

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

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YMCA OF PARKERSBURG,  
Plaintiff Below, Petitioner

vs.

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES,  
Plaintiff Below, Respondent

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West Virginia Department of Health and Human Services  
Office of Inspector General Board of Review  
Todd Thornton, State Hearing Examiner  
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Building 6, Room 817B  
Charleston, West Virginia 25305

**BRIEF OF THE PETITIONER, YMCA OF PARKERSBURG**

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# **BRIEF OF THE PETITIONER, YMCA OF PARKERSBURG**

## **I. ASSIGNMENTS OF ERROR**

Now comes the Petitioner, YMCA of Parkersburg, by Robert L. Bays and Bowles Rice LLP as counsel of record and makes the following Assignments of Error.

**Assignment of Error No. 1.** The Decision of August 3, 2022, made by Todd Thornton, State Hearing Officer, is contrary to the greater weight of the evidence, clearly wrong in view of reliable, probative and substantial evidence and therefore arbitrary and capricious. This Appeal deals with two cases, which were consolidated for hearing, and are consolidated in this Petition for Appeal. Both cases involve the West Virginia Department of Health and Human Resources, hereinafter referred to as “WVHHR”, rendered a decision in both cases that the Parkersburg YMCA had terminated child care for Child LG and Child LW without a two-week notice and were properly issued a first offense “Strike One” corrective action against the YMCA resulting in a loss of federally funded stabilization payments to the YMCA of over \$252,000.00. The evidence clearly shows that both Child LG and Child LW were issued only a suspension with an allowed return date to the YMCA and in fact, not terminated;

**Assignment of Error No. 2.** The actions of the WVDHHR in suspending the YMCA’s stabilization payments for an alleged first offense or Strike One are contrary to law and the authority of the Agency; and

**Assignment of Error No. 3.** The actions of the WVDHHR have the practical effect of the issuance of a fine against the YMCA by virtue of the denial of stabilization payments,

which is contrary to the lawful authority of the WVDHHR as an Agency and, even if lawful, constitutes an excessive fine or penalty contrary to law.

## **II. STATEMENT OF THE CASE**

### **Preface**

There are two cases consolidated before the Hearing Officer below, and in this Appeal. Both cases dealt with the issuance of a strike one by the WVDHHR against the YMCA. The impact of the issuance of each strike was a denial of Stabilization funding to the YMCA for two of its facilities resulting in a total loss of funding of \$252,000.00.

Procedurally, the strikes were issues by the WVDHHR and the YMCA was afforded a hearing before WVDHHR Board of Review. That hearing occurred on June 31, 2022. Hearing Officer, Todd Thornton issued an opinion upholding the strikes on August 3, 2022. See *Appendix*, Exhibit 10. The Petitioner timely filed its Notice of Appeal of that decision on August 25, 2022. The facts relating to each case and the proceedings are set forth hereafter.

### **Case No. 22 BOR 1508**

In the above-captioned case, the YMCA received a notification of Provider Regulatory Status dated March 25, 2022, citing the YMCA for terminating child care services without an appropriate two-week notification. See *Appendix*, p. 3. Kristall Chambers was a supervisor of family services at Choices in its' Parkersburg Office and investigated the complaints of the parent of Child LW. Chambers' testimony indicated that she was attempting to get child care for its LW and in talking with the parent was advised that the child care services had been terminated by the Parkersburg YMCA. See *Transcript*, pp. 7 and 8. The parent advised

Ms. Chambers of the termination and Ms. Chambers testified that the duty rests on the YMCA to give a two-week notice of termination to the WVDHHR.

Chambers testified that per WVDHHR policy, that the first strike is considered a warning, the second strike requires an improvement plan, and the third strike requires removal of the Provider Service Agreement, see *Transcript*, pp. 9 and 10. The services that were provided to LW were provided at the Parkersburg's YMCA. Chambers testified that normally a first strike would be just a warning. However, because of the extra funding of COVID, it resulted in a suspension of payments to the YMCA of \$10,000.00 a month. See *Transcript*, p. 12. Chambers admitted that under normal circumstances the first warning would have no financial impact to the YMCA. See *Transcript*, p. 13. Ms. Chambers acknowledged that if there was no expulsion or termination of proceedings, there would be no reason for the YMCA to notify the WVDHHR. See *Transcript*, p. 14. Chambers further stated that when she investigated the complaints in both cases, that she did not talk to the YMCA about their side of the case before issuing the first strike. See *Transcript*, p. 14. Ms. Chambers indicated that she relied on the providers' billing to determine the child was terminated as the YMCA's evidence. See *Transcript*, pp. 14 and 15. She also acknowledged that a YMCA can suspend services for a child. Ms. Chambers acknowledged that the parent of LW acknowledged that she had received a suspension from the YMCA. In fact, Chambers testified that the mother of LW acknowledged that she was going to try another place other than the YMCA. See *Transcript*, pp. 16 and 17. After avoiding the question regarding whether or not the LW child was suspended, under cross-examination on pages 16 through 17, Ms. Chambers finally admitted that the child was suspended until March 17, 2022. Chambers' evasive testimony on the issue between a suspension and termination is illustrated on page 18 of the *Transcript*, where she kept trying to avoid answering questions about whether or not she had asked

anybody at the YMCA whether or not they had terminated services or simply issued a suspension. Finally, at the bottom of page 18 of the *Transcript*, she admitted not contacting the YMCA before issuing the strike.

Katie Flinn testified on behalf of the YMCA with respect to LW. Flinn testified that the Provider Agreement between the YMCA and the parents respecting child care services specifically provides that a child can be either suspended or terminated. See *Transcript*, p. 41. See also, *Appendix*, p. 7, ¶11. Flinn testified that up until two weeks prior to the hearing, the YMCA had never terminated the child from their child care facility. However, the termination that had occurred in the prior week had been based upon a two-week notice. See *Transcript*, p. 42. The issues with LW with respect to his behavior that resulted in the suspension were that LW put his hands on other children leaving bruises, not listening, not following instructions. See *Transcript*, p. 42. See exhibits produced by the YMCA, see *Appendix 8*, pp. 50 and 51. Exhibit 8, *Appendix*, p. 51 clearly indicated that LW could return to the YMCA on March 17, 2022, when his behavioral specialist returned to meet with him, and that document was signed by his mother. See *Transcript*, p. 43. The behavioral specialist did report to the YMCA on the 17th, expecting to meet with LW and LW did not show up. See *Transcript*, p. 43. As far as the YMCA was concerned, LW was suspended from March 8 until March 17. Flinn testified that LW was not terminated and was maintained on the active roster. See *Transcript*, p. 43. Flinn further testified that if a YMCA participant was terminated that they would be taken off the active record and that the YMCA participant record is a business record kept in the ordinary course of business. See *Transcript*, pp. 43 and 44. Flinn further testified that LW was not sent a termination notice because he was welcome back to the facility starting on March 17, 2022. See *Transcript*, p. 44.

**Case No. 22 BOR 1509**

Teresa Wascom, an assistant director of Choices Child Care Resources, investigated the LG claim. See *Transcript*, p. 19. LG was attending the YMCA child care facility in Williamstown. Wascom testified that she was advised by LG's foster parent that child care services had been terminated by the YMCA on February 14, 2022. She did not become aware of the termination until April 5, 2022. See *Transcript*, p. 20. Wascom issued a first strike upon the advice of her supervisors. Wascom also testified that other than for the COVID funding, the result of the first strike was that no action would have been taken against the YMCA. Wascom confirmed that the Stabilization Funding resulted in a financial penalty to the YMCA by virtue of the first strike. See *Wascom Testimony*, pp. 21 and 22. Wascom testified that she had not investigated the YMCA side of the story because the first strike was only considered a warning. See *Transcript*, p. 23. Wascom acknowledged that she did not investigate the YMCA's side of the story. See *Transcript*, p. 24. Wascom further acknowledged that the YMCA was providing child care services to the sibling of LG. See *Transcript*, p. 24.

Jeff Olson, the Director of the Parkersburg YMCA, testified to the YMCA's position with respect to LG. Olson testified that the impact of the strikes on the YMCA was the loss of \$10,000.00 of Stabilization payments per month at the Williamstown facility for the LW Child and \$11,000.00 for funding at the Parkersburg YMCA for LG. See *Transcript*, p. 35.

Olson testified that LG suffers from PTSD and is in foster care. Olson had reached out to LG's foster mother about an incident in which LG hit one of the YMCA's staff people. Olson explained to the mother the suspension policy and the fact that there could be a termination depending upon what his future behavior was. See *Transcript*, p. 36. Olson testified that although

under the YMCA policy LG was eligible to be terminated, that he sought to investigate, and learned from the foster mother there were issues regarding the child's medication, and it had been changed. See *Transcript*, p. 36. The foster mother also requested that Olson investigate his behavior by contacting the Williamstown Elementary School, which Olson proceeded to do, and then called the foster mother back and advised that they were going to suspend LG for the remainder of the week and the following week and invited him to come back hopefully at a time when his medication would have a chance to level out and his behavior would improve. See *Transcript*, p. 37. Olson advised that the foster parent was appreciative and did not indicate that she would not be coming back. The next thing that occurred with respect to the LG matter as far as the YMCA was concerned was the issuance of the first strike. Olson acknowledged that there was no investigation by the WVDHHR with respect to the YMCA's side of the story with respect to LG. Olson testified that Exhibit 8 to the Hearing, *Appendix*, p. 92, was the active roster of students at the relevant time periods and that LG's name was on the active roster because he had never been terminated by the YMCA.

Katie Flinn testified that LG was welcome to return to the YMCA on February 28, 2022, and that she had confirmed that return date with his parent. See *Transcript*, p. 44. Flinn testified that when a child doesn't show up or is on suspension that the YMCA does not bill for child care services. See *Transcript*, p. 45. She indicated that the only exception was if the child was out for COVID, they are allowed to bill but that neither LW or LG were out because of COVID. See *Transcript*, pp. 45 and 46.

Denise Richmond, the Child Care Policy Specialist, with the WVDHHR, testified that the basis for the cessation of the of the stabilization payments to the Parkersburg YMCA was

because they were not in good standing with their Provider Service Agreement. See *Transcript*, pp. 28 and 29. Richmond testified to the three-strike policy, namely strike one is a warning letter, strike two is corrective action and retraining and strike three would be revocation of the Provider Service Agreement, which stops any subsidy funding from the WVDHHR. See *Transcript*, p. 29. Richmond went on to state that with respect to the COVID funding, the Stabilization payments, that the second strike would not have resulted in any greater penalty than the first strike, except that the Stabilization Funding could be withheld for a longer period of time. Finally, Richmond testified that even with the issuance of a strike one and strike two, that the Parkersburg YMCA could continue to receive regular subsidy payments from the WVDHHR. See *Transcript*, p. 30.

### **III. STANDARD OF REVIEW**

The Standard of Review is contained in West Virginia Code §29A-5-4(g) and is set forth as follows:

- (g) The court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate, or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision, or order are:
  - (1) In violation of constitutional or statutory provisions;
  - (2) In excess of the statutory authority or jurisdiction of the agency;
  - (3) Made upon unlawful procedures;
  - (4) Affected by other error of law;
  - (5) Clearly wrong in view of the reliable, probative, and substantial evidence on the whole record; or

- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

The Standard of Review for an excessive fine or monetary penalty is *de novo*. See *Perrine v. E.I. DuPont du Nemours and Company*, 225 W. Va. 482 (2010).

#### **IV. SUMMARY OF ARGUMENT**

The Parkersburg YMCA operates numerous child care facilities in Wood County, West Virginia. Two of its facilities were issued a strike one by the WVDHHR. The basis for the issuance of the strike one in each instance was the alleged termination of child care services for one child at the Williamstown facility and for another child at the main Parkersburg YMCA facility. The issuances of the strikes resulted in a cessation of funding of Federal stabilization payments costing the YMCA \$252,000.00. Prior to the availability of Federal stabilization funds, the issuance of a first strike to either facility would have resulted in no cessation of any payments, no penalty, or no fine, as detailed in the statement of the case. The YMCA was afforded a hearing before Hearing Officer Todd Thornton of the WVDHHR's Board of Review. The result of the hearing was that Hearing Officer Thornton affirmed the issuance of the strikes and the cessation of the stabilization payments. By this appeal, the YMCA seeks to reverse the decision of the Hearing Officer, invalidate the issuance of the strikes and reinstate the denied stabilization benefits.

The arguments asserted by the YMCA in support of its appeal are three-fold. The first is that the decision of the Hearing Officer was against the clear weight of the evidence and therefore arbitrary and capricious. As will be demonstrated in the argument, the strikes were issued against the YMCA without a full investigation of the YMCA's side of the story and were based

on the faulty assumption that simply because the children's names were not contained in the billing information provided by the YMCA, that their services had been terminated. This assumption by the WVDHHR's investigators is based on the false premise that the only reason for the children not to be billed for services was that they had been terminated for the program. In fact, children are often not on the billing cycle because they have not received services, by their own choice, or were ill during the particular period, or perhaps, as in this case, they had been suspended from receiving services because of inappropriate behavior at YMCA facilities. The WVDHHR acknowledged at the hearing that the YMCA has the right to suspend child care services and that a suspension is different from a termination. Further, it goes without saying that if the YMCA had submitted names of children for subsidy payments by the WVDHHR that were not receiving services, fraud had would have been committed. Accordingly, when the YMCA issued suspensions to the two children in question, it would have been inappropriate for the YMCA to seek compensation when services had not been provided. However, it has been the YMCA's position that neither of the two children were terminated, which would have required a written two-week notification, but rather was simply suspended.

The next ground of appeal sought by the YMCA is based upon the fact that under the statutes and Legislative Rule, that there is no authority for the WVDHHR to suspend payments to a child care provider as a form of penalty. As recited in the argument hereafter, the statutes and Legislative Rules give the WVDHHR the authority to terminate licensure, limit licensure or suspend licensure to a facility, which would in the denial of subsidy payments issued by the WVDHHR. However, there is no statutory authority for penalizing a child care facility by limiting payments to the facility that it would otherwise be entitled to. In the instant case, the YMCA

license was not suspended or limited or terminated. In fact, the YMCA continued, and has continued, to provide child care services and receive subsidy payments from the WVDHHR.

Finally, the third ground for appeal is that the resulting penalty to the YMCA is excessive in nature. The WVDHHR investigators that testified in the case, both agreed that prior to the availability of stabilization funds from the Federal Government that the issuance of a first strike was simply a warning. In fact, both testified that because of the issuance of the first strike was a warning that they did not have to contact the YMCA for their side of the story because there was no impact. However, in this case, the impact was great as the YMCA, although it continued to meet the Federal program guidelines in providing child care services, was denied \$252,000.00 in payments. As set forth in the following argument, the result of the WVDHHR's action in issuing this strike is in essence a fine or penalty to the YMCA and clearly excessive.

## **V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Petitioner requests that this matter be set for oral argument under Rule 20.

## **VI. LAW AND ARGUMENT**

### **Assignment of Error No. 1**

The Decision of August 3, 2022, made by Todd Thornton, State Hearing Officer, is contrary to the greater weight of the evidence, clearly wrong in view of reliable, probative and substantial evidence and therefore arbitrary and capricious. This Appeal deals with two cases, which were consolidated for hearing, and are consolidated in this Petition for Appeal. Both cases involve the West Virginia Department of Health and Human Resources, hereinafter referred to as "WVHHR", rendered a decision in both cases that the Parkersburg YMCA had terminated child care for Child LG and Child LW without a two-week notice and were properly issued a first offense

“Strike One” corrective action against the YMCA resulting in a loss of federally funded stabilization payments to the YMCA of over \$252,000.00. The evidence clearly shows that both Child LG and Child LW were issued only a suspension with an allowed return date to the YMCA and in fact, not terminated.

### **Law and Argument – Assignment of Error No. 1**

It goes without saying that the hearing officer herein, or any trier of fact, cannot either create or ignore un rebutted evidence. In this case, the testimony of both investigators, Chambers and Wascom, should have been subject to scrutiny at the outset because they failed in adhering to one of the most basic concepts of an investigation, which is to get both sides of the story. The explanation offered by both is that because a first strike by WVDHHR policy prior to the receipt of the COVID Stabilization Funds was merely a warning, which contained no financial impact and required no remedial efforts by the child care provider, no investigation was required. Further, the first strike, even in this case, did not affect the WVDHHR subsidy. In other words, it is a fact that the YMCA was still deemed to be a viable provider of child care services by the WVDHHR, even with the issuance of a first strike against two of its facilities. Secondly, the evidence established by the YMCA was clear and that is that both children, LW and LG, were only suspended. The testimony is conclusive that a suspension would not have required reporting to anybody at the WVDHHR or its contract administrators. The documents established from the YMCA show that a letter written by the parent of LW acknowledged that her child was suspended. See *Appendix Transcript*, p. 16. . Further, the YMCA’s suspension documents clearly indicated on their face that the two children in question were being suspended. The YMCA’s participation logs, which were established as a business record kept in the ordinary course of business, indicated that both children were still active in the program.

Accordingly, the only evidence adduced by the WVDHHR , other than the parental claims, that there was an actual termination of either child was based upon the fact that the WVDHHR was not billed for the child care services. See *Testimony of Chambers, Transcript*, p. 14. However, the fact that the children were not listed on the billing is not proof of termination. A child would not be billed for if they did not show up and receive services, unless the child care participant was prevented from attending child care due to COVID. A child would not show up on the billing records if they had been suspended pursuant to the Providers Services Agreement. The Providers Services Agreement, with respect to both children, clearly provide that the YMCA is entitled to suspend children, which is the case for both of the children in question. The parental claims are clearly contradicted by the YMCA's reports signed by the parents.

Although the documentation from the YMCA is clear that neither of these children were terminated, the Court should pay particular attention to Chambers' testimony, *Transcript*, pp. 7 and 8. Chambers testified that when the mother of LG contacted her to seek placement at another facility that she could not do so unless there had been a termination at the YMCA. Herein lies the dilemma for a YMCA or any other child care provider. If they suspend a child from their child care facility for misconduct, a parent will go seek to find another subsidized child care provider. The only way a parent can then obtain such services as testified to by Chambers would be if there had been a previous termination. Accordingly, a parent, in this situation, is always influenced to claim a termination so that they can get substitute child care at another subsidized facility.

Under West Virginia law, a trier of facts findings will be set aside where they are clearly against the greater weight of the evidence or simply wrong. If the trial judge finds the

verdict is against the clear weight of the evidence, is based upon false evidence, or will result in the miscarriage of justice, the trial judge may set aside the verdict, even if supported by substantial evidence, and grant a new trial. *Sayre v. Roop*, 205 W. Va. 193, 196 (1999). The trial judge is vested with discretion in supervising verdicts and preventing miscarriages of justice and holds the power to award a new trial if the verdict rendered by a jury is plainly wrong - even if it is supported by some of the evidence. *Cook v. Harris*, Syl. Pt. 1, 159 W. Va. 641 (1976).

Here the finding of the Hearing Officer that there had been a termination can only be based on the testimony of the two witnesses, Wascom and Chambers. Since neither Wascom nor Chambers sought to investigate the YMCA's side of the story, the only basis they gave for the termination was the fact that there were no billings for either of the children. The investigators did not see the documents signed by the parents before issuing the strikes. This testimony is based on the false premise that the only reason there would be for no billings would be a termination, when in fact it could be that the child simply did not show up for services as many do from time to time or had been rightfully suspended, which is the case for both of these children. The findings made by the trial examiner are contrary to the greater weight of evidence and further based upon unreliable evidence from the investigators, Chambers and Wascom, and should be set aside. The YMCA's reports, signed by the parents, show that the parents were advised of the suspensions, which contradicts their claims of termination.

The only credible evidence adduced at the hearing came from the YMCA with respect to both its corporate records, documents signed or authored by the parents and from the testimony of YMCA officials, Flinn and Olson, that neither child had been terminated, both had merely been suspended. Since the only basis for the imposition of the first strike penalty was the

alleged fact that the YMCA did not give two-week notice of a termination, the findings of the Hearing Officer should be reversed and the YMCA entitled to the Stabilization payments, which were withheld based on the issuance of the first strike.

### **Assignment of Error No. 2**

The actions of the WVDHHR in suspending the YMCA's stabilization payments for an alleged first offense or Strike One are contrary to law and the authority of the Agency.

### **Law and Argument – Assignment of Error No. 2**

THE WVDHHR has statutory authority for the licensure and operation of child care facilities, generally, under West Virginia Code §49-2-101 *et seq.* West Virginia Code §49-2-116 grants the agency the authority to investigate complaints regarding child care facilities. West Virginia Code §49-2-117 gives the WVDHHR the authority to revoke the licensure of a child care facility for any material violation of the Code Section. West Virginia Code §49-2-118 gives the agency the authority to close a facility if it constitutes an immediate danger or serious harm to children. Finally, West Virginia Code §49-2-120 provides for the penalties for violating the provisions of West Virginia Code as they relate to child care facilities. West Virginia Code §49-2-120 provides for a fine of \$500.00 and a jail sentence of up to one year for operating a child care facility without a license in Section (a) and in Section (b) provides for a \$500.00 fine for operating a family child care facility without a license. In §49-2-120(c), the agency is given the authority to seek injunctive relief where there is immediate or serious harm threatened the children. Accordingly, the West Virginia statutes that deal with child care give the agency the authority to revoke the licensure of a child care facility, to have fines imposed and a possible jail sentence in

instances in which there are operations without a license and to seek injunctions where necessary to protect children from harm.

The Legislative Rules relating to child care centers is found in Title 78. Section 78-1-5.3 provides that when an inspection for a complaint finds non-compliance with this rule, the secretary may require a plan of correction. Section 78-1-24 provides that the agency may make a license provisional or order closure in accordance with West Virginia Code Chapter 49, Article 2 (Part 1).

In neither of the two cases, that are the subject of this appeal, did the WVDHHR enforce any of the remedies authorized by either statute or Legislative Rule. That is to say that the license of the YMCA to operate its child care facility at the main Parkersburg YMCA and the Williamstown facility was not limited in any fashion. The licenses for both facilities were not suspended or revoked, as the facilities continued their operations. Both facilities continued to receive funding from the WVDHHR after each of these incidences. Further, the YMCA was not even given a plan of correction pursuant to West Virginia Legislative Rule 78-1-5.3. The undersigned represents to the Court that he has been unable to locate in either of the West Virginia statutes or the West Virginia Legislative Rules a basis for the strike system testified to by Denise Richmond. Apparently, the strike system, prior to the availability of the Federal Stabilization funds, was an internal procedure developed by the agency for the purpose of determining when a limitation or revocation of a license should occur. However, none of the statutes or the Legislative Rules provide that the agency has the ability to restrict funding in any fashion as a penalty to a child care facility. In fact, as was testified by Denise Richmond, in the time period before the Federal Stabilization funds were available, the issuance of a first strike and a second strike contained no monetary penalty, and the facility would continue its operations and continue to

receive its funding. As set forth by Denise Richmond, the second strike would have resulted in a plan of corrective action, which is in accordance with both the Code and the Legislative Rules. Even the issuance of a third strike did not result in a monetary penalty, but rather a license revocation.

The agency has published a West Virginia Child Care Stabilization Payment Policy and Procedural Manual, a copy of which is hereto attached as *Exhibit 1*, for the convenience of the Court. That Policy does not contain in its definition of program terms any definition of a strike one, two or three or the issuance of a strike. The Policy does provide a definition for revoke or revocation in Paragraph 1.1.12. That Policy, in Paragraph 2.3, indicates that a violation of any section of the Providers Services Agreement can cause a provider to not be eligible for the program. The Stabilization Program goals are defined in this Manual as shown below in Paragraphs 1.0.2. and 1.0.3

1.0.2. West Virginia State Goals – The primary goal of child care services is to provide experiences to children which will foster their healthy development while enabling their parents to participate in work or educational activities. The WV Child Care Stabilization Grant payment program will assist child care providers to continue to provide care and protection that a child receives from his parents.

1.0.3. Federal Goals – The American Rescue Plan (ARP) Act Child Care Funding will support stabilization grants to child care providers to cover their operating expenses as they face less revenue and higher expenses during the pandemic.

Chapter 7 of the Policy provides that the child care specialist, in 7.1.2, shall collect information monthly from the Child care Resource and Referral Agencies regarding providers who have had their Providers Services Agreement revoked or received a strike and provide notice to providers whose stabilization payment will change based on information collected from the Referral

Agencies. Section 7.1.3 provides that the regulatory specialist will be responsible for sending notice of change in stabilization payments that occur as a result of negative actions, such as temporary closures due to complaint or IIU investigations. Under West Virginia law, a statute is vague as defined in *Gooden v. Board of Appeals*, 160 W. Va. 318 (1977) as follows:

The test of vagueness in the context of a statute or regulation designed to punish or discipline is whether a person of ordinary intelligence is given fair notice that his contemplated conduct is prohibited by such statute or regulation.

The Policy is vague on its face for a variety of reasons. First, the Policy does not provide, in any specific language, that the stabilization payments can be suspended for a year based on the issuance of a first strike. In fact, the Policy contains no language indicating that the stabilization payments can be suspended for any period of time. Second, the conditions for eligibility, Section 2.2.4, provide that the facility is eligible if it has a Providers Services Agreement in good standing, the action taken against the YMCA did not impact the YMCA's Providers Services Agreement and result in a determination that it was not in good standing. Third, although the Policy provides that the child care policy specialist shall collect information regarding the issuance of a strike in 7.1.2. There is no language in the Policy which indicates that the issuance of a strike should result in a penalty or should result in a determination that a Providers Services Agreement is no longer in good standing. The WVDHHR website contains only two other documents about the Stabilization program. One is an overview document; the other is a form of Agreement (see *Exhibit 2*). Neither notifies providers such as the YMCA that a "strike one" can result in a cessation of stabilization payments. Exhibits 1 and 2 are provided to the Court, as they are listed in the WVDHHR'S website under the Rules for the Stabilization Program.

Accordingly, the WVDHHR has enacted a policy which purports to give the agency the authority to withhold child care stabilization funds to a child care agency, which has no basis in the West Virginia Statutes or the West Virginia Legislative Rules. Further the stabilization policy adopted is not clear as to whether or not a strike one is sufficient to result in a reduction in stabilization payments. As testified to by the WVDHHR, a strike one or two prior to the Federal funding for the stabilization payments would have resulted in no funding changes to the YMCA. Only the issuance of a third strike, which would lead to a license revocation, would have affected the YMCA's funding. That prior policy and procedure would appear to comport with both the West Virginia Statutes and the West Virginia Legislative Rules. However, the policy that has been implemented for the stabilization payments changed those rules without statutory basis or basis in the West Virginia Legislative Rules, and therefore should not be used as a basis for a denial of stabilization funding.

### **Assignment of Error No. 3**

The actions of the WVDHHR have the practical effect of the issuance of a fine against the YMCA by virtue of the denial of stabilization payments, which is contrary to the lawful authority of the WVDHHR as an Agency and, even if lawful, constitutes an excessive fine or penalty contrary to law.

### **Law and Argument – Assignment of Error No. 3**

The Appellant's Second Assignment of Error sets forth the grounds establishing that the YMCA has been subjected to an excessive fine or penalty by the actions of the WVDHHR, contrary to the Agency's lawful authority. If the WVDHHR cannot establish, through the West Virginia Statutes or the West Virginia Legislative Rules, a basis for reducing funding to the YMCA, then any reduction in funding is in essence an excessive fine or penalty. However, as

recited above, West Virginia Code §49-2-120(a) and (b) are the criminal penalties that relate to the violations of child care licensure requirements, and both only require a \$500.00 fine. West Virginia Code §49-4-107, which is a part of the West Virginia child welfare code dealing with court actions provides for a criminal fine of not less than \$10.00 and not more than \$100.00. As testified to by both of the investigators in this, a strike one, as defined by the WVDHHR, is a warning. It was not defined by any of the testifying parties to be anything other than a warning. Clearly their testimony, in this case, does not indicate that there was any violation of either the West Virginia Code or the West Virginia Legislative Rules. The effective penalty to the YMCA, as testified to by Jeff Olson, was the loss of stabilization funding of \$120,000.00 for the Williamstown facility and \$132,000.00 for the Parkersburg main YMCA facility. In both of these instances, the resulting impact on the YMCA, in the loss of the funds for a warning, is, on its face, excessive, in comparison to the criminal penalties.

The most relevant legal comparison is to view this penalty to the YMCA in the context of a civil punitive damage award. In *Perrine v. E.I. DuPont du Nemours and Company*, 225 W. Va. 482 (2010), the Supreme Court, in reviewing a punitive damage claim, reduced a jury award for punitive damages as being excessive. The Supreme Court noted that a standard for review, with respect to punitive damages, was *de novo*, citing *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656 (1991), and *Alkire v. First National Bank of Parsons*, 197 W. Va. 122 (1996). The Court noted that even where punitive damages are appropriate, that they must be within the constitutional boundaries set by the court, in *TXO Production Corp. v. Alliance Resources Corp.*, 187 W. Va. 457 (1992). The Court noted that even where a punitive damage award is within the ration set forth in *TXO, supra*, that the Supreme Court can, in its discretion, reduce the punitive damage award where it finds appropriate mitigating factors. Here in the instant case, the YMCA

was allowed to continue its child care services and its license was neither suspended nor terminated. The YMCA continued to provide the child care services that were supposed to be benefited from the Federal stabilization fund and was still entitled to receive child care subsidy payments from the WVDHHR. The result of denying the YMCA over \$252,000.00 in payments for services when it was continuing to meet the objectives, not only of the WVDHHR's subsidy program and the stabilization grant, is obviously excessive. West Virginia Supreme Court, in *State v. Day*, 191 W. Va. 641 (1994), acknowledged that the Eighth Amendment to the U.S. Constitution requires that monetary fines not be excessive. The Court specifically noted *Alexander v. U.S.*, 113 S. Ct. 2766 (1993), finding that RICO forfeiture provisions are a form of monetary punishment no different for Eighth Amendment purposes than a traditional fine. The Court held that withholding assets is, in effect, a fine or penalty. In that opinion, the Supreme Court remanded for a determination as to whether the criminal forfeiture was excessive. Herein, the withholding of stabilization funds, when the services to be funded by the Stabilization Program are still being provided, is a monetary punishment, and therefore subject to review as excessive.

## **VII. CONCLUSION**

For the reasons recited herein, the YMCA respectfully requests that the Intermediate Court of Appeals reverse the decision of Hearing Officer Todd Thornton rendered on the 3rd day of August 2023 and find that the YMCA was not guilty of violating its Provider Services Agreement because the children in question were merely suspended and not terminated and reinstate the stabilization payments withheld by the WVDHHR. In the event that the Intermediate Court of Appeals determines that the issuance of the first strike was appropriate, it is still respectfully submitted by the YMCA that the penalty to the YMCA was contrary to law and excessive and that the issuance of the first strike, under the stabilization program, should have the

same effect as the issuance of a first strike with respect to the WVDHHR subsidy program and that there be no financial impact to the YMCA, and that the YMCA be awarded its previously withheld stabilization payments.

YMCA OF PARKERSBURG, Petitioner

By counsel,

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**CERTIFICATE OF SERVICE**

The undersigned, counsel for Petitioner, YMCA of Parkersburg, hereby certifies that on the 2nd day of December 2022 a copy of foregoing *Brief of the Petitioner, YMCA of Parkersburg* was electronically served, via File & ServeXpress, upon all counsel of record:

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/s/ Robert L. Bays  
Robert L. Bays (WVSB # 274)  
*Counsel for Petitioner,  
YMCA of Parkersburg*

# West Virginia Child Care Stabilization Payment Policy & Procedure Manual

American Rescue Plan Act  
Child Care Funding

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Child Care Stabilization Payment Policies and Procedures Manual

WV Department of Health and Human Resources  
Bureau for Family Assistance  
Division of Early Care & Education  
350 Capitol Street, Room B-18  
Charleston, WV 25301-3704

October 1, 2021

**EXHIBIT**

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# CHAPTER 1: WV CHILD CARE STABILIZATION PROGRAM GOALS AND DEFINITION

## 1.0. WV Child Care Stabilization Grant Program Description and Goals

### 1.0.1. Program Description

As child care providers continue to face financial hardships caused by the ongoing pandemic, the Center for Disease Control (CDC) requirements, lower than normal enrollment, staffing shortages and day to day budget demands, child care providers need an influx of funds to continue offering quality child care services to the families of West Virginia.

### 1.0.2. West Virginia State Goals

The primary goal of child care services is to provide experiences to children which will foster their healthy development while enabling their parents to participate in work or educational activities. The WV Child Care Stabilization Grant payment program will assist child care providers to continue to provide care and protection that a child receives from his parents.

### 1.0.3. Federal Goals

The American Rescue Plan (ARP) Act Child Care Funding will support stabilization grants to child care providers to cover their operating expenses as they face less revenue and higher expenses during the pandemic.

## 1.1. Definition of Program Terms

The following definitions of program terms shall be used in interpreting WV Child Care Stabilization Grant Program policy:

**1.1.1. Certificate of Registration:** A statement issued by the Commissioner for a period of up to two years to a family child care home upon receipt of a self-certification statement of compliance with the applicable rules promulgated by the Commissioner.

**1.1.2. Child Care Resource & Referral Agency (CCR&R or R&R):** An agency under contract with the Department of Health and Human Resources to maintain provider resources, provide consumer education, manage the child care subsidy program, refer parents to available providers, and offer services to improve the quality of child care, such as provider training and technical assistance.

**1.1.3. Child Care Center:** A facility operated for the care of 13 or more children on a nonresidential basis.

**1.1.4. DHHR:** West Virginia Department of Health and Human Resources.

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**1.1.5. FACTS:** The Family and Children Tracking System (FACTS) is the management information system used to maintain child care information on families and providers, determine eligibility and process payments.

**1.1.6. FACTS Plus:** West Virginia website where child care providers are able to track child care payments. <https://www.wvfacts.org/factsplusnet/>

**1.1.7. Family Child Care Home:** A facility which is used to provide nonresidential child care for compensation in the provider's home. The provider may care for four to six children, including children who are living in the household, who are under six years of age. No more than two of the total number of children may be under twenty-four months of age.

**1.1.8. Family Child Care Facility:** Any facility which is used to provide nonresidential child care for compensation for seven (7) to twelve (12) children for four (4) or more hours per day, including children who are living in the household who are under six years of age. No more than four (4) of the total number of children may be under 24 months of age.

**1.1.9. Informal Family Child Care:** An informal family child care home provides care for three (3) or fewer children. At least one (1) child is not related to the provider. Informal child care providers are exempt from regulatory requirements but may volunteer to register in order to receive federal child care or food program funding.

**1.1.10. In-Home Care:** In-home child care is provided by relatives or non-relatives for a child or children in the child's own home.

**1.1.11. Out of School Time Child Care Program:** A child care service that offers activities to children before and after school, on school holidays, when school is closed due to emergencies and on school calendar days set aside for teacher activities. OST Programs provide out of school time services typically for fewer than four (4) hours daily, and not more than 30 full days annually for children aged 5 and up.

**1.1.12. Revoke/revocation:** Negative action taken by terminating licensure or registration when a provider fails to maintain established requirements of child care.

**1.1.13. Relative Family Child Care:** A relative family child care home provides care only to children related to the caregiver. The caregiver must be a grandparent, great grandparent, aunt, uncle, great-aunt, great-uncle, or adult sibling. Relative family child care homes are exempt from regulatory requirements but may volunteer to register in order to receive federal child care or food program funding.

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## **CHAPTER 2: OVERVIEW OF WV CHILD CARE STABILIZATION PAYMENT ELIGIBILITY**

### **2.1. Who is Eligible?**

Any child care provider in West Virginia who meets the specified conditions and that has a child care license or certificate of registration is eligible, including:

- Type 1 Child Care Centers (serving 30 or fewer children)
- Type 2 Child Care Centers (serving 60 or fewer children)
- Type 3 Child Care Centers (serving 61 or more children)
- Family Child Care Home Facilities
- Family Child Care Homes
- Out of School Time Programs (one month prior to opening and during the months of operation)

### **2.2. Conditions for eligibility:**

**2.2.1.** Possess a valid provisional or regular license or certificate of registration.

**2.2.2.** Must provide full-time child care services in West Virginia, defined as a program that is open and offering at least eight consecutive hours of care per day, five days per week. (Out of School Time Programs that operate in West Virginia are exempt from the eight consecutive hour requirement.)

**2.2.3.** Must have at least 25% of the child care program's revenue received from private pay tuition and/or West Virginia's child care subsidy program.

**2.2.4.** Have a Provider Services Agreement in good standing.

**2.2.5.** Have not committed substantiated misrepresentation or fraud.

**2.2.6.** Are current on any signed repayment agreement.

### **2.3. Providers Not Eligible**

Providers are not eligible if any of the following apply:

- The provider is a Pop-up Site.
- The provider transports children to a location out of state to provide care.
- The provider is in violation of any section of the Provider Services Agreement.
- The provider is behind or has reneged on a repayment agreement.
- The provider has failed to enter into a repayment agreement when necessary.
- Providers who have committed substantiated misrepresentation or fraud.

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## **CHAPTER 3: ACCEPTABLE USE OF STABILIZATION PAYMENTS**

### **3.1. Child care providers may use these funds to cover a range of expenses.**

#### **3.1.1. Personnel costs.**

Wages and benefits for child care program personnel, including increases in compensation for any staff in a child care center or family child care providers and their employees; health, dental, and vision insurance; scholarships; paid sick or family leave; and retirement contributions. Other examples of allowable personnel costs include ongoing professional development or training, premium or hazard pay, staff bonuses, and employee transportation costs to or from work. Child care providers may also use resources to support staff in accessing COVID-19 vaccines, including paid time off for vaccine appointments and to manage side effects, as well as transportation costs to vaccine appointments.

#### **3.1.2. Rent or Mortgage payments.**

Rent (including rent under a lease agreement) or payment on any mortgage obligation, utilities, facility maintenance, (as it applies to the portion of the home or property used for caring for children). It also may include late fees or charges related to late payment. ECE recommends you consult your tax advisor regarding Internal Revenue Service Rules for business use of the home.

#### **3.1.3. Insurance premiums.**

Employee health, dental, vision insurance. Insurance premiums for, general and professional liability insurance, home or property liability insurance, (as it applies to the portion of the home or property used for caring for children). ECE recommends you consult your tax advisor regarding Internal Revenue Service Rules for business use of the home.

#### **3.1.4. Facility maintenance and improvements**

Funds may not be used for construction or major renovations. Allowable facility maintenance and improvements may include, but are not limited to, building, or upgrading playgrounds, renovating bathrooms, installing railing, ramps, or automatic doors to make the facility more accessible, and removing non-load bearing walls to create additional space for social distancing. In addition, maintenance, and minor renovations to address COVID-19 concerns are appropriate. The facility maintenance and improvements must be assisting with meeting state and local health and safety guidelines or facilitate business practices consistent with safety protocols.

#### **3.1.5. Personal protective equipment (PPE) and COVID-related supplies. Training and professional development related to health and safety practices.**

Personal protective equipment (PPE), cleaning and sanitization supplies and services, or training and professional development related to health and safety practices. Uses of funds under this category are not limited to those designed specifically in response to the COVID-

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19 public health emergency and may include equipment, supplies, services, and training that support meeting state and local health and safety guidelines, including those related to the prevention and control of infectious diseases, prevention of sudden infant death syndrome and use of safe sleep practices, administration of medication (consistent with standards for parental consent), prevention and response to emergencies due to food and allergic reactions, building and physical premises safety, prevention of shaken baby syndrome and abusive head trauma and child maltreatment, response planning for emergencies from a natural disaster or a man-caused event, handling and storage of hazardous materials and the appropriate disposal of bio contaminants, appropriate precautions in transporting children, pediatric first-aid and CPR, and recognition and reporting of child abuse and neglect.

### **3.1.6. Equipment and Supplies**

This category includes purchases of or updates to equipment and supplies to respond to the COVID-19 public health emergency. So long as the equipment and supplies are in response to the COVID-19 public health emergency, they may include indoor and outdoor equipment and supplies that facilitate business practices consistent with safety protocols and developmentally appropriate practice, as well as business items needed to respond to new challenges, such as business software and upgrades. This also includes technological upgrades that programs can use to collect data and report to lead agencies.

### **3.1.7. Goods and services needed to resume providing care.**

This category includes any material good or service necessary for the operation of a child care program. Examples of goods that might be necessary to maintain or resume child care services include food and equipment and materials to facilitate play, learning, eating, diapering and toileting, or safe sleep. Examples of services that are allowable include business automation training and support services, shared services, child care management services, food services, and transportation. The category also covers fees associated with licensing and costs associated with meeting licensing requirements.

### **3.1.8. Mental health supports for children and early educators.**

Providers may use these funds to support the mental health of children and employees. Infant and early childhood mental health consultation (IECMHC), an evidence-based, prevention-based strategy that teams mental health professionals with people who work with young children and their families to improve their social, emotional, and behavioral health and development in the settings where children learn and grow, is one example of an allowable mental health support. The wellbeing of caregivers is also important to stabilizing the child care sector because the mental health and wellbeing of staff impacts training, recruitment, and retention as well as the level of care provided to children. Mental health consultations for staff and other types of mental health supports to staff are also allowable.

### **3.1.9. Reimbursement of costs associated with the current public health emergency, including paying for past expenses.**

Prior to the passage of the ARP Act, child care providers incurred substantial financial losses. In order to keep providing these essential services to their communities throughout the pandemic, and there were not sufficient resources available over the past year to support the child care sector. Prolonged and short-term closures, reduced hours, tuition adjustments,

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low enrollment, extra expenses related to sanitation and safety, and accommodations for new safety and staffing protocols have placed many child providers on very precarious financial footing for which prospective stabilization grants will not compensate. Assisting child care providers with these past financial losses will help ensure their future viability and are an essential component to stabilizing the availability of child care for families and communities.

**3.2.0. Timeline for Child Care Stabilization payments**

3.2.1. Child Care Stabilization monies must be utilized for acceptable expenses on or before December 31, 2023.

3.1.2. Child Care Stabilization monies can be utilized for acceptable expenses incurred after January 1, 2020.

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## CHAPTER 4: AVAILABLE FUNDING AMOUNTS

### 4.1. Grant Amounts

Depending upon the quality rating of the child care provider, monthly payments will begin October 1, 2021 and end December 31, 2023.

### 4.2. Payment Rate

Provider Type	Quality Tier I	Quality Tier II	Quality Tier III
Type 1 Child Care Center (serving 30 or fewer children)	\$5,000	\$10,000	\$22,000
Type 2 Child Care Center (serving 60 or fewer children)	\$9,000	\$15,000	\$24,000
Type 3 Child Care Center (serving 61 or more children)	\$11,000	\$20,000	\$27,000
Family Child Care Home Facility	\$1,500	\$2,400	\$3,200
Family Child Care Home	\$750	\$1,200	\$1,600
Out of School Time Program	\$10,000	N/A	N/A

### 4.3. Tracking WV Child Care Stabilization payments

DHHR will automatically process monthly stabilization payments for all eligible providers. Providers will be able to track these payments through FACTS Plus. Providers who do not currently have FACTS Plus accounts can obtain one here:

<https://www.wvfacts.org/factsplusnet/>

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## CHAPTER 5: APPLICATION PROCESS

### 5.0 Overview

To determine the eligibility of providers for the WV Child Care Stabilization Grant, every child care provider must apply prior to November 1, 2021.

### 5.1. Child Care Stabilization Payment Certification Agreement

**5.1.1.** Each eligible provider applying for funds is REQUIRED to fill out and return the Child Care Stabilization Payment Certification Agreement, signed, and dated. The Child Care Stabilization Payment Certification Agreement is posted on the WV DHHR Division of Early Care and Education website:

<https://dhhr.wv.gov/bcf/ece/Pages/default.aspx>

**5.1.2.** This agreement must be completed and returned via email, by November 1, 2021, to continue to receive stabilization payments to:

[mailto: ECEProviders@WV.gov](mailto:ECEProviders@WV.gov)

**5.1.3.** Providers who do not complete and return the Certification Agreement by the due date will not be eligible to receive additional stabilization payments.

### 5.2. Providers will Certify:

**5.2.1.** When open and providing services, implement policies in line with guidance and orders from states, territorial, Tribal, and local authorities, and , to the greatest extent possible, implement policies in line with guidance from the Centers for Disease Control and Prevention (CDC).

**5.2.2.** For each employee, pay at least the same amount in weekly wages and maintain the same benefits. This stipulation does not prevent the provider from increasing wages and/or benefits.

**5.2.3.** Will not involuntarily furlough employees through the duration of the receipt of Child Care Stabilization Payments and,

**5.2.4.** To the extent possible, provide relief from the copayments and tuition payments for families enrolled in the program, and prioritize relief for families struggling to make payments.

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## **CHAPTER 6: ADDITIONAL INFORMATION**

### **6.0. Additional Requirements**

#### **6.1. Taxes**

The Stabilization Grant payment is considered taxable income. The WV DHHR will issue an IRS Form 1099 to each provider at the end of the year. Please contact a tax professional with questions regarding how to report this income

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## CHAPTER 7: PROCEDURES

### 7.1. Stabilization Payment Monitoring

The Division of Early Care and Education will create a Child Care Stabilization Payment Excel Master Chart. This chart will be updated on a monthly basis as providers open or change provider type or tier status.

7.1.1. The Quality Improvement State Lead is responsible for informing the Child Care Program Manager of changes in tier status monthly. The QISL is responsible for including notice of any change in Stabilization Payment amounts in the notice of Tier change.

7.1.2. The Child Care Policy Specialist shall collect information monthly from the Child Care Resource and Referral Agencies regarding:

- Providers entering repayment or falling behind on repayments.
- Providers who have had their Provider Services Agreement revoked or received a strike.
- The Child Care Policy Specialist is responsible for sending notice to providers whose Stabilization Payment amount will be changed based on information collected from the regional Child Care Resource & Referral agencies.

7.1.3. The regulatory specialists in the child care center licensing and family child care units will be responsible for sending notice of change in Stabilization Payment amounts that occur as a result of negative action such as temporary closures due to complaint or IIU investigations.

7.1.4. The regulatory specialists in the child care center licensing and family child care units will update the Master Chart by removing closed providers and adding any new providers opened during the month by the first working day of the next month. For example, all new providers opened in October 2021, must be added to the list by the first working day in November 2021.

7.1.5. The regulatory specialists in the child care center licensing will be responsible for notifying the Child Care Program Manager of seasonal start-up of any OST programs at least 45 days prior to opening date of the program.

7.1.6. The Child Care Program Manager will update amounts owed to providers based on information received in the above areas on the first working day of the month.

7.1.7. The Child Care Program Manager will send the monthly Master List to finance on or before the first working day of the month.

7.1.8. WV Division of Finance will enter payments by the third working day of the month as per the chart, making a data entry of chosen expenditure areas indicated by the provider on the Certification Agreement.



# Announcing – West Virginia Child Care Stabilization Payments

*West Virginia Resource of Health (WVHR) and Child Care Practices*

## STABILIZATION PAYMENTS OVERVIEW

As child care providers continue to face financial hardships caused by the ongoing pandemic, requirements of the Centers for Diseases Control and Prevention (CDC), lower than normal enrollment, staffing shortages and day to day budget demands, childcare providers need an influx of funds to continue offering childcare services.

The West Virginia Department of Health and Human Resources (DHHR) will begin releasing monthly stabilization payments, based on child care tier quality, to all qualifying licensed and registered childcare providers.

### ELIGIBILITY – Who is eligible for the West Virginia Child Care Stabilization Payment?

Any child care provider in West Virginia who meets the specified conditions and that has a child care license or certificate of registration is eligible. That includes:

- Type 1 Child Care Centers (serving 30 or fewer children)
- Type 2 Child Care Centers (serving 60 or fewer children)
- Type 3 Child Care Centers (serving 61 or more children)
- Family Child Care Home Facilities
- Family Child Care Homes
- Out of School Time Programs

Providers must meet the following conditions to be eligible:

- Possess a valid provisional or regular license or certificate of registration.
- Must provide full-time child care services in West Virginia, defined as a program that is open and offering at least eight consecutive hours of care per day, five days per week. Out of School Time Programs that operate in West Virginia are exempt from the eight consecutive hour requirement.
- Must have at least 25% of the child care program's revenue received from private pay tuition and/or West Virginia's child care subsidy program.
- Have a Provider Services Agreement in good standing.
- Have not committed substantiated misrepresentation or fraud.
- Are current on any signed repayment agreement.

**EXHIBIT**

2

## **ANNOUNCING – WEST VIRGINIA CHILD CARE STABILIZATION PAYMENTS**

### *American Rescue Plan (ARP) Act Child Care Funding*

#### **Is there any child care provider that may not be eligible?**

Providers are not eligible if any of the following apply:

- The provider is a pop-up site.
- The provider transports children to a location out of state to provide care.
- The provider is in violation of any section of the Provider Services Agreement.
- The provider is behind or has defaulted on a repayment agreement.
- The provider has failed to enter into a repayment agreement when necessary.
- Providers who have committed substantiated misrepresentation or fraud.

#### **PAYMENTS – When will the West Virginia Child Care Stabilization Payments be available?**

Beginning October 1, 2021, through September 30, 2023, DHHR will automatically process monthly stabilization payments for all eligible providers. Providers will be able to track these payments through FACTS Plus. Providers who do not currently have FACTS Plus accounts can obtain one here:

<https://www.wvfacts.org/factsplusnet/>

#### **USE OF FUNDS – What can providers use the funding for?**

Child care providers may use these funds to cover a range of expenses such as:

- Personnel costs
- Rent or mortgage payments
- Insurance
- Facility maintenance and improvements
- Personal protective equipment (PPE) and COVID-related supplies
- Training and professional development related to health and safety practices
- Goods and services needed to resume providing care
- Mental health supports for children and early educators
- Reimbursement of costs associated with the COVID-19 Pandemic

Please see the West Virginia Child Care Stabilization Payment Policy and Procedure Manual for an in-depth view of allowable uses. <https://dhhr.wv.gov/bcf/Childcare/Policy/Pages/default.aspx>

#### **AMOUNT OF MONTHLY CHILD CARE STABILIZATION PAYMENTS – How much can my program expect to receive each month?**

Depending upon the type of childcare center, out of school time program or family child care provider, monthly payments, beginning October 1, 2021, and ending September 30, 2023, payments will be:

**ANNOUNCING – WEST VIRGINIA CHILD CARE STABILIZATION PAYMENTS**

*American Rescue Plan (ARP) Act Child Care Funding*

<b>Provider Type</b>	<b>Quality Tier I</b>	<b>Quality Tier II</b>	<b>Quality Tier III</b>
Type 1 Child Care Center (serving 30 or fewer children)	\$5,000	\$10,000	\$22,000
Type 2 Child Care Center (serving 60 or fewer children)	\$9,000	\$15,000	\$24,000
Type 3 Child Care Center (serving 61 or more children)	\$11,000	\$20,000	\$27,000
Family Child Care Home Facility	\$1,500	\$2,400	\$3,200
Family Child Care Home	\$750	\$1,200	\$1,600
Out of School Time Program	\$10,000	N/A	N/A

**APPLICATION PROCESS – How do I apply for funds?**

The Child Care Stabilization Payment Certification Agreement is posted on DHHR’s Division of Early Care and Education website at <https://dhhr.wv.gov/bcf/ece/Pages/default.aspx>. Each eligible provider applying for funds is REQUIRED to complete and return the agreement, signed, and dated, via email to [ECEProviders@WV.gov](mailto:ECEProviders@WV.gov) by November 15, 2021, to continue to receive stabilization payments. Providers who do not complete and return the Certification Agreement by the due date will not be eligible to receive additional stabilization payments.

Providers must certify that they will:

- When open and providing services, implement policies in line with guidance and orders from states, territorial, Tribal, and local authorities, and, to the greatest extent possible, implement policies in line with guidance from the Centers for Disease Control and Prevention (CDC); the CDC has posted several fact sheets and guides to help child care providers understand and meet the guidelines, including:
  - *Guidance from the Centers for Disease Control and Prevention (CDC) (available at <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/guidance-for-childcare.html>).*
  - *Quick Guide: Help Protect Your Child Care Center From COVID-19, available at [https://www.cdc.gov/coronavirus/2019-ncov/downloads/community/schools-childcare/322883-B\\_COVID-19\\_ChildcareGuidance\\_CENTER\\_infographic\\_v3.pdf](https://www.cdc.gov/coronavirus/2019-ncov/downloads/community/schools-childcare/322883-B_COVID-19_ChildcareGuidance_CENTER_infographic_v3.pdf).*

## ANNOUNCING – WEST VIRGINIA CHILD CARE STABILIZATION PAYMENTS

### *American Rescue Plan (ARP) Act Child Care Funding*

- *Quick Guide: Help Protect Your Family Child Care Home from COVID-19, available at [https://www.cdc.gov/coronavirus/2019-ncov/downloads/community/schools-childcare/322883-B\\_COVID-19\\_ChildcareGuidance\\_HOME\\_infographic\\_v7.pdf](https://www.cdc.gov/coronavirus/2019-ncov/downloads/community/schools-childcare/322883-B_COVID-19_ChildcareGuidance_HOME_infographic_v7.pdf).*
- *Child Care Providers Quick Guide to Symptoms of COVID-19 at Child Care, available at <https://www.cdc.gov/coronavirus/2019-ncov/downloads/community/schools-childcare/Childcare-Providers-Quick-Guide-Symptoms-of-COVID-19-at-Child-Care.pdf>.*
- For each employee, pay *at least* the same amount in weekly wages and maintain the same benefits. This stipulation does not prevent the provider from increasing wages and/or benefits.
- Will not involuntarily furlough employees through the duration of the receipt of Child Care Stabilization Payments.
- To the extent possible, provide relief from copayments and tuition payments for families enrolled in the program, and prioritize relief for families struggling to make payments. If a provider is unable to provide relief from copayments and tuition payments for all families enrolled in the program, they should prioritize doing so for families most in need of relief and target families earning below 85 percent of the State Median Income.

### **ADDITIONAL REQUIREMENTS -- Do I need to do anything else to receive funds?**

There are no additional documentation requirements, however, you are asked to keep a file of expenditures in case of future auditing. Financial records, supporting documents, statistical records, and all other records pertinent to the Child Care Stabilization Payments must be retained for a period of three years from the date of submission of the report indicating how the funds were used. If any litigation, claim, or audit is started before the expiration of the 3-year period, the records must be retained until all litigation, claims, or audit findings involving the records have been resolved and final action taken.

### **TAXES - Is the payment taxable?**

Yes, the payment is considered taxable income. DHHR will issue an Internal Revenue Service 1099 form for taxes at the end of the year. Please contact a tax professional with any questions you have regarding how to report this on your taxes.

# West Virginia Child Care Stabilization Payment Certification Agreement

*American Rescue Plan (ARP) Act Child Care Funding*

<b>Provider Name:</b>			
<b>Program/Facility Name:</b>			
<b>Mailing Address:</b>		<b>County:</b>	
<b>City, State, Zip:</b>			
<b>Phone Number:</b>		<b>Email Address:</b>	
<input type="checkbox"/> <b>Center</b> (select type: <input type="checkbox"/> Type I <input type="checkbox"/> Type II <input type="checkbox"/> Type III)	<input type="checkbox"/> <b>Family CC Home</b>	<input type="checkbox"/> <b>Family CC Facility</b>	<input type="checkbox"/> <b>OST Center</b>
<b>Applicant Race:</b> <input type="checkbox"/> American Indian/Alaska Native	<input type="checkbox"/> Asian	<input type="checkbox"/> Black/African American	
<input type="checkbox"/> Native Hawaiian/Pacific Islander	<input type="checkbox"/> White	<input type="checkbox"/> Multiracial	
<b>Applicant Ethnicity:</b>	<b>Applicant Latino:</b> <input type="checkbox"/> yes <input type="checkbox"/> no	<b>Applicant Gender:</b>	

**Use of Funds**

Please refer to the West Virginia Child Care Stabilization Payment Policy and Procedure Manual, Chapter 3: Acceptable Use of Stabilization Payments, for definitions of the below categories.

<https://dhhr.wv.gov/bcf/ece/policies/Pages/default.aspx>

To receive a Child Care Stabilization Payment, I agree to use the funds only for the following:  
(Select all that apply)

- Personnel costs
- Rent or mortgage payments
- Insurance
- Facility maintenance and improvements
- Personal protective equipment (PPE) and COVID-related supplies
- Training and professional development related to health and safety practices
- Goods and services needed to resume providing care
- Mental health supports for children and early educators
- Reimbursement of costs associated with the COVID-19 Pandemic

## Certification

Please read and initial each statement below:

\_\_\_\_\_ I understand that it is my responsibility to maintain records and other documentation to support the use of funds I receive as well as to document my compliance with the requirements described below.

By signing this agreement, I am certifying that I will meet requirements throughout the period of the Child Care Stabilization Payments, October 1, 2021, through September 30, 2023, including the following:

\_\_\_\_\_ I understand that I must be open and providing full day child care services in West Virginia to the community. A full day is defined as at least eight consecutive hours. Out of School Time Programs are exempt from the eight-hour requirement.

\_\_\_\_\_ When open and providing services, I will implement policies in line with guidance and orders from corresponding state, territorial, Tribal, and local authorities and, to the greatest extent possible, implement policies in line with guidance from the U.S. Centers for Disease Control and Prevention (CDC).

\_\_\_\_\_ For each employee (including lead teachers, aides, and any other staff who are employed by the child care provider to work in transportation, food preparation, or other type of service), I must continue paying **at least** the same amount of weekly wages and maintain the same benefits (such as health insurance and retirement) for the duration of the subgrant. I understand that I may not involuntarily furlough employees from the date of application submission throughout the duration of the subgrant period.

\_\_\_\_\_ To the extent possible, I will provide relief from copayments and tuition payments for the families enrolled in the child care program and prioritize such relief for families struggling to make either type of payment. If I am unable to provide relief from copayments and tuition payments for all families enrolled in my program, I will prioritize doing so for families most in need of relief and target families earning below 85 percent of the State Median Income.

\_\_\_\_\_ I must abide by my Provider Services Agreement and maintain compliance with licensing and regulatory requirements.

\_\_\_\_\_ I understand that billing for unapproved services may result in legal action for repayment and prosecution for fraud. If there is substantiated misrepresentation by a provider that provider shall be prohibited from receiving Child Care Stabilization Payments.

\_\_\_\_\_ I agree that the West Virginia Department of Health and Human Resources and any of its authorized representatives shall have the right of access to any documents, papers, or other records which are related to the Child Care Stabilization Payments, in order to make audits, examinations, excerpts, and transcripts. The right also includes timely and reasonable access to the program personnel for the purpose of interview and discussion related to such documents. The rights of access are not limited to the required retention period but last as long as the records are retained.

The following signature affirms that I will adhere to the items noted above. It also affirms I will only use the funds in the areas noted. I understand that I must keep records and receipts to verify expenditures, and I understand that I may be required to repay any funds used for unapproved purposes.

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Signature

Printed Name

Date

**FAILURE TO RETURN THIS FORM TO [ECEProviders@wv.gov](mailto:ECEProviders@wv.gov) BY NOVEMBER 15, 2021, WILL RESULT IN DISCONTINUATION OF CHILD CARE STABILIZATION PAYMENTS.**