GREATER BOSTON LEGAL SERVICES
...and justice for all

September 11, 2015

General Counsel Carmel C. Sullivan
Department of Early Education and Care
51 Sleeper Street, 4th Floor
Boston, MA 02210

Re: Unlawful deprivation of rights to families receiving child care financial assistance

Dear Ms. Sullivan:

I write on behalf of legal services clients, my colleagues representing them, and similarly situated families to raise serious concerns with certain EEC policies and procedures for the administration of child care financial assistance to low income families.

These concerns have come to a head in connection with four recent cases, two handled by my office and two by attorney Weayonnoh Nelson-Davies of the Central West Justice Center in Worcester. The cases are [redacted] *v. EEC* (filed pro se, then I entered an appearance; case was settled), [redacted] *v. EEC and* [redacted] (filed by Ms. Nelson-Davies and pending), [redacted] *v.* [redacted] (filed by my colleague at GBLS, attorney Sarah Levy, settlement in progress to provide an EEC hearing, but not to resolve the underlying case); and the case of [redacted] (represented by Ms. Nelson-Davies and resolved at the administrative level). Cases handled by Naomi Meyer, also my colleague at GBLS whom you know, have also informed our assessment.

EEC's Eligibility Bar Penalty

In the three cases brought in court, EEC had purported to impose ineligibility for child care financial assistance for three years or "up to" three years. The bar on eligibility is distinct from termination for actual ineligibility and from liability to repay any child care financial assistance received during a period of ineligibility. Rather, the bar is on the right even to apply for child care benefits when the family is otherwise actually eligible.

There is no authority for the bar stated in the statutes or regulations relating to EEC-administered child care. The only references to the eligibility bar are in the EEC forms that Child Care Resource and Referral entities ("CCR&Rs") require clients to sign – and in Review and Appeal decisions. In connection with [redacted]' case, the Assistant Attorneys General involved told me that EEC's claimed authority for the bar is based on the forms that EEC requires parents to sign.

In the absence of a specific statutory provision, administrative agencies lack authority to impose penalties in programs like need-based child care to enable low income parents to work or attend education or training. We ask that EEC cease imposing eligibility bars and remove any remaining ineligibility periods still in effect for any families against whom EEC has imposed an eligibility bar.

Unlawful Limitations on Appeal Rights

EEC's regulations, policies, and practices impose unlawful limitations on appeal rights.

[redacted]'s case demonstrates this explicitly where EEC completely and unlawfully denied her right to a hearing. She had timely requested a hearing on EEC's form after receiving an adverse decision on her request for review. In denying her request for a hearing, EEC wrote that she:

> failed to state any valid reason explaining how EEC improperly terminated your child care subsidy. As such, I have determined that your request for a hearing is a direct challenge to the child care subsidy regulations and policies.
>
> Be advised that the scope of the review process is limited to determining whether a subsidy administrator acted, or failed to act, in accordance with the child care subsidy laws. See 606 CMR 10.14(8)(a). Since your request failed to state any claim that EEC took any action that violated child care subsidy laws, your Request for Review is denied and your child care subsidy remains denied[.]

The grounds stated for the denying [redacted] a hearing are tracked in EEC's form for requesting a hearing – provided to the clients in all four cases we raise here. EEC's hearing request form states: "Please explain how the Child Care Resource & Referral Agency (CCR&R), the Child Care Provider, or Review Officer failed to follow or improperly applied EEC's Regulations or Policies."

There is no authority for EEC to deny the right of a parent to timely request a hearing in connection with termination or other adverse action regarding EEC child care benefits. Denying a hearing on the grounds that the parent did not claim a violation of "child care subsidy laws" completely obviates the clear right to contest such matters as factual determinations of the agency, errors of law under the agency's own regulations, and noncompliance with the agency's own procedures. Further, calling for a client to articulate a violation of "child care subsidy laws" creates an unreasonable and arbitrary barrier to the right to appeal an adverse action. While EEC has now agreed (through the Assistant Attorney General representing EEC) to provide a hearing to [redacted], it is clear this would not have occurred if she had not received representation in filing an action for judicial review.

When hearings are, in fact, provided, EEC imposes unlawful restrictions on the scope of what can be challenged. EEC regulations, notices, and forms state that parents are not permitted to challenge EEC "policy" through an appeal, without regard for whether the policy is sub-

regulatory. A sub-regulatory policy cannot be treated as a binding regulation since it was not promulgated as a regulation. If it conflicts with governing law, it clearly is challengeable in an administrative appeal as an error of law. Administrative hearing officers have authority and responsibility to consider and rule on the legality of a sub-regulatory policy.

Arbitrary Decision-Making

In all four cases referred to at the beginning of this letter, EEC accused the mothers of wrong-doing relating to the father of a child receiving child care financial assistance. In three of the cases, EEC erroneously concluded that the father was living with the family and in the other (the [redacted] case), in which the mother reported to the CCR&R that the father had moved in, erroneously concluded that the father lacked a service need. EEC failed to ensure that the CCR&R explored the relevant facts of each case or to explore all relevant facts itself and consider all relevant evidence provided or offered by the parent. At the review stage and, in the [redacted] and [redacted] cases, also at the hearing stage, EEC erroneously failed to accept and rely on testimony and documentary evidence.

As expressed in the four cases, EEC's position is that proof of registration of a vehicle or receipt of mail at the family's address is enough to establish that a person lives at that address. This is in conflict with the apt conclusion of the Superior Court in [redacted] *v. Dept. of Public Welfare* that these facts alone – receipt of mail and registration of a vehicle – are not considered adequate documentation of where a person is living. EEC's further position is that to rebut such documentation the mother must prove the negative – that the father is not living with the family and also prove specifically where the father does live.

For example, in both the [redacted] and [redacted] cases, EEC erroneously assumed that the father of the child was in the home based on the father receiving some mail at the mother's address and registering a vehicle at her address. At the review stage, and, in [redacted], also at the hearing stage, EEC treated these facts as dispositive that the father was living with the family and grounds to terminate benefits, assert that sizable "improper payments" had been made and would be recouped, and impose the ineligibility bar – unless the mother could prove that the father was living elsewhere and the address at which he lived.

In [redacted]'s case, a postal check form included a person with the father's name. However, as [redacted] explained to the EEC review officer, her son and his father have the same name. She also explained that the father refused to give her his address. Nevertheless, the EEC review officer considered the postal form as adequate evidence on which to base termination of child care benefits. In [redacted]'s case, EEC relied in part on a postal check; however, her son and his father also have the same name.

In these three cases, EEC rejected the evidence and explanation provided by the mother that the father was <u>not</u> living with the family, holding to the position that the mother must affirmatively prove where the father was living. This position conflicts with EEC's own regulation, section 10.03(1)(a), which states: "Any documents which reasonably establish family composition and

size must be accepted, and no requirement for a specific type of documentation may be imposed."

In the [redacted] case, the mother never disputed that the father had moved into her home – she had supplied proof of this in the form of a lease amendment to her local child care agency office in the same month that the father moved in. EEC initially failed to consider whether this development actually made the family ineligible. It did not – the father had his own service need based on disability and had no income. However, even after the father's medical provider made clear that the father had a serious disability and obviously could not care for a child, EEC treated him as lacking a qualifying service need because his provider left out certain magic words in the accompanying letter called for in EEC's detailed instructions on its "Verification of Disability/Special Need for Parent/Guardian" form.

In each of the four cases, among other errors, EEC engaged in arbitrary decision-making.

Inequitable Treatment of Families Regarding "Improper Payment"

In its Financial Assistance Policy Guide, EEC sets forth a number of procedures regarding handling claims of "improper payments" of child care benefits to families. One such required procedure is to provide the family with a "recoupment letter" containing critical information about improper payment claims.

Under section 31.5 of the Guide, the letter must include:

- the amount owed;
- the time period that the debt relates to;
- the reason for the debt (e.g., family failed to report change in service need or family underpaid parent fees); and
- a proposed monthly repayment plan.

Further, the letter must "notify the parent that she/he has 14 days to respond [and that the] response may include a request for a new monthly repayment amount or an agreement to re-pay the debt."

To our knowledge, such letters were not provided in the [redacted], [redacted], and [redacted] cases. Although none of the families in the three cases actually received an improper payment, EEC "decided" they had and, therefore, was obligated to, but did not, give the families the same advantages to be given to other families under the provisions in the Guide. The three families were told they owed specific large amounts to repay "improper payments," but were not given a proposed monthly repayment plan, let alone informed that they could request a different amount.

For example, in [redacted]'s case, the claim was asserted in the April 7, 2015, decision on her request for review (the decision on which she was denied a hearing), which states in part:

> Furthermore, EEC has determined that you have received a child care subsidy for which you were ineligible which is an improper payment for which you are financially responsible. The amount of the improper payment reflects all subsidy payments made on your behalf since June 1, 2013 (when you transitioned from DTA) through May 18, 2014 (the last day of your EEC subsidy). As a result, you are now responsible for repaying $8,614.99 to the Commonwealth of Massachusetts.

The Guide further provides information about the scope of review that conflicts with the unlawfully narrow scope asserted by EEC in other materials, as discussed earlier in this letter:

> The recoupment letter must notify the family of their right to request a review if they have relevant evidence and grounds for challenging the termination of their subsidy. Grounds may include a challenge to the facts alleged by the provider/system/CCR&R (e.g., a second parent was not residing in the home), the debt amount, or the time period used to calculate the debt.

Guide section 13.5(C). While this language is not fully consistent with due process requirements, it is much closer than the information about review rights given to the families in the four cases we have raised.

In [redacted]'s case, EEC further did not accord the procedures set forth in section of 13.3(B)(5)(a) of the Guide which specifically applies to recoupments claims on the ground of a second parent residing with the families. Subsection 13.3(B)(5)(a)(3) calls for any recoupment amount in this situation to be determined taking into account whether the second parent had a service need and the second's parent's income amount.

Request to Meet

By their nature, the problems my colleagues and I have encountered, as described above, are systemic matters, not isolated instances. Consequently, separately from our representation of our current client families, we seek to discuss these problems with you in more depth and remedial steps we believe should be taken. Please contact me to let me know your response.

Sincerely,

Melanie Malherbe
Managing Attorney
Welfare Law Unit
(617) 603-1625
mmalhebe@gbls.org