for legal aid and legal services organizations across New York State. We have offices in Rochester, Albany, White Plains, Yonkers and Central Islip. We provide training, litigation support and policy analysis to 20 legal aid offices, from Long Island to Chautauqua. In addition, we assist hundreds of community groups that serve low income clients, and represent low income clients in a wide array of poverty law areas.

Subsidized child care provides multiple vital supports to low income families. First, child care provides a nurturing and enriching environment in which children may learn and develop. Children receiving quality child care exhibit a higher degree of language and cognitive development than those who do not receive high quality child care.¹ Longitudinal studies of at-risk children found that, by the age of 40, children who had received high quality early child care experienced fewer arrests, less drug abuse, and less public welfare use, along with higher earnings, more home ownership and greater educational achievement than a control group of similarly situated children who did not receive high quality early care.² Continuity of care is also critical since continual adjustment to new surroundings and routines can have long-term negative consequences on child development.³

The Child Care Development Block Grant of 2014 (CCDBG), recognizes the importance of high quality care to child development and imposes a number of requirements that support continuity of care. The New York State plan identifies a number of areas where statutory and regulatory changes will have to be made in order for the state to comply with federal law. The plan does not recommend what changes the Office of Children and Family Services (OCFS) would like legislature to make. This testimony makes specific recommendations and urges OCFS, the legislature, and newly created Child Care Task Force to consider them.

1. GRADUATED PHASE-OUT OF ASSISTANCE – [OCFS plan at § 3.1.7 at p.55-57]:

The CCDBG requires that families be recertified annually. When a family recertifies and has income over the state eligibility standard, but below 85% of state median income (SMI), **the state must provide a graduated phase out of assistance.** This can be done by providing assistance for a specific period of time before termination, or establishing an “exit threshold,” such as allowing families to stay on child care assistance until they reach 85% of SMI. **New York State is not in compliance with this requirement.** In New York, 85% of SMI is \$5263

¹ M. Korjenevitch and R. Dunifon, Child Care Center Quality and Human Development Cornell University, College of Human Ecology (2010)
https://www.human.cornell.edu/sites/default/files/PAM/Parenting/Child-20Care-20Center-20Quality-20-20Development-20Brief_FINAL.pdf (Accessed May 11, 2018).

²3. L.J. Schweinhart,, J. Montie, Z. Xiang, W.S. Barnett, C.R. Belfield, & M. Nores, Lifetime Effects: The High/Scope Perry Preschool Study Through Age 40, High/Scope Press: 2005. General information available at <https://highscope.org/perrypreschoolstudy> (Accessed May 11, 2018)

³ Information Memorandum CCDF-ACF-IM-2011-06, Policies and Practices that Promote Continuity of Care Services and Enhance Subsidy Systems (9/21/11) available at <http://www.acf.hhs.gov/programs/occ/resource/im2011-06>. (Accessed May 11, 2018)

per month,⁴ and the current highest eligibility level is 200% of poverty, which is significantly lower at \$3463. [OCFS plan at pp.71].

New York State has not yet implemented a graduated phase out of assistance. The plan states that OCFS **statutory and/or regulatory amendments are required** to comply with this CCDBG requirement, but does not indicate how it will do so.

RECOMMENDATION: New York should amend the Social Services Law to permit families whose income exceeds the local district eligibility standard to remain eligible for a subsidy for 12 months or until the family income exceeds 85% of state median income, whichever occurs first.

2. TWELVE MONTH ELIGIBILITY PERIOD [OCFS plan at 3.3.1, pp. 65-67]:

The federal law at 42 USC 9858c(c)(2)(N) requires a minimum period of 12 month eligibility regardless of changes in income (unless income exceeds 85% of SMI) [42 CFR 98.21(a)(1)(i)] and regardless of a temporary change in work (including time-limited, family, parental or sick leave, interruptions in seasonal work, student breaks, reduction in work or education hours, cessation of work or training that does not exceed three months) [98.21(a)(1)(ii)]. The federal regulations also prohibit an increase in copayments during that 12 month eligibility period, except in very limited circumstances. [98.21(a)(3), (b)(3)].

The OCFS plan does not say how this requirement will be met, but says that **statutory and/or regulatory authority will be necessary to make this change** (p.65). The OCFS plan states that as an interim step, it will no longer approve local district requests to choose six month recertification periods (p.66). The OCFS 2016-18 plan committed to this same interim step two years ago (at page 66).

RECOMMENDATION: OCFS should amend its regulations to require all districts to have a 12 month certification period.

RECOMMENDATION: New York should amend the Social Services Law to require a minimum eligibility period of 12 months regardless of changes in income (unless income exceeds 85% of SMI) or temporary changes in work or training (including but not limited to time-limited, family, parental or sick leave, interruptions in seasonal work, student breaks, reduction in work or education hours, AND cessation of work or training that does not exceed three months).

RECOMMENDATION: The Social Services Law should also be amended to state that copayments may not be increased above the amount set when eligibility was determined until the next 12 month redetermination, and that copayments may be decreased if the family reports a reduction in income.

⁴ The federal LILHEAP website says the New York State median income for a family of four is \$88,451, and should be adjusted by 84% to get the household size for three persons. <https://liheapch.acf.hhs.gov/profiles/povertytables/FY2017/nysmi.htm> (Accessed May 9, 2018) which would make it \$74,298.84. Eighty-five percent of that number would be \$63,154. Dividing that number by 12 to get a monthly number would be \$5262.83.

3. CHANGES IN RESIDENCY ACROSS COUNTIES

The 12 month eligibility requirement of the CCDBG means that child care will need to be continued regardless of whether a family moves to another county within the state. States like New York that have county-administered systems will need to address this 12-month continuity of care provision so that families do not lose their subsidies when crossing county lines during that 12 month period. The proposed federal regulations underscore the need for addressing this issue, stating that children shall be considered eligible and will continue to receive child care services **regardless of a change of residency within the state.** 98.21(a)(1)(ii)(G). This means that child care must continue even if a family moves from one county to another. This is not an issue for most states, which have state administered child care programs.

However, in New York, this will be a significant change because individuals lose eligibility when they move from a district and must reapply in their new district of residence. As the attached fair hearing illustrates (FH#7155859Y), it can be a shocking revelation for low income families that move to be closer to their work or to take advantage of affordable housing that the move has cost them their child care subsidy. In this fair hearing, the Appellant, a single mother with a disabled child, and working full time, moved to Schenectady County believing that her child care subsidy would simply be continued from her prior county of residence. Instead, she was required to go to the end of the wait list, causing her to fall behind in her rent and utilities as she struggled to pay for child care on her own.

Adopting this change will require significant administrative adjustments in New York State. Only five other states terminate the subsidies of families who move from one county to another within the state. In three of those states subsidies are protected across counties in some circumstances: if the move is in a metropolitan area encompassing a number of counties (Colorado), if the move is to a county that falls within the jurisdiction of the same multi-county workforce development board (Texas) or if the move is to a county that is in the same Early Learning Coalition as the former county of residence (Florida).⁵ In Minnesota, subsidies are continued for two months after the move.⁶

Colorado is in the process of amending its regulations to comply with this federal requirement. The comment period has just closed on proposed regulations that would require continuation of a subsidy when a family moves anywhere within the state. The Colorado proposal also addresses what happens at redetermination when the county to which the family has moved (the “receiving county”) has a wait list or a different income-eligibility threshold. After the family moves, the county from which the family has moved (called the “originating county”) must continue payment for the remainder of the 12 month eligibility period. The child care provider shall be reimbursed at the rate of the county in which the provider is located unless the originating county has a fiscal agreement with the provider. The originating county is reimbursed by the state for the cost for child care during the remainder of the 12 month eligibility period. The family will

⁵ Florida has 31 Early Learning Coalitions and 67 Counties.1/21/16 e-mail from Phyllis Kalifeh, Ed.D, President and CEO, The Children’s forum, Tallahassee, Florida. On file at Empire Justice.

⁶ Minnesota DHS Policy Manual §8.2. available at http://www.dhs.state.mn.us/main/idcplg?IdcService=GET_DYNAMIC_CONVERSION&RevisionSelectionMethod=LatestReleased&dDocName=ccap_0812 (accessed May 9, 2018)

be re-evaluated at the 12 month redetermination date, using the eligibility requirements of the receiving county. The case can be closed if the family does not meet the eligibility requirements of the receiving county or the family can be put on a wait list, if there is a wait list in place and the family is not a target population.⁷

In New York, we will have to determine which copayment will apply when the family moves to a new county and the counties have different copayment amounts. This challenge is not affecting all of the other county administered states. For example, Florida and Colorado have uniform copayment schedules across their states, so the copayment will remain the same regardless of where the family moves within the state.⁸

RECOMMENDATION: New York should amend the Social Services Law to require that the county that authorizes the family at the beginning of a 12 month eligibility period continue to pay for the subsidy throughout the eligibility period and until the next recertification period begins, even if the family moves. Given the new 12 month eligibility rule, the counties should already be budgeting for a 12-month period of care. Alternatively, subsidies for families that move could be paid for by an earmarked allocation in the state budget.

RECOMMENDATION: The parent copayment shall remain the same as the county from which the parent has moved, until recertification, when the copayment multiplier in the new county will apply. If the multiplier in the new county is smaller, the parent multiplier in the new county of residence will apply.

3. HOMELESS FAMILIES [OCFS plan at 3.2.2 and 3.2.3 pp-61-65]:

The federal Child Care Development Block Grant of 2014 requires states to place a strong emphasis on serving homeless families and children. Specifically, the federal law requires that after establishing initial eligibility, states must allow a grace period for homeless children to provide documentation, particularly with respect to immunizations; provide training to child care providers regarding services and supports for homeless children; and to conduct outreach to homeless families. 42 USC 9858c(c)(2)(I)(i)(l);(c)(2)(O)(i);(c)(3)(B)(i).

The prevalence of trauma among families experiencing homelessness is high, as is the prevalence of post-traumatic stress disorder (PTSD) and depression among mothers who are homeless, putting children experiencing homelessness at risk of developmental and mental health delays and disabilities. The toxic stress of homelessness has been proven to impair brain development, “altering brain size and structure, leading to impaired cognitive skills, memory, emotional self-regulation, behavioral problems, coping and social relationships, particularly portions of the brain dedicated to higher order skills.” E. Bassuk, MD. C. DeCandia, PsyD, et, al., *America’s Youngest Outcasts, A Report Card on Child Homelessness*, American Institutes for

⁷ 9 CCRR 2503-911(CC) (Proposed), available at: https://gallery.mailchimp.com/77bac9f533d6bce265cae77d9/files/1f46af32-5a3a-4239-a593-d5725eae9afd/DG_4_30_18_DRAFT_9_CCR_2503_9_CCCAP_Rules_2018.pdf (accessed May 10, 2018)

⁸ 5/10/18 email from Bill Jaeger, Vice President, Early Childhood Initiative, Colorado Children’s Campaign. On file with Empire Justice. 1/31/16 e-mail from Phyllis Kalifeh, Ed.D, President and CEO, The Children’s forum, Tallahassee, Florida. On file at Empire Justice.

Research, pp.81-82, 85 (2014), available at:

<http://www.air.org/sites/default/files/downloads/report/Americas-Youngest-Outcasts-Child-Homelessness-Nov2014.pdf>. Minimizing toxic stress, by providing a safe and nurturing space, is one part of the critical response to the need to protect children experiencing homelessness.

New York State has made significant progress in helping to assure that homeless children have access to quality care. In particular, by regulation, OCFS has required that local districts:

- Give priority to families experiencing homelessness to child care services;
- Waive the copayment for homeless families;
- Provide an enhanced subsidy rate of 5% over market rate to providers serving homeless children, and permitting a local option to go up to 15% over market rate;
- Provide homeless families with a 90 day grace period to comply with documentation requirements, and a two week grace period (which can be extended to 30 days) to provide proof of immunizations;
- May not treat payments made during the grace period as an error or improper payment.

We commend OCFS for taking leadership in this area and thank the agency for taking the comments of child care providers, parents and advocates into consideration when developing homeless regulations at 18 NYCRR 415.2 and policy at 17 OCFS-LCM-5, available at https://www.ocfs.ny.gov/main/policies/external/OCFS_2017/LCMs/17-OCFS-LCM-05.pdf .

4. PAYMENT FOR ABSENCES [OCFS plan at 4.5.1, 4.5.2. pp.86-90]

The federal law requires that a state's provider payment practices support the fixed cost of child care by delinking payment rates from occasional absences. 42 USC 9858c(c)(2)(S)(ii). The federal regulations at 98.45(l) (2) allow states to do this by paying providers based on enrollment rather than attendance; providing full payment as long as a child attends 85% of the time; or providing full payment so long as the child has no more than five or fewer absences in a four week period.

The OCFS plan notes that 53 out of 58 counties already pay for absences. However, the representation masks the fact that **thirty-three of those districts will only pay for absences if the provider has a contract with the district**⁹. Many districts pay their contracted providers at a rate below market rate meaning that the provider has to make a difficult decision whether to be paid less, but compensated for absences, or paid more and not be compensated for absences.

RECOMMENDATION: New York should amend the Social Services Law or regulations to require that just as for private pay families, payment should be based on enrollment rather

⁹ The Consolidated Services Plans that local social services districts file with OCFS indicate whether they limit payment for absences to contracted providers in Appendix R: <https://ocfs.ny.gov/main/childcare/plans/plans.asp>

than attendance. Alternatively, we suggest that the legislature pass A. 6974 (Jaffee)/ S.6974 (Avella) which requires districts to pay for at least 12 absences in a six month period to provides some modicum of economic stability for child care providers. We recommend that the bill be amended to remove the cap on absences that can be paid at district option, so that districts that currently have more generous policies can continue them.

6. FLUCTUATIONS IN EARNINGS – [OCFS plan at 3.1.6, p. 58]

The CCDBG says that states must take into account irregular fluctuations in earnings. 42 UCS 9858(c)(2)(N)(i)(II). The OCFS plan reports that New York is in compliance with this requirement already because New York averages income for a period of not less than one or more than three months, and permits averaging between 3-6 months if income fluctuates significantly.

The federal regulation at 98.21(c) says that “states must ensure that temporary increases in income, including temporary increases that result in monthly income exceeding 85% of SMI, do not effect eligibility or family copayments.” The commentary to the federal regulations (81 FR 67469) permits 12 month income averaging. This is consistent with the 12 month eligibility period, and also allows states to disregard short term overtime pay and receipt of income which is not indicative of a permanent increase in income.

RECOMMENDATION: New York should amend the Social Services Law to adopt the more generous 12 month income averaging provision permitted by federal law and disregard short term overtime pay which is not indicative of a permanent increase in income.

7. DEFINITION OF SPECIAL NEEDS CHILD: [OCFS Plan at 1.4.1, p.19; 3.1.1 (b), p. 52 and 3.2.1(a), p. 62].

We commend the commitment that OCFS has made to improve the administration and coordination of care to special needs children, by working with advocates, unions, staff from non-profit centers and pediatricians to revise the very outdated administrative directive at 91 ADM-34 setting for state policy on payment for children with special needs. We look forward to the state revising its policy to improve access of children with special needs to quality child care, and to improve coordination of services with other providers.

The definition of special needs child in the state plan (p. 48) reflects the outdated definition in state regulation at 18 NYCRR 415.1(c), and does not conform to the new definition required by the CCDBG at 42 UCS 9858n(4) and federal regulation 45 CFR 98.2. New York State’s definition of a special needs child should be revised to conform to the new federal definition.

RECOMMENDATION: New York should amend the Social Services Law and/or regulations to define of special needs child to be consistent with federal law.

8. MARKET RATE: [OCFS Plan at 4.2, pp 77-81].

The CCDBG permits states to establish payment rates using an alternative methodology other than a market rate survey, such as a cost estimation model. 42 USC 9858C(c)(4)(B)(i),(ii). New York State has indicated in its plan that it will utilize a market rate survey. New York lowered its reimbursement rate to the 69th percentile of market rate, after many years of maintaining the rates at the 75th percentile. New York should restore payment rates to the 75th percentile of market rate to support access to quality care. The federal regulations discourage states from setting reimbursement rates below the 75th percentile, stating that the 75th percentile is an "important benchmark for gauging equal access for children receiving CCDF funded care. 81 Fed,Reg. 67561, 67512.

Additionally, New York should explore the use of an alternate method of setting payment rates which takes into account the complexities of child care financing, particularly the effect that increased rates only work if there is full enrollment; and that the tuition paid by small centers (under 100 children), which constitute the majority of centers in New York State, find it increasingly difficult to meet high quality standards at the current market rates. The Provider Cost of Quality Calculator (PCQC) is an easy-to-use, dynamic Web-based tool that calculates the cost of quality-based on site-level provider data.¹⁰ The tool helps state policymakers understand the costs associated with delivering high-quality early care and education. The tool can demonstrate whether there is a gap between the cost of providing quality services and the revenue sources available to support a program. Knowing the size of the gap at different quality levels for various provider types can inform the design of financial support and incentive packages.

The PCQC is useful to states that have a Quality Rating and Improvement System (QRIS) and to states that want to understand the cost of operating a particular type of quality program, such as prekindergarten. The tool can model the cost of quality for any jurisdiction(state, county, city). A user can manage and share multiple scenarios and provider profiles, and store and print reports. Over a dozen states and local governments, including New Jersey, Pennsylvania, Washington, Rhode Island, North Carolina, California, Ohio, the District of Columbia and Kansas City have used the PCQC to develop a set of dynamic models to estimate the cost of operating early learning programs at various levels of quality consistent with the state's QRIS.¹¹

RECOMMENDATION: New York should set its payment rates at the 75th percentile of market rate.

RECOMMENDATION: New York should fund a cost modeling study that will support the development an alternative method of setting payment rates that will support high quality infant and toddler care and quality care for 3-5 year olds. The New York State Assembly has passed a bill that would require the use of a cost estimation model to inform its decisions in making market rates. A. 290 (Jaffee)/ S.1455 (Avella). It is time for the Senate to take action on this bill.

¹⁰ Available at: <https://www.ecequalitycalculator.com/Login.aspx?ReturnUrl=%2f&AspxAutoDetectCookieSupport=1>

¹¹ E-mail from Anne Mitchell, Executive Director of Early Childhood Finance dated May 10, 2018 (On file with the Empire Justice Center) See: <http://www.earlychildhoodfinance.org/finance/cost-modeling>

9. EQUAL ACCESS – CHILD CARE COPAYMENTS [OCFS Plan at 3.4, pp 71-75].

The commentary to the federal regulations state that to assure equal access to child care, child care must be affordable, and recommends that parent copayments do not exceed 7% of household income. 81 Fed. Reg. 67515 (9/30/16). The commentary relies on data from the U.S. Census Bureau, showing that the percent of monthly income spent on child care by American families is, on average seven percent of household income. However, poor families on average spend approximately four times the share of their income on child care compared to higher income families.¹² The commentary states that CCDF families should not be expected to pay a greater share of their income on child care than reflects the national average.

The OCFS state plan states that in New York copayments are affordable because the state regulation limits copayments to 35% of income over poverty.[3.4.6, p.75] As set forth more fully below, a 35% copayment is not an affordable copayment, especially for families over 150% of poverty. In twenty social services in New York State, families pay 17.5% of their income at 200% of poverty.¹³ As indicated by attached chart A, for lower income families the percentages are slightly better, but even families at 150% of poverty pay nearly 12% of their income if they reside in counties with 35% multipliers.

As indicated at page 71 of the proposed New York State plan, and the attached chart B, **only seven out of 58 social services districts have parent copayments that are at or below 7.5% for families at 200% of poverty.**

This disparity exists because of the Office of Children and Family Services (OCFS) regulation at 18 NYCRR 415.3 [e] [3] sets forth the formula for calculating copayment amounts that gives social services districts total discretion to choose a multiplier between 10% and 35% that is then applied to the family's income above the state income standard (the equivalent of the federal poverty level) to determine the household's copayment amount. The result is that the larger the multiplier chosen by the county, the smaller the child care benefit received by the family. The inequity in the child care benefit offered to similarly situated families (same family size, same income) varies by as much as 300% depending on the county in which a family resides.

The inequity is vast across New York. As indicated by the attached chart B:

- four social services districts parents pay 10% of their income over the poverty level as their child care copayment;
- three districts parents pay 15% of their income over poverty;
- thirteen districts, parents pay 20% of their income over poverty;
- fifteen districts, parents pay 25% of their income over poverty;
- one district parents pay 27% of their income over poverty;
- two districts, parents pay 30% of their income over poverty; and

¹²*Who's Minding the Kids? Child Care Arrangements: Spring 2011, U.S. Census Bureau, 2013.*
<https://www.census.gov/prod/2013pubs/p70-135.pdf> (Accessed May 9, 2018)

¹³ As indicated in the text accompanying footnote 16, *infra*, New York City, one of these twenty counties, has an approved waiver that caps parent copayments at 17%, a half a percentage point lower than the other 19 counties in this category.

- twenty districts, parents pay 35% of their income over poverty.

It's time to address this inequity. Despite clear guidance in New York's Social Services Law 410-x(2)(a) requiring that families be provided "equitable access" to child care funds, and that parent copayment should be "based upon the family's ability to pay" SSL 410-x(6), this standardless formula has been in place, unchanged, since at least June 29, 1987, when the New York State Department of Social Services, the OCFS predecessor agency, directed all social services districts to adopt the methodology by June 1, 1988.

A bill sponsored by Assemblywoman Titus and cosponsored by sixteen other Assemblymembers (A.4207) during the 2015-16 session would have ameliorated these inequities by providing that no family could be required to pay more than 10% of their gross income for child care. This bill still permitted counties to choose their multiplier, but it imposed a second step in the copayment calculation – if the resulting number exceeds 10% of the family's gross income, the copayment is adjusted downward to that number. New York City actually implemented such a cap from 2007-2009,¹⁴ but ended up adjusting the cap upward from 10% to 12% in May 2009¹⁵ and then to 17% in 2011,¹⁶ rendering the cap essentially meaningless.

RECOMMENDATION: New York should amend the Social Services Law to assure that no family that receives a subsidy is required to pay more than 10% of their income as a copayment for child care.

Thank you for your consideration of these comments, and please do not hesitate to contact me at Santos@empirejustice.org if I can provide you with any further information.

¹⁴ <http://www.ocfs.state.ny.us/main/childcare/plans/New%20York%20County/New%20York%20County312.pdf>

¹⁵ <http://www.ocfs.state.ny.us/main/childcare/plans/New%20York%20County/New%20York%20County310.pdf>

¹⁶ <http://www.ocfs.state.ny.us/main/childcare/plans/New%20York%20County/New%20York%20County305.pdf>