



STATE OF DELAWARE
STATE COUNCIL FOR PERSONS WITH DISABILITIES
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The Honorable John Carney
Governor

John McNeal
SCPD Director

MEMORANDUM

DATE: November 30, 2017

TO: Ms. Nicole Cunningham, DMMA
Planning & Policy Development Unit

FROM: Ms. Jamie Wolfe, Chairperson
State Council for Persons with Disabilities

RE: 21 DE Reg. 374 [DMMA Proposed Child Care Redetermination Regulation (11/1/17)]

The State Council for Persons with Disabilities (SCPD) has reviewed the Department of Health and Social Services/Division of Medicaid and Medical Assistance (DMMA) proposal to amend its regulations to conform to federal regulations published at 81 Fed Reg 67438 (September 30, 2016). Copies of the relevant background section of the regulations (81 Fed Reg 67461-67469) and the current federal regulation (45 CFR 98.21) are attached. The proposed regulation was published as 21 DE Reg. 374 in the November 1, 2017 issue of the Register of Regulations.

The Department of Health & Social Services maintains a program covering the costs of child care for individuals meeting certain program and financial standards. Eligibility is generally open to the following: 1) TANF beneficiaries who are employed, attending school, or participating in vocational programs; 2) low income working families; 3) low income families involved with job training or education programs; 4) some Food Supplement program beneficiaries; 5) families receiving DFS protective services; and 6) eligible families with a special needs parent or child. See 16 DE Admin Code §§11002.4 and 11003.7.8.

In a nutshell, participants exceeding the normal financial eligibility cap are essentially given an extended, 12-month period of eligibility if their countable income is between 185-200% of the Federal Poverty Level (FPL) but below 85% of the State's Median Income (SMI). The purpose of the "graduated phase out" is to allow families to transition gradually from receiving subsidized child care rather than facing abrupt termination.

The Division projects a State fiscal impact of \$2 million in FFY18 whose impact is partially offset by \$6 million in federal funds. At 375.

Since the State is required to implement the federal regulation, and the revision benefits program

participants (including “special needs” parents and children), the SCPD is endorsing the proposed regulation.

Thank you for your consideration and please contact SCPD if you have any questions regarding our position on the proposed regulation.

cc: Mr. Steve Groff, DMMA
Mr. Brian Hartman, Esq.
Governor’s Advisory Council for Exceptional Citizens
Developmental Disabilities Council

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the requirement while minimizing any unnecessary burden on families. The final rule retains language in this provision as proposed in the NPRM.

Protective services. Section 658P(4) of the Act indicates that, for CCDF purposes, an eligible child includes a child who is receiving or needs to receive protective services. This final rule adds language at § 98.20(a)(3)(ii) to clarify that the protective services category may include specific populations of vulnerable children as identified by the Lead Agency. Children do not need to be formally involved with child protective services or the child welfare system in order to be considered eligible for CCDF assistance under this category. The Act references children who "need to receive protective services," demonstrating that the intent of this language was to provide services to at-risk children, not to limit this definition to serve children already in the child protective services system.

It is important to note that including additional categories of vulnerable children in the definition of protective services is only relevant for the purposes of CCDF eligibility and does not mean that those children should automatically be considered to be in official protective service situations for other programs or purposes. It is critical that policies be structured and implemented so these children are not identified as needing formal intervention by the CPS agency, except in cases where that is appropriate for reasons other than the inclusion of the child in the new categories of vulnerable child for purposes of CCDF eligibility. We received limited comments on this section and discuss these below.

Similarly, this final rule removes the requirement that case-by-case determinations of income and co-payment fees for this eligibility category must be made by, or in consultation with, a child protective services (CPS) worker. While consulting with a CPS worker is no longer a requirement, it is not prohibited; a Lead Agency may consult with or involve a CPS caseworker as appropriate. We encourage collaboration with the agency responsible for children in protective services, especially when a child also is receiving CCDF assistance.

These changes provide Lead Agencies with additional flexibility to offer services to those who have the greatest need, including high-risk populations, and reduce the burden associated with eligibility determinations for vulnerable families.

Under previous regulations at § 98.20(a)(3)(ii)(B), at the option of the Lead Agency, this category could already include children in foster care. The regulations already allowed that children deemed eligible based on protective services may reside with a guardian or other person standing "in loco parentis" and that person is not required to be working or attending job training or education activities in order for the child to be eligible. In addition, the prior regulations already allowed grantees to waive income eligibility and co-payment requirements as determined necessary on a case-by-case basis, by, or in consultation with, an appropriate protective services worker for children in this eligibility category. This final rule clarifies, for example, that a family living in a homeless shelter may not meet certain eligibility requirements (e.g., work or income requirements), but, because the child is in a vulnerable situation, could be considered eligible and benefit from access to high-quality child care services.

We note that this new provision does not require Lead Agencies to expand their definition of protective services. It merely provides the option to include other high-needs populations in the protective services category solely for purposes of CCDF, as many Lead Agencies already choose to do.

We did not receive many comments on this policy, but those who did comment were supportive of this clarification and appreciative of the "discretion to include specific populations of vulnerable children, especially if they do not need to be formally involved with CPS or child welfare system." The regulatory language proposed in the NPRM is retained in this final rule.

Additional eligibility criteria. Under pre-existing regulations, Lead Agencies are allowed to establish eligibility conditions or priority rules in addition to those specified through Federal regulation so long as they do not discriminate, limit parental rights, or violate priority requirements (these are described in full at § 98.20(b)). This final rule revises this section in paragraph 98.20(b)(4) to add that any additional eligibility conditions or priority rules established by the Lead Agency cannot impact eligibility other than at the time of eligibility determination or re-determination. This revision was made to be consistent with the aforementioned change to § 98.20(a) which says that eligibility criteria apply only at the time of determination or re-determination. It follows that the same would be true of additional criteria established at the Lead Agency's option.

The final rule adds paragraph (c), clarifying that only the citizenship and immigration status of the child, the primary beneficiary of CCDF, is relevant for the purposes of determining eligibility under PRWORA and that a Lead Agency, or other administering agency, may not condition eligibility based upon the citizenship or immigration status of the child's parent. Under title IV of PRWORA, CCDF is considered a program providing Federal public benefits and thus is subject to requirements to verify citizenship and immigration status of beneficiaries. In 1998, ACF issued a Program Instruction (ACYF-PI-CC-98-08) which established that "only the citizenship status of the child, who is the primary beneficiary of the child care benefit, is relevant for eligibility purposes." This proposal codifies this policy in regulation and clarifies that Lead Agencies are prohibited from considering the parent's citizenship and immigration status.

ACF has previously clarified through a program instruction (ACYF-PI-CC-98-09) that when a child receives Early Head Start or Head Start services that are supported by CCDF funds and subject to the Head Start Performance Standards, the PRWORA verification requirements do not apply. Verification requirements also do not apply to child care settings that are subject to public educational standards. These policies remain in effect.

All comments received were supportive of the clarification on citizenship and this policy will remain in this final rule. One national organization commented that "ensuring that the citizenship or immigration status of a child's parent does not impact their ability to access CCDF-funded child care maintains the program's focus on ensuring access to high-quality child care services for vulnerable populations. Given that this policy was previously contained in sub-regulatory guidance to States, we are very appreciative of ACF's proposal to codify it within the CCDF program regulations."

§ 98.21 Eligibility Determination Processes

In this final rule, § 98.21 addresses the processes by which Lead Agencies determine and re-determine a child's eligibility for services. In response to comment, this final rule includes a new § 98.21(a)(5) which describes limited additional circumstances for which assistance may be terminated prior to the end of the minimum 12-month eligibility period, which will be discussed in greater detail below.

Minimum 12-month eligibility.

Section 98.21 reiterates the statutory change made in Section 658E(c)(2)(N)(i) of the Act, which establishes minimum 12-month eligibility periods for all CCDF families, regardless of changes in income (as long as income does not exceed the Federal threshold of 85 percent of SMI) or temporary changes in participation in work, training, or education activities. Under the Act, Lead Agencies may not terminate CCDF assistance during the 12-month period if a family has an increase in income that exceeds the Lead Agency's income eligibility threshold but not the Federal threshold, or if a parent has a temporary change in work, education or training.

We note that, during the minimum 12-month eligibility period, Lead Agencies may not end or suspend child care authorizations or provider payments due to a temporary change in a parent's work, training, or education status. In other words, once determined eligible, children are expected to receive a minimum of 12 months of child care services, unless family income rises above 85% of SMI or, at Lead Agency option, the family experiences a non-temporary cessation of work, education, or training.

As the statutory language states that a child determined eligible will not only be considered to meet all eligibility requirements, but also "will receive such assistance," Lead Agencies may not offer authorization periods shorter than 12 months as that would functionally undermine the statutory intent that, barring limited circumstances, eligible children shall receive a minimum of 12 months of CCDF assistance. We note that, despite the language that the child "will receive such assistance," the receipt of such services remains at the option of the family. The Act does not require the family to continue receiving services nor does it force the family to remain with a provider if the family no longer chooses to receive such services. Lead Agencies would not be responsible for paying for care that is no longer being utilized. This is discussed further in the new § 98.21(a)(5).

Comment: Comments were generally supportive of the statutory change to a minimum 12-month eligibility period, though there were concerns about the costs and possible impacts on enrollment patterns. Those in support emphasized that this change "would make it easier for families to access and retain more stable child care assistance and increase continuity of care for children." These commenters considered this a significant improvement to the previous law which

"commonly resulted in children experiencing short periods of assistance of usually less than a year, and families cycling on and off assistance," and had the unintended consequence of "modest increases in earnings or brief periods of unemployment or reductions in work hours caus[ing] families to lose child care assistance."

Other commenters also thought that "setting eligibility for longer periods will dramatically reduce the significant administrative burden on small businesses and at-risk families," and that this policy will facilitate "the ability to partner with others such as Head Start and Early Head Start and increases the quality of those partnerships."

However, some commenters, particularly States, shared concerns about the implications of this change, wanting to "draw attention to the significant cost of this requirement especially in light of stagnant funding levels to implement all the required changes." Another commenter focused on the idea that the "unintended consequence of these proposed rules is that by extending eligibility for current recipients of child care subsidies, other families in need will never have a chance to access the subsidies because federal funding has not been sufficiently increased to cover the cost."

Response: While we recognize the logistical challenges that States will experience as they are transitioning to minimum 12-month eligibility, we re-emphasize that this is a statutory requirement. We also think these longer periods of assistance will ensure that families derive greater benefit from the assistance and that this policy creates more opportunity for families to work towards economic stability. Any policy decision will have significant tradeoffs, and while the total number of families served may decrease as families stay on longer, this effect would be due to a decrease in churn, meaning that the number of children and families served at any given point would not be affected by families staying on longer. We think that the added benefit of continuity of services provided by reducing churn will have a positive overall impact on children and families and be a more effective use of federal dollars.

However, we do recognize that during the minimum 12-month redetermination periods, it may be necessary to collect some information to complete the redetermination process in time. We allow such practices, so long as it is limited (e.g. a few days or weeks in advance) and is not used as a way to circumvent the minimum 12-month period. Even if information is collected

in advance, eligibility cannot be terminated prior to the minimum 12-month period, even if disqualifying information is discovered during the preliminary collection of documentation (unless it indicates that family income has exceeded 85% of SMI or, at the Lead Agency option, the family has experienced a non-temporary cessation in work, or attendance at a training or education program).

Comment: One commenter questioned our interpretation of the Act that "assistance must be at the same level throughout the period." This commenter thought that "a State should be able to adjust the number of authorized hours (and thus the payment level) within the 12-month period due to a change in the number of hours of child care needed for a parent to work or participate in education or training, while maintaining eligibility for the entire 12-month period."

Response: Section 658E(c)(2)(N)(i)(I) of the Act states that each child who receives assistance under this subchapter in the State will be considered to meet all eligibility requirements for such assistance "and will receive such assistance" for not less than 12 months before the State or designated local entity re-determines the eligibility of the child under this subchapter. "[A]nd will receive such assistance" clearly indicates that eligibility and authorization for services, as determined at the time of eligibility determination or redetermination, should be consistent throughout the period. To clarify the regulatory language on this policy, we are adding language at § 98.21(a)(1) to say that once deemed eligible, the child shall receive services "at least at the same level" for the duration of the eligibility period. This also makes this section more consistent with the Act, which says that the child will receive such assistance, for not less than 12 months, and § 98.21(a)(3) of the final rule, which prohibits Lead Agencies from increasing family co-payments within the minimum 12-month eligibility period.

We are making a change to the language as proposed in the NPRM to now say that, once deemed eligible, the child shall receive services "at least at the same level." This makes it clear that the Lead Agency still has the ability to increase the child's benefit during the eligibility period, aligning the section with the provision at § 98.21(e)(4)(i), which requires Lead Agencies to act on information provided by the family if it would reduce the family's co-payment or increase the family's subsidy.

However, we do note that a State is not obligated to pay for services that are

not being used, so if a family voluntarily changes their care arrangement to use less care, the State can adjust their payments accordingly. We do want to reemphasize, however, that as this rule makes it clear that authorizations do not have to be tied to a family's work, training, or education schedule, even if the parents' schedule changes, in the interest of child development and continuity, the child must be allowed the option to stay with their care arrangement.

Definition of temporary. This final rule defines "temporary change" at § 98.21(a)(1)(ii) to include, at a minimum: (1) Any time-limited absence from work for employed parents due to reasons such as need to care for a family member or an illness; (2) any interruption in work for a seasonal worker who is not working between regular industry work seasons; (3) any student holiday or break for a parent participating in training or education; (4) any reduction in work, training or education hours, as long as the parent is still working or attending training or education; and (5) any cessation of work or attendance at a training or education program that does not exceed three months or a longer period of time established by the Lead Agency.

The above circumstances represent temporary changes to the parents' schedule or conditions of employment, but do not constitute permanent changes to the parents' status as being employed or attending a job training or educational program. This definition is in line with Congressional intent to stabilize assistance for working families. Lead Agencies must consider all changes on this list to be temporary, but should not be limited by this definition and may consider additional changes to be temporary. The final rule modifies language proposed in the NPRM at § 98.21(a)(1)(ii)(A), which addresses absences from employment. Whereas the NPRM stipulated that the definition of temporary had to include family leave (including parental leave) or sick leave, the final rule modifies this to say any time-limited absence from work for an employed parent due to reasons such as need to care for a family member or an illness. This change was made to acknowledge that while a parent may have a legitimate reason for an absence, there may be circumstances where leave is not granted by the employer. This language ensures that even if official leave has not been granted, CCDF assistance should still be continued. To clarify, in this new language still accounts for family leave (or parental leave), which will now be included

under the need to care for a family member.

Section 98.21(a)(ii)(F) clarifies that a child must retain eligibility despite any change in age, including turning 13 years old during the eligibility period. This is consistent with the statutory requirement that a child shall be considered to meet all eligibility requirements until the next re-determination. This allows Lead Agencies to avoid terminating access to CCDF assistance immediately upon a child's 13th birthday in a manner that may be detrimental to positive youth development and academic success or that might abruptly put the child at-risk if a parent cannot be with the child before or after school.

Comment: Commenters were supportive of this clarification, one stating that "taken together, these provisions protect children from losing access to child care because their parent experiences a temporary change in employment status, small increase in income, or has to move within the State," and another commenter stated that they found it particularly helpful "that ACF declares eligibility is maintained when a parent is using sick leave or parental leave or is on a student holiday break from classes."

However, one comment indicated that the State "would incur significant costs if allowed children to stay on after they turn 13," and recommended "State discretion to do this pending available funds."

Response: Given that there were few comments opposing this new policy allowing children to remain eligible after they turn 13, we are keeping this provision in this final rule. Additionally, given the nature of funding for CCDF, this "significant cost" is more accurately characterized as a reallocation of expenses rather than new costs. For the small subset of CCDF children who will turn 13 during their eligibility period, there is value in allowing them to retain eligibility, and that the benefits of such policies outweigh the potential challenges. We also note that if the family chooses to stop utilizing care prior to the end of the eligibility period (e.g. the school year ends and there are no plans for care during the summer), then the State would no longer be obligated to pay for the care that is not being used.

At § 98.21(a)(ii)(G), this final rule requires that a child retain eligibility despite any change in residency within the State, Territory, or Tribal service area. This provides stability for families who, under current practice, may lose child care assistance despite maintaining their State, Territory or

Tribal residency. This may require coordination between localities within States, Territories, or Tribes or necessitate some Lead Agencies to change practices for allocating funding. This level of coordination is essential, as the State, Territory, or Tribe is the entity responsible for CCDF assistance.

Comment: We received a number of comments in this area, some that were supportive of this policy and its importance for ensuring that families retain their benefits, and others, particularly States that are county-administered, that were concerned about the implementation of this requirement. A number of States indicated that "due to the unique administrative structure of [county administered] States, with delegated authority to local entities for administration of programs and services, the transference of eligibility, from one part of the State to another, poses uniquely difficult situations when each locality has a distinctive financial situation. For example, the States are unsure how to handle continuity of services and maintenance of 12-month eligibility during situations where a family moves out of the county where they initially became eligible and into a county that is out of funding and has a wait list." Some commenters asked for further clarification, particularly as it related to which county would be responsible for the ongoing payment, "If a child is eligible for 12 months, does the originating county continue payments or the receiving county? Or, should the State reserve funding to address the inter-county movement of families?" This commenter further emphasized that "given the financial impact, additional guidance is needed with regard to how 12-month eligibility is funded."

This also raised the issue of what happens when a family moves out of State. One commenter said, "There are also situations where a customer moves out of State. In some instances, they move without notifying the Lead Agency. [This] Lead Agency recommends that the rule is amended to allow Lead Agencies to terminate benefits prior to 12-months if it is discovered that a family moved out of State."

Response: Given the number of comments on this issue, we carefully considered the various factors in play and are keeping the policy on retaining eligibility if a family moves within the State, but are adding new language that would allow a Lead Agency to terminate eligibility prior to the end of the eligibility period if the family moves out of the State.

While we understand some of the unique challenges facing county-administered States, given that the CCDF block grant is a block grant to the State, it is reasonable for the State to develop policies that allow a family to retain their eligibility as long as they remain within the State. The question of whether the receiving or originating county should pay for the assistance is a question best left up to the State. These are logistical and implementation issues that will vary depending on each State's approach to administering the program. However, we do emphasize that this does not prohibit counties from establishing different eligibility criteria to take into account local variation.

As for a family that moves out of the State, we agree that this would be considered appropriate grounds for termination. We have added a new section at § 98.21(a)(5) describing additional limited circumstances that would allow a Lead Agency to end assistance prior to the end of the minimum 12-month eligibility period. We discuss this in more detail below, but the new regulatory language at § 98.21(a)(5)(ii) allows Lead Agencies to terminate assistance due to a change in residency outside of the State, Territory, or Tribal service area. However, while the final rule allows Lead Agencies to terminate for this reason, this is a permissive policy and not a requirement. Neighboring States/Territories/Tribes can still develop agreements to allow families to retain their eligibility if they cross State/Territory/Tribal boundaries. For example, in large metropolitan areas where daily commutes and neighborhoods regularly cross State boundaries, or Tribal populations which may move outside the Tribal service area but remain within a State boundary, it may be appropriate to develop such agreements. We encourage Lead Agencies to develop policies to meet the needs of their families and match the realities of their population's geographic and economic mobility.

Nothing in this rule prohibits Lead Agencies from establishing eligibility periods longer than 12 months or lengthening eligibility periods prior to a re-determination. We encourage (but do not require) Lead Agencies to consider how they can use this flexibility to align CCDF eligibility policies with other programs serving low-income families, including Head Start, Early Head Start, Medicaid, or SNAP. For example, once determined eligible, children in Head Start remain eligible until the end of the succeeding program year. Children in Early Head Start are considered eligible until they age out of the program.

Consistent with existing ACF guidance (ACYF-PIQ-CC-99-02) a Lead Agency could establish eligibility periods longer than 12 months for children enrolled in Head Start and receiving CCDF in order to align eligibility periods between programs. Similarly, Lead Agencies are encouraged to establish longer eligibility periods during an infant or toddler's enrollment in Early Head Start or in other collaborative models, such as Early Head Start-Child Care Partnerships.

Operationalizing alignment across programs can be challenging, particularly if families enroll in programs at different times. While the Lead Agency must ensure that eligibility is not re-determined prior to 12 months, it could align with other benefit programs by "resetting the clock" on the eligibility period to extend the child's CCDF eligibility by starting a new 12-month period if the Lead Agency receives information, such as information pursuant to eligibility determinations or re-certifications in other programs, that confirms the child's eligibility and current co-payment rate. Alignment promotes conformity across Federal programs, such as SNAP, and can simplify eligibility and reporting processes for families and administering agencies. However, it should be noted that a Lead Agency cannot terminate assistance for a child prior to the end of the minimum 12-month period if the recertification process of another program reveals a change in the family's circumstances, unless those changes impact CCDF eligibility (e.g., a change in income over 85 percent of SMI or, at the option of the Lead Agency, a non-temporary change in the work, job training, or educational status of the parent). We retained the language in section 98.21(a)(1) as proposed in the NPRM.

Continued assistance. In 98.21(a)(2) of this final rule, if a parent experiences a non-temporary job loss or cessation of education or training, Lead Agencies have the option—but are not required—to terminate assistance prior to the minimum 12 months. Per the Act, prior to terminating assistance, the Lead Agency must provide a period of continued assistance of at least three months to allow parents to engage in job search activities. By the end of the minimum three-month period of continued assistance, if the parent is engaged in an eligible work, education, or training activity, assistance should not be terminated and the child should either continue receiving assistance until the next scheduled re-determination or be re-determined eligible for an additional minimum 12-

month period. This final rule clarifies that assistance must be provided at least at the same level during the period. This clarification is important because reducing levels of assistance during this period would undermine the statutory intent to provide stability for families during times of increased need or transition.

It is important to note that the Act allows Lead Agencies to continue child care assistance for the full minimum 12-month eligibility period even if the parent experiences a non-temporary job loss or cessation of education or training. The default policy is that a child remains eligible for the full minimum 12-month eligibility period, but the Lead Agency has the option to terminate assistance under these particular conditions. A Lead Agency may choose not to terminate assistance for any families prior to a re-determination at 12 months.

If a Lead Agency chooses to terminate assistance under these conditions after at least three months of continued assistance, it has the option of doing so for all CCDF families or for only a subset of CCDF families. For example, a Lead Agency could choose to allow priority families (e.g., children with special needs, children experiencing homelessness) to remain eligible through their eligibility period despite a parent's loss of work or cessation of attendance at a job training or educational program, but terminate assistance (after a period of continued assistance) for families who do not fall in a priority category. Or, a Lead Agency may choose to allow families in certain types of care, such as high-quality care, to remain eligible regardless of a parent's work or education activity.

While the Lead Agency must provide continued assistance for at least three months, there is no requirement to document that the parent is engaged in a job search or other activity related to resuming attendance in an education or training program during that time. In fact, we strongly discourage such policies as they would be an additional burden on families and be inconsistent with the purposes of CCDF.

If a Lead Agency does choose to terminate assistance under these circumstances, it must allow families that have been terminated to reapply as soon as they are eligible again instead of making the family wait until their original eligibility period would have ended in order to reapply.

A policy that provides continuous eligibility, regardless of non-temporary changes, reduces the burden on families and the administrative burden on Lead Agencies by minimizing reporting and

the frequency of eligibility adjustments. Retention of eligibility during periods of family instability (such as losing a job) can alleviate some of the stress on families, facilitate a smoother transition back into the workforce, and support children's development by maintaining continuity in their child care. Moreover, studies show that the same families that leave CCDF often return to the program after short periods of ineligibility. A report published by the Assistant Secretary for Planning and Evaluation (ASPE) at HHS, *Child Care Subsidy Duration and Caseload Dynamics: A Multi-State Examination*, found that "many families receive subsidies sporadically over time and frequently return to the subsidy programs after they exit." Short periods of subsidy receipt can be the result of a variety of factors, including eligibility policies and procedures. The "churning" present in CCDF demonstrates that families often lose their child care assistance for conditions that are temporary, which is detrimental for the family and child and inefficient for the Lead Agency.

Lead Agencies considering the option to terminate assistance in response to "non-temporary" changes are encouraged to use administrative data to understand the extent to which CCDF families currently cycle on and off the program, to make a determination as to whether it is in the interest of anyone (child, parent, or agency) to terminate assistance for families who may ultimately return to the program.

Some Lead Agencies include in their definition of allowable work activities a period of job search and allow children to initially qualify for CCDF assistance based on their parent(s) seeking employment. It is not our intention to discourage Lead Agencies from allowing job search activities as qualifying work. Therefore, consistent with language included in the preamble to the NPRM, new regulatory language at § 98.21(a)(2)(iii) addresses this circumstance. This is consistent with the intent of the Act to allow Lead Agencies the option to end assistance prior to a re-determination if the parent(s) has not secured employment or educational or job training activities, as long as assistance has been provided for no less than three months. In other words, if a child qualifies for child care assistance based on a parent's job search, the Lead Agency has the option to end assistance after a minimum of three months if the parent has still not found employment, although assistance must continue if the parent becomes employed during the job search period. Even if the parent does not find employment within three

months, Lead Agencies could choose to provide additional months of job search to families as well or to continue assistance for the full minimum 12-month eligibility period.

Comment: Commenters were supportive of this policy. One State indicated while "continuity will have a fiscal impact," they thought that "allowing States the option to terminate assistance prior to 12 months, with a minimum of 3 months of continued assistance is reasonable." Other States voiced appreciation for the clarification that States have the "discretion to continue assistance to a subset of families such as those within a certain priority or type of care."

There was a request for clarification regarding how often the minimum 3-month period of continued assistance could apply within a particular eligibility period. The commenter asked "if, within the 12-month eligibility period, an individual experiences more than one occasion of permanent job loss or of education/training, do they continue to get 3 months of job search each time, and with each new loss?" These commenters asked for clarification about "whether there are any limitations to how many times within a single 12-month eligibility period a person is entitled to a 3-month job search period." This was raised as a concern because of the potential negative impact it could have on a parent's motivation "to truly reestablish employment or education if they are able to "work" for one day every three months and still continue to receive services."

Response: A plain reading of the statutory language does not provide a limit to the number of times a family could receive the period of continued assistance. Given that the 3-month period of continued assistance is at the State option and that the default policy (as stated above) is for families to retain their eligibility until the end of the eligibility period, it would be inconsistent to put a limit on how many times this could apply. Since the intent of this provision is to allow the parent some time to resume work, or resume attendance at a job training or educational activity, a parent who has successfully found new employment or resumed another qualifying activity within the minimum 3-month period should not be penalized by losing their child care assistance (and possibly undermining the stability of newfound employment, training, or education). Especially given the often unstable nature of employment among low-income communities, this will provide some measure of stability in instances

where families, despite their best efforts, cycle in and out of employment. In these instances, when the home life may be in flux, a level of stability in the child's care arrangement becomes that much more valuable.

Additional circumstances for termination: In the proposed rule, we asked for comment on whether there are any additional circumstances other than those discussed above under which a Lead Agency should be allowed to end a child's assistance (after providing three months of continued assistance) prior to the minimum 12-month period. Commenters were reminded that since these regulations must comply with statutory requirements, any suggestions had to remain within the bounds of the Act in order to be considered.

Based on feedback from States and various stakeholders (received prior to the publication of the proposed rule), ACF had already considered possible exceptions to the minimum 12-month eligibility period for certain populations, such as children in families receiving TANF and children in protective services, but had decided that such special considerations would be in conflict with the Act, which clearly provides 12-month eligibility for all children.

Comment: We had a number of comments in this area. Commenters provided suggestions for reasons that a State should be able to terminate assistance prior to the end of the eligibility period, including: Non-use of subsidy, fraud or intentional program violations, moving out of the State, changes in household composition, protective services status (some emergency assistance that may not be required for a full eligibility period), change in priority group, and failure to cooperate with mandatory child support.

Response: We agreed with commenters on the need to provide some additional allowances in this area because there were legitimate reasons why a Lead Agency may need to terminate assistance prior to the end of the eligibility period. Therefore, in response to comments, the final rule adds a new § 98.21(a)(5), which describes additional limited circumstances that would allow a Lead Agency to end assistance prior to the end of the minimum 12-month eligibility period.

This new regulatory language states that notwithstanding paragraph (a)(1), the Lead Agency may discontinue assistance prior to the next re-determination in limited circumstances where there have been: (i) Excessive unexplained absences despite multiple

attempts by the Lead Agency or designated entity to contact the family and provider, including notification of possible discontinuation of assistance; (A) If the Lead Agency chooses this option, it shall define the number of unexplained absences that shall be considered excessive; (ii) A change in residency outside of the State, Territory, or Tribal service area; or (iii) Substantiated fraud or intentional program violations that invalidate prior determinations of eligibility.

We have determined that these three were compelling reasons for which Lead Agencies would be justified in acting. Regarding termination due to excessive unexplained absences, we stress that every effort should be made to contact the family prior to terminating benefits. Such efforts should be made by the Lead Agency or designated entity, which may include coordinated efforts with the provider to contact the family. If a State chooses to terminate for this reason, the Lead Agency must define how many unexplained absences would constitute an "excessive" amount and therefore grounds for early termination. The definition of excessive should not be used as a mechanism for prematurely terminating eligibility and must be sufficient to allow for a reasonable number of absences. It is ACF's view that unexplained absences should account for at least 15 percent of a child's planned attendance before such absences are considered excessive. This 15 percent aligns generally with Head Start's attendance policy and ACF will consider it as a benchmark when reviewing and monitoring this requirement.

As discussed above, we are allowing States to terminate eligibility if the family moves outside of the State, Territory, or Tribal service area. This was not explicitly discussed in the proposed rule, but the discussion about maintaining eligibility when moving within State revealed the need for clarification in this area. Given that the CCDF program is a block grant with the State, it would not make sense for the family's benefit to be able to travel across those borders. As discussed above, this is a permissive policy and not a requirement. We encourage Lead Agencies to develop agreements where appropriate to accommodate parental movement, particularly in areas where appropriate and necessary to meet the needs of families. And as a reminder, as stated in § 98.21(a)(ii)(G), States cannot terminate assistance if a family is moving within the State.

As for changes in household composition, this is already allowed, in so far as the Lead Agency can require

families to report such changes if they would result in a change that would raise the family's income level above 85% of SMI.

Fraud or intentional program violation would also be a legitimate reason to terminate assistance if such fraud invalidates the prior eligibility determination or redetermination. One commenter stated that it "is critical to have processes and procedures in place to limit improper payments and other fraudulent activities," and therefore recommended including a provision in the final rule that families could lose eligibility if they misrepresented circumstances at the initial determination and/or provided fraudulent information. Early termination of benefits is justified when there has been substantiated fraud or intentional program violation and such a family would not have been eligible. We caution that this does not change the limitations on what a State can require a family to report during the eligibility period. However, in instances where program integrity efforts reveal fraud or intentional program violations, under this final rule, the State would be able to terminate eligibility.

Co-payments. Section 98.21(a)(3) clarifies that a Lead Agency cannot increase family co-payment amounts within the minimum 12-month eligibility period as raising co-payments within the eligibility period would not be consistent with the statutory requirement that the child receive such assistance for not less than 12 months. Protecting co-payments levels within the eligibility period provides stability for families and reduces administrative burden for Lead Agencies. This final rule includes an exception to this rule for families that are eligible as part of the graduated phase-out provision discussed below.

In addition, the final rule requires the Lead Agency to allow families the option to report changes, particularly because we want to permit families to report those changes that could be beneficial to the family's co-payment or subsidy level. The Lead Agency must act upon such reported changes if doing so would reduce the family's co-payment or increase the subsidy. The Lead Agency is prohibited from acting on the family's self-reported changes if it would reduce the family's benefit, such as increasing the co-payment or decreasing the subsidy.

The limitation on raising co-payments, by protecting the child's benefit level for the minimum 12-month eligibility period, is consistent with the statutory requirement at 658E(c)(2)(N) of the Act that, once deemed eligible, a

child shall receive such assistance, for not less than 12 months. Raising co-payments earlier than the 12-month period could potentially destabilize the child's access to assistance and has the unintended consequence of forcing working parents to choose between advancing in the workplace and child care assistance. This is discussed further below in the section on reporting changes in circumstances.

Comment: Comments received in this area were mixed. In general, States wanted to retain the ability to increase co-payments throughout the year, while national organizations and other stakeholders thought that keeping co-payments stable during the year was a worthwhile policy for families.

Those who supported this policy cited studies that showed that "high co-payments are a major reason that families leave the subsidy program." Commenters also referenced a Senate Health, Education, Labor, and Pensions Committee Report on the CCDBG Act, which 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."

Those in favor of retaining the ability to increase co-pays pointed to the implications, primarily financial, should they be unable to adjust co-payments. One stated that they would be forced to "charge the highest co-payment amounts allowed in order to manage the fiscal liability" and another pointed out that such a policy "limits the Department's ability to utilize co-payments as a means of managing State fiscal resources," and an inability to do so would "result in serving fewer children and families and may force waitlists."

Other commenters stated that they thought increasing co-payment amounts during the eligibility period would not negatively affect a family's subsidy or co-payment and would not be unduly burdensome. This commenter reasoned that "In most cases, income changes reported are fairly small, and even if that change moves the family up on the co-pay schedule, the incremental change in the co-pay will likely be less than \$4 per week." Commenters also pointed out that increasing co-payment amounts was beneficial to families to help them transition off child care assistance and thus avoid the cliff effect that comes with losing the subsidy.

Response: While we recognize the States' positions, for the following reasons, we are declining to change this for this final rule. Regarding the use of co-payments to manage budgets and wait lists, such ongoing incremental changes are to the overall detriment of participating families and ultimately undermine the effectiveness of the program. One of the commenters above mentioned that these co-payment increases are usually minor and would not impact the family's financial situation. Given this incremental financial benefit to the State, the administrative burden to both the family (notification with every change in income) and the State (having to track and adjust co-payments with minor changes for families throughout the year) outweighs the benefit gained. Additionally, a small increase (such as the \$4 increase mentioned above) may seem incremental from a policy perspective, but may represent a significant burden on low-income families managing the daily expenses of food, clothing, diapers, etc.

As for using co-payments to mitigate the impact of the cliff effect, this is an area where we agree. This is why § 98.21(e)(3) allows Lead Agencies to increase co-payments for families eligible due to the graduated phase-out provision. Since the graduated phase-out period (which will be discussed in the next section) was specifically designed to help families transition as their income rises, it is appropriate that co-payments be adjusted.

Graduated phase-out. New statutory language at Section 658E(c)(2)(N)(iv) of the Act requires Lead Agencies to have policies and procedures in place to allow for the provision of continued child care assistance at the time of re-determination for children of parents who are working or attending a job training or educational program and whose income has risen above the Lead Agency's initial income eligibility threshold to qualify for assistance but remains at or below 85 percent of State median income. Lead Agencies retain the authority to establish their initial income eligibility threshold at or below 85 percent of SMI. If a Lead Agency's initial eligibility threshold is set at 85 percent of SMI, it would be exempt from this requirement.

The proposed rule would have required Lead Agencies that set their initial income eligibility level below 85 percent of SMI (for a family of the same size) to provide for a graduated phase-out of assistance by establishing two-tiered eligibility (an initial, entry-level income threshold and a higher exit-level income threshold for families already

receiving assistance) with the exit threshold set at 85 percent of SMI. States would have had the option of either allowing the family to remain income eligible until the family exceeded 85% of SMI or for a limited period of not less than an additional 12 months.

The purpose of this graduated phase-out provision is to promote continuity of care and is consistent with the statutory requirement that families retain child care assistance during an eligibility period as their income increases. However, as discussed below, in response to comment, the final rule makes two significant changes to this requirement: (1) Offering additional flexibility on setting the second tier of eligibility, and (2) removing the possible time limit on eligibility.

Comment: We received mixed comment on the proposed graduated phase-out requirement. While commenters were supportive of improving continuity for families, a number of commenters indicated that they thought setting the two tiered system with the exit threshold at 85% of SMI was too restrictive. Commenters also raised similar concerns about the cost of this provision and the impact that it could potentially have on the demographics of CCDF families served. One commenter said that "the down side of this otherwise sensible policy idea is that, absent sufficient resources, lower income families may be denied access to subsidies while higher income families continue to benefit. It's a difficult tradeoff."

Response: Given the comments that we received in this area, and in recognition of the difficult trade-offs inherent in this policy, the final rule revises language proposed by the NPRM for the graduated phase-out provision. This final rule still requires Lead Agencies to establish two-tiered eligibility thresholds, but the graduated phase-out requirement at § 98.21(b) now says that the second tier of eligibility (used at the time of eligibility re-determination) will be set at 85 percent of SMI for a family of the same size, but that the Lead Agency has the option of establishing a second tier lower than 85% of SMI as long as that level is above the Lead Agency's initial eligibility threshold, takes into account the typical household budget of a low income family, and provides justification that the eligibility threshold is (1) sufficient to accommodate increases in family income that promote and support family economic stability; and (2) reasonably allows a family to continue accessing child care services without unnecessary disruption.

This revision from what was proposed in the NPRM will give Lead Agencies additional flexibility to establish their second tier of eligibility. However, it is important to note that once deemed eligible, the family shall be considered eligible for a full minimum 12-month eligibility period even if their income exceeds the second eligibility level during the eligibility period, as long as it does not exceed 85 percent of SMI.

While the revised regulatory language offers Lead Agencies some flexibility to set the second tier of eligibility, we still strongly encourage that Lead Agencies establish this second tier at 85 percent of SMI (as a number of States have already done). Not only does this maximize continuity of subsidy receipt for the family, linking the exit threshold to the Federal eligibility limit is the most straightforward approach for families to navigate and for Lead Agencies to implement. However, ACF also understands that there are significant trade-offs associated with establishing the second tier at 85% of SMI, including how many lower income families can be served in the program.

As a result, the final rule provides Lead Agencies flexibility to set their second tier below 85% of SMI, provided they show that their exit threshold takes into account typical family expenses, such as housing, food, health care, diapers, transportation, etc., and is set at an income level that promotes and supports family economic stability and reasonably allows a family to continue accessing child care services without unnecessary disruption. Lead Agencies setting their second tier below 85% of SMI must take into account a number of factors to determine whether the family's increase in income is a substantial enough change to justify a loss of assistance without causing a "cliff effect." For example, the Lead Agency would need to show that there is a difference between the first and second eligibility tiers and that this difference is sufficient to accommodate increases in income over time that are typical for low-income workers. ACF encourages Lead Agencies setting their second tier below 85% SMI to also consider how families that lose their subsidy will access ongoing child care and potential impacts on families' economic security.

Additionally, when determining a family's ability to afford child care, the Lead Agency should be mindful that this final rule uses seven percent of family income as a benchmark for affordable child care. While Lead Agencies have flexibility in establishing their sliding fee scales and determining what constitutes a cost barrier for

families, seven percent level is a recommended benchmark and any calculations about affordability should either incorporate this benchmark or provide justification for how families can afford to spend a higher percentage of their income on child care. Furthermore, to ensure Lead Agencies are fully taking into consideration the financial obligations of families, Lead agencies must also collect data on any amounts providers charge families more than the required family co-payment in instances where the provider's price exceeds the subsidy payment, if the State allows for such a practice, and to demonstrate a rationale for the allowance to charge families any additional amounts. This is mentioned in greater detail below in response to comments received specifically on the policies set forth in the proposed rule related to charging amounts above the co-payment. As for other concerns about the potential impact of the graduated phase-out provision, there are already several factors that will mitigate the possible negative impacts of this policy. First of all, the graduated phase-out provision provides some level of stability by protecting income growth, but there will still be natural attrition from the program due to other factors. Families have to go through redetermination every 12 months (or a longer period set by the Lead Agency) and be deemed otherwise eligible for the program. Families will also cycle out of the program through the Lead Agency option to terminate assistance due to job loss or cessation of education/training (after at least three months of continued assistance). According to analyses of CCDF administrative data, the current levels of attrition over time are steady and dramatic. Approximately 24 percent of families receive services for longer than a year, only about 10 percent receive it for 2 years, and the decline continues until approximately only 1 percent still receives the subsidy after 5 years. (Unpublished HHS tabulations based on CCDF administrative data reported by States on the ACF-801) We expect policies put into place to promote continuity will lengthen eligibility, but due to external factors, there will continue to be a turnover in the CCDF population.

In addition, the financial impact of this policy may be contained because: (1) The average cost of subsidy tends to naturally decline over time as the child's age increases, and (2) this final rule allows the Lead Agency to increase co-pays during the graduated phase-out period. CCDF administrative data shows that per child costs decline as the child

ages. This is due to the fact that school-age care is typically part-time for much of the year and less expensive than care provided for younger children. Therefore, the cost of the subsidy for families who remain on the program will naturally decline, which will free up resources for new enrollment.

As discussed further below, this final rule at section 98.21(b)(3) allows Lead Agencies to adjust co-payments during the graduated phase-out period. Over time, this would result in more cost sharing with families and free up State funds to allow other children to enter the subsidy system. As co-pays rise for parents with increasing incomes, families will naturally choose to leave the program.

Comment: There were objections to the second option of the proposed graduated phase-out proposal, which would have allowed Lead Agencies to offer a period of graduated phase-out for a limited period of not less than an additional 12 months. A number of commenters objected to "any provision that allows or encourages States to set arbitrary time limits on child care assistance," and said that "income, rather than time spent in the program, is a far better measure of families' need for continued assistance."

Response: We agree with this concern and have removed the provision from this final rule. The option was included in the proposed rule to provide some parameters around the graduated phase-out provision, but we recognize now that the introduction of a time limit to the program could have unintended consequences and runs counter to the goals of the program, including to support parents trying to achieve independence from public assistance. And as described above, there are factors already in play within the graduated phase-out provision that will naturally limit the fiscal impact of this over time. That, combined with the new flexibility on establishing the second eligibility threshold, makes the previous option of "a limited period of not less than an additional 12 months" unnecessary.

We have also added language at § 98.21(b)(2) to clarify that once determined eligible under the graduated phase-out provision, the family is considered eligible under the same conditions described in § 98.20 and § 98.21, with the exception of the co-payment restrictions at § 98.21(a)(3). Pursuant to § 98.21(a)(3), Lead Agencies are prohibited from increasing family co-payments within the minimum 12-month eligibility period. However, in subparagraph (b)(2) of this section, Lead Agencies will be permitted to adjust

family co-payment amounts during the graduated phase-out period to help families transition off of child care assistance as they become better able to afford the cost of care.

Lead Agencies have the option to gradually increase co-payments for families with children eligible under the graduated phase-out provision and may require additional reporting on changes to do so. However, this final rule further clarifies that such additional reporting requirements must not constitute an undue burden, pursuant to the conditions in (e)(2)(ii) and (e)(2)(iii). Such requirements must not require an office visit in order to fulfill notification requirements, and must offer a range of notification options (e.g., phone, email, online forms, extended submission hours) to accommodate the needs of parents.

While such co-payment policies should help families gradually transition off of assistance, ACF encourages Lead Agencies to ensure that co-payment increases are gradual in proportion to a family's income growth and do not constitute too high a cost burden for families so as to ensure stability as family income increases. Lead Agencies must remain in compliance with the statutory requirement at Section 658E(c)(5) that the State's sliding fee scale is not a barrier to families receiving CCDF assistance.

Income eligibility policies play an important role in promoting pathways to financial stability for families. Currently, 16 Lead Agencies use two-tiered income eligibility. However, even with higher exit-level eligibility thresholds in these States/Territories, a small increase in earnings may result in families becoming ineligible for assistance before they are able to afford the full cost of care. While there are many factors that determine how a State sets their eligibility thresholds, an unintended consequence of low eligibility thresholds is that low income parents may pass up raises or job advancement in order to retain their subsidy, which undermines a key goal of CCDF to help parents achieve independence from public assistance. This rule allows low-income families to continue child care assistance as their income grows in order to support financial stability.

Irregular fluctuations in earnings. In § 98.21(c), we reiterate statutory language at Section 658E(c)(2)(N)(i)(II) of the Act which requires Lead Agencies to establish processes for initial determination and re-determination of eligibility that take into account parents' irregular fluctuations in earnings. We

clarify that temporary increases in income should not affect eligibility or family co-payments, including monthly income fluctuations that show *temporary* increases, which if considered in isolation, may incorrectly indicate that a family is above the federal threshold of 85 percent of SMI, when in actuality their annual income remains at or below 85 percent of SMI.

Lead Agencies retain broad flexibility to set their policies and procedures for income calculation and verification. There are several approaches Lead Agencies may take to account for irregular fluctuations in earnings. Lead Agencies may average family earnings over a period of time (e.g., 12 months) to better reflect a family's financial situation; Lead Agencies may adjust documentation requirements to better account for average earnings, for example, by requesting the earnings statement that is most representative of the family's income, rather than the most recent statement; or Lead Agencies may choose to discount temporary increases in income provided that a family demonstrates that an isolated increase in pay (e.g., short-term overtime pay, lump sum payments such as tax credits, etc.) is not indicative of a permanent increase in income.

We did not receive substantive comment in this section and are therefore retaining the proposed language in this final rule.

Undue disruption. In accordance with Section 658E(c)(2)(N)(i)(II) of the Act, the final rule adds § 98.21(d), which requires the Lead Agency to establish procedures and policies to ensure that parents, especially parents receiving TANF assistance, are not required to unduly disrupt their education, training, or employment in order to complete the eligibility re-determination process. This provision of the Act seeks to protect parents from losing assistance for failure to meet renewal requirements that place unnecessary barriers or burdens on families, such as requiring parents to take leave from work in order to submit documentation in person or requiring parents to resubmit documents that have not changed (e.g., children's birth certificates).

To meet this provision, Lead Agencies could offer a variety of family-friendly mechanisms through which parents could submit required documentation (e.g., phone, email, online forms, extended submission hours, etc.). Lead Agencies could also consider strategies that inform families, and their providers, of an upcoming re-determination and what is required of the family. Lead Agencies could consider only asking for information

necessary to make an eligibility determination or only asking for information that has changed and not asking for documentation to be re-submitted if it has been collected in the past (e.g., children's birth certificates; parents' identification, etc.) or is available from other electronic data sources (e.g., verified data from other benefit programs). Lead Agencies can pre-populate renewal forms and have parents confirm that information is accurate.

In general, ACF strongly encourages Lead Agencies to adopt reasonable policies for establishing a family's eligibility that minimize burdens on families. Given the new eligibility provisions established by reauthorization, Lead Agencies are encouraged to re-evaluate processes for verifying and tracking eligibility to simplify eligibility procedures and reduce duplicative requirements across programs. Simplifying and streamlining eligibility processes along with other changes in the subpart may require significant change within the CCDF program. Lead Agencies should provide appropriate training and guidance to ensure that caseworkers and other relevant child care staff (including those working for designated entities) clearly understand new policies and are implementing them correctly. Comments received in this section were supportive of the proposed policies and we are therefore keeping these provisions in this final rule.

Reporting changes in circumstance. Currently, many Lead Agencies have policies in place to monitor eligibility on an ongoing basis to ensure that at any given point in time a family is eligible for services, often called change-reporting or interim-reporting. As the revised statute provides that children may retain eligibility through most changes in circumstance, it is our belief that comprehensive reporting of changes in circumstance is not only unnecessary but runs counter to CCDF's goals of promoting continuity of care and supporting families' financial stability.

Additionally, there are challenges associated with interim monitoring and reporting, including costs to families trying to balance work or education and family obligations and costs to Lead Agencies administering the program. Overly burdensome reporting requirements can also result in increased procedural errors, as even parents who remain eligible may face difficulties complying with onerous reporting rules.

Lead Agencies should significantly reduce change reporting requirements for families within the eligibility period,

and limit the reporting requirements to changes that impact federal CCDF eligibility. Section 98.21(e) of final rule requires Lead Agencies to specify in their Plans any requirements for families to notify the Lead Agency (or its designee) of changes in circumstances between eligibility periods, and describe efforts to ensure such requirements do not place an undue burden on eligible families that could impact continued eligibility between re-determinations.

Under § 98.21(e)(1), the Lead Agency must require families to report a change at any point during the minimum 12-month period only when the family's income exceeds 85% of SMI, taking into account irregular income fluctuations. At the option of the Lead Agency, the Lead Agency may require families to report changes where the family has experienced a non-temporary cessation of work, training, or education.

Section 98.21(e)(2) specifies that any notification requirements may not constitute an undue burden on families and that compliance with requirements must include a range of notification options (e.g., phone, email, online forms, extended submission hours) and not require an in-person office visit. This includes parents who are working, as well as those participating in job training or educational programs.

The final rule also limits notification requirements only to items that impact a family's eligibility (e.g., income changes over 85 percent of SMI, and at Lead Agency option, the status of the child's parent as working or attending a job training or educational program) or those that are necessary for the Lead Agency to contact the family or pay providers (e.g., a family's change of address or a change in the parent's choice of provider). Lead Agencies may examine additional eligibility criteria at the time of the next re-determination.

Section 98.21(e)(4) requires Lead Agencies to allow families the option of reporting information on an ongoing basis, particularly to allow families to report information that would be beneficial to their assistance (such as an increase in work hours that necessitates additional child care hours or a loss of earnings that could result in a reduction of the family co-payment). While we encourage limiting reporting requirements for families, it was not our intent to limit the family's ability to report changes in circumstances, particularly in cases where they may have entered into more stressful or vulnerable situations or would be eligible for additional child care assistance. Moreover, if a family voluntarily reports changes on an

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§ 98.21 Eligibility determination processes.

(a) A Lead Agency shall re-determine a child's eligibility for child care services no sooner than 12 months following the initial determination or most recent redetermination, subject to the following:

(1) During the period of time between determinations or redeterminations, if the child met all of the requirements in § 98.20(a) on the date of the most recent eligibility determination or redetermination, the child shall be considered eligible and will receive services at least at the same level, regardless of:

(i) A change in family income, if that family income does not exceed 85 percent of SMI for a family of the same size; or

(ii) A temporary change in the ongoing status of the child's parent as working or attending a job training or educational program. A temporary change shall include, at a minimum:

(A) Any time-limited absence from work for an employed parent due to reasons such as need to care for a family member or an illness;;

(B) Any interruption in work for a seasonal worker who is not working between regular industry work seasons;

(C) Any student holiday or break for a parent participating in training or education;

(D) Any reduction in work, training or education hours, as long as the parent is still working or attending training or education;

(E) Any other cessation of work or attendance at a training or education program that does not exceed three months or a longer period of time established by the Lead Agency;

(F) Any change in age, including turning 13 years old during the eligibility period; and

(G) Any change in residency within the State, Territory, or Tribal service area.

(2)

(i) Lead Agencies have the option, but are not required, to discontinue assistance due to a parent's loss of work or cessation of attendance at a job training or educational program that does not constitute a temporary change in accordance with paragraph (a)(1)(ii) of this section. However, if the Lead Agency exercises this option, it must continue

assistance at least at the same level for a period of not less than three months after each such loss or cessation in order for the parent to engage in job search and resume work, or resume attendance at a job training or educational activity.

(ii) At the end of the minimum three-month period of continued assistance, if the parent is engaged in a qualifying work, education, or training activity with income below 85% of SMI, assistance cannot be terminated and the child must continue receiving assistance until the next scheduled re-determination, or at Lead Agency option, for an additional minimum 12 - month eligibility period.

(iii) If a Lead Agency chooses to initially qualify a family for CCDF assistance based a parent's status of seeking employment or engaging in job search, the Lead Agency has the option to end assistance after a minimum of three months if the parent has still not found employment, although assistance must continue if the parent becomes employed during the job search period.

(3) Lead Agencies cannot increase family co-payment amounts, established in accordance with § 98.45(k), within the minimum 12-month eligibility period except as described in paragraph (b)(3) of this section.

(4) Because a child meeting eligibility requirements at the most recent eligibility determination or redetermination is considered eligible between redeterminations as described in paragraph (a)(1) of this section, any payment for such a child shall not be considered an error or improper payment under subpart K of this part due to a change in the family's circumstances.

(5) Notwithstanding paragraph (a)(1), the Lead Agency may discontinue assistance prior to the next re-determination in limited circumstances where there have been:

(i) Excessive unexplained absences despite multiple attempts by the Lead Agency or designated entity to contact the family and provider, including prior notification of possible discontinuation of assistance;

(A) If the Lead Agency chooses this option, it shall define the number of unexplained absences that shall be considered excessive;

(B) [Reserved]

(ii) A change in residency outside of the State, Territory, or Tribal service area; or

(iii) Substantiated fraud or intentional program violations that invalidate prior determinations of eligibility.

(b)

(1) Lead Agencies that establish family income eligibility at a level less than 85 percent of SMI for a family of the same size (in order for a child to initially qualify for assistance) must provide a graduated phase-out by implementing two-tiered eligibility thresholds, with the second tier of eligibility (used at the time of eligibility re-determination) set at:

(i) 85 percent of SMI for a family of the same size; or

(ii) An amount lower than 85 percent of SMI for a family of the same size, but above the

Lead Agency's initial eligibility threshold, that:

(A) Takes into account the typical household budget of a low income family; and

(B) Provides justification that the second eligibility threshold is:

(1) Sufficient to accommodate increases in family income over time that are typical for low-income workers and that promote and support family economic stability; and

(2) Reasonably allows a family to continue accessing child care services without unnecessary disruption.

(2) At re-determination, a child shall be considered eligible (pursuant to paragraph (a) of this section) if their parents, at the time of redetermination, are working or attending a job training or educational program even if their income exceeds the Lead Agency's income limit to initially qualify for assistance, as long as their income does not exceed the second tier of the eligibility described in (b)(1);

(3) A family meeting the conditions described in (b)(2) shall be eligible for services pursuant to the conditions described in § 98.20 and all other paragraphs of § 98.21, with the exception of the co-payment restrictions at § 98.21(a)(3). To help families transition off of child care assistance, Lead Agencies may gradually adjust co-pay amounts for families whose children are determined eligible under the graduate phase-out conditions described in paragraph (b)(2) and may require additional reporting on changes in family income as described in paragraph (e)(3) of this section, provided such requirements do not constitute an undue burden, pursuant to conditions described in (e)(2)(ii) and (iii) of this section.

(c) The Lead Agency shall establish processes for initial determination and redetermination of eligibility that take into account irregular fluctuation in earnings, including policies that ensure temporary increases in income, including temporary increases that result in monthly income exceeding 85 percent of SMI (calculated on a monthly basis), do not affect eligibility or family co-payments.

(d) The Lead Agency shall establish procedures and policies to ensure parents, especially parents receiving assistance through the Temporary Assistance for Needy Families (TANF) program, are not required to unduly disrupt their education, training, or employment in order to complete the eligibility redetermination process.

(e) The Lead Agency shall specify in the Plan any requirements for parents to notify the Lead Agency of changes in circumstances during the minimum 12-month eligibility period, and describe efforts to ensure such requirements do not place an undue burden on eligible families that could impact continued eligibility between redeterminations.

(1) The Lead Agency must require families to report a change at any point during the minimum 12-month period, limited to:

(i) If the family's income exceeds 85% of SMI, taking into account irregular income fluctuations; or

(ii) At the option of the Lead Agency, the family has experienced a non-temporary cessation of work, training, or education.

(2) Any additional requirements the Lead Agency chooses, at its option, to impose on parents to provide notification of changes in circumstances to the Lead Agency or entities designated to perform eligibility functions shall not constitute an undue burden on families. Any such requirements shall:

(i) Limit notification requirements to items that impact a family's eligibility (*e.g.*, only if income exceeds 85 percent of SMI, or there is a non-temporary change in the status of the child's parent as working or attending a job training or educational program) or those that enable the Lead Agency to contact the family or pay providers;

(ii) Not require an office visit in order to fulfill notification requirements; and

(iii) Offer a range of notification options (*e.g.*, phone, email, online forms, extended submission hours) to accommodate the needs of parents;

(3) During a period of graduated phase-out, the Lead Agency may require additional reporting on changes in family income in order to gradually adjust family co-payments, if desired, as described in paragraph (b)(3) of this section.

(4) Lead Agencies must allow families the option to voluntarily report changes on an ongoing basis.

(i) Lead Agencies are required to act on this information provided by the family if it would reduce the family's co-payment or increase the family's subsidy.

(ii) Lead Agencies are prohibited from acting on information that would reduce the family's subsidy unless the information provided indicates the family's income exceeds 85 percent of SMI for a family of the same size, taking into account irregular income fluctuations, or, at the option of the Lead Agency, the family has experienced a non-temporary change in the work, training, or educational status.

(f) Lead Agencies must take into consideration children's development and learning and promote continuity of care when authorizing child care services.

(g) Lead Agencies are not required to limit authorized child care services strictly based on the work, training, or educational schedule of the parent(s) or the number of hours the parent(s) spend in work, training, or educational activities.

[81 FR 67579, Sept. 30, 2016]
