

Scholarly Commons @ UNLV Boyd Law

Scholarly Works

Faculty Scholarship

2001

Child Care for Families Leaving Temporary Assistance for Needy Families

Rebecca L. Scharf

University of Nevada, Las Vegas – William S. Boyd School of Law

Sujatha Jagadeesh Branch

Cynthia Godsoe

Sherry Leiwant

Roslyn Powell

See next page for additional authors

Follow this and additional works at: <https://scholars.law.unlv.edu/facpub>



Part of the [Family Law Commons](#), and the [Social Welfare Law Commons](#)

Recommended Citation

Scharf, Rebecca L.; Branch, Sujatha Jagadeesh; Godsoe, Cynthia; Leiwant, Sherry; Powell, Roslyn; and LaCheen, Cary, "Child Care for Families Leaving Temporary Assistance for Needy Families" (2001). *Scholarly Works*. 591.

<https://scholars.law.unlv.edu/facpub/591>

This Article is brought to you by the Scholarly Commons @ UNLV Boyd Law, an institutional repository administered by the Wiener-Rogers Law Library at the William S. Boyd School of Law. For more information, please contact youngwoo.ban@unlv.edu.

Authors

Rebecca L. Scharf, Sujatha Jagadeesh Branch, Cynthia Godsoe, Sherry Leiwant, Roslyn Powell, and Cary LaCheen

Child Care for Families Leaving Temporary Assistance for Needy Families

By Sujatha Jagadeesh Branch, Cynthia Godsoe, Sherry Leiwant, Roslyn Powell, Cary LaCheen, and Rebecca Scharf

Since Temporary Assistance for Needy Families (TANF) replaced the Aid to Families with Dependent Children program in 1996, the welfare rolls have decreased by more than 40 percent.¹ While unemployment and poverty rates have declined, families who leave welfare generally earn low wages and remain below the poverty level.² Because families leaving welfare are mostly single mothers with young children, child care is critical to their ability to work outside the home.³ Low-income parents trying to make ends meet, as well as employers

of low-wage workers, emphasize the importance of appropriate, affordable child care in enabling women who leave welfare to make a successful transition into the work force.⁴

However, lack of adequate child care and the high cost of child care often force working parents leaving welfare to make the impossible choice between providing inadequate care for their children and failing to provide for their families financially.⁵ While child care subsidies can help low-income parents, many families do not use child care subsidies for which they are

¹ See Admin. for Children & Families, U.S. Dep't of Health & Human Servs., Temporary Assistance for Needy Families, Change in TANF Caseloads Since Enactment of New Welfare Law, at www.acf.dhhs.gov/news/stats/aug-dec.htm (last modified Aug. 22, 2000).

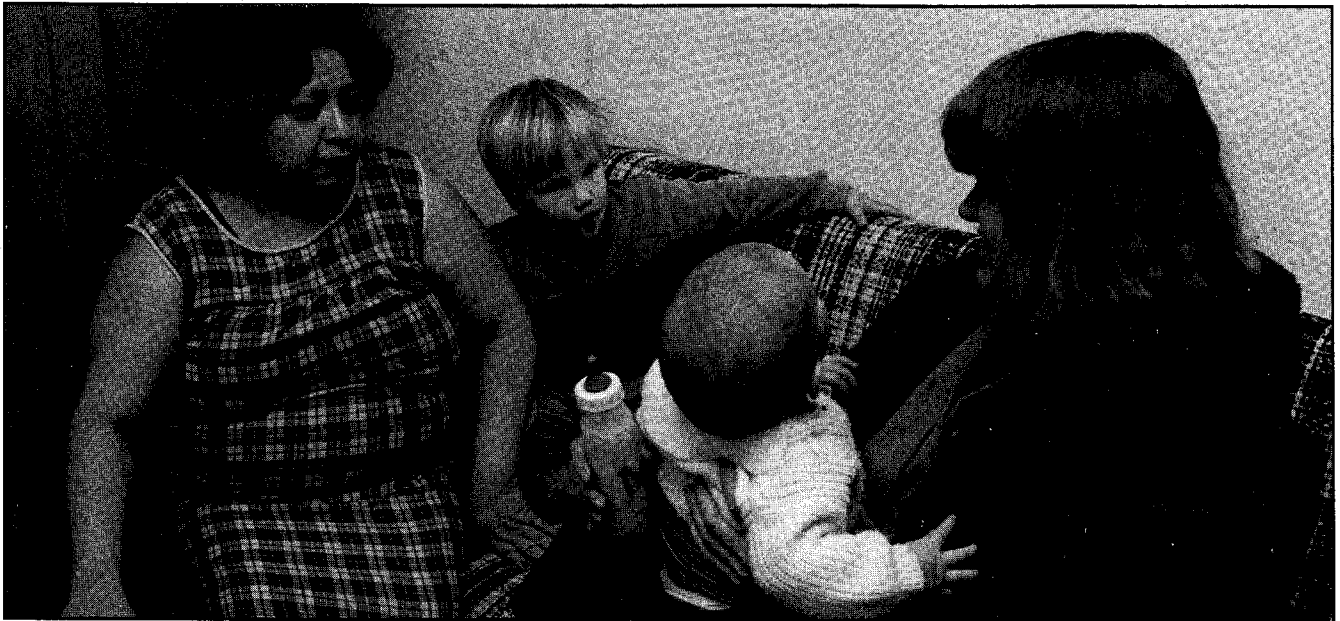
² See Ctr. on Budget & Policy Priorities, Poverty Rate Hits Lowest Level Since 1979 as Unemployment Reaches a 30-Year Low 1 (Sept. 26, 2000) (press release); GEN. ACCOUNTING OFFICE, PUB. NO. GAO/HEHS-99-48, WELFARE REFORM: INFORMATION ON FORMER RECIPIENTS' STATUS 16, 18 (1999). Note, however, that the General Accounting Office states that some policymakers are concerned that the results of studies of people leaving welfare may not apply to the general population of people leaving welfare because those who fail to answer surveys may be worse off than those who answer surveys. See *id.* at 13.

³ Former welfare recipients are more likely than other low-income women to have small children: 32 percent of all low-income women and 42 percent of former recipients have children under age 3. See PAMELA LOPREST, URBAN INST., FAMILIES WHO LEFT WELFARE: WHO ARE THEY AND HOW ARE THEY DOING? 6 tbl.1 (1999), available at <http://newfederalism.urban.org/html/discussion99-02.html>.

⁴ See, e.g., GREG OWEN ET AL., WILDER RESEARCH CTR., WHOSE JOB IS IT? EMPLOYERS' VIEWS ON WELFARE REFORM 15 (2000), available at www.jcpr.org/wpfiles/Owen_Shelton.PDF.

⁵ E.g., in San Francisco County the average monthly cost of center-based child care for an infant is \$893.27 per month, almost 90 percent of a minimum-wage worker's earnings. See Shelley Waters Boots & Sophia Jeng, California Child Care Resource & Referral Network, 2000 Market Rate Survey of California Child Care Providers (May 2000) (available from Sujatha Branch, Child Care Law Center, 415.495.5498).

For the note on the authors, go to the end of the article.



eligible.⁶ Although subsidies can help poor families, they do not necessarily solve problems of affordability or availability of good child care choices. Low-income families also are likely to face one or more special issues that make finding appropriate child care even more difficult.

In this article we discuss child care subsidies for families leaving welfare, key issues low-income working families face in accessing quality, affordable child care, and advocacy strategies to help ensure that state child care policies serve these families effectively.⁷

I. Child Care Subsidies for Families Leaving Welfare

The major child care funding source for families leaving welfare is the Child Care and Development Fund (CCDF).⁸ States have discretion to determine eligibility for subsidies, although under the fund's regulations families' incomes must be below 85 percent of the state median income.⁹ Most states set eligibility levels substantially lower.¹⁰

Seventy percent of CCDF funding must be used to serve TANF families, families attempting to make the transition off

⁶ Studies have found that 10 percent of those eligible under federal standards and 15 percent of those eligible under their state standards received Child Care and Development Fund (CCDF) subsidies. See, e.g., U.S. Dep't of Health & Human Servs., Access to Child Care for Low-Income Working Families ¶ 4 (Oct. 19, 1999), at www.acf.dhhs.gov/news/press/1999/ccreport.htm.

⁷ For a discussion of issues related to the low uptake of subsidies by former Temporary Assistance for Needy Families (TANF) recipients, see Maurice Emsellem et al., *Income Supports Can Dramatically Increase Resources Available for Lower-Income Working Families*, in this issue.

⁸ See 42 U.S.C.S. §§ 9858 *et seq.* (LEXIS through 2000). If TANF funding is used directly to pay for child care for families leaving welfare, it does not implicate time limits and eligibility restrictions as long as the person leaving welfare is working. See *id.* §§ 602(a)(1)(A)(i), 604(d)(1)(B), (d)(3). If TANF funding is transferred to CCDF, then it does not implicate TANF time limits and eligibility restrictions, but CCDF rules do apply. See 45 C.F.R. § 260.31(b)(3) (1999). For an extensive discussion of eligibility for child care subsidies, see Jo Ann C. Gong et al., *Child Care in the Postwelfare Reform Era: Analysis and Strategies for Advocates*, 32 CLEARINGHOUSE REV. 373 (Jan.-Feb. 1999).

⁹ See 45 C.F.R. § 98.20(a)(2) (1999).

¹⁰ Twenty-two states established income eligibility at between 40 percent and 59 percent of state median income. See NAT'L CHILD CARE INFO. CTR., CHILD CARE AND DEVELOPMENT BLOCK GRANT: REPORT OF STATE PLANS FOR THE PERIOD 10/01/97 TO 9/30/99, 71 (1998) (prepared for Child Care Bureau, Administration for Children and Families, U.S. Department of Health and Human Services).

welfare through work activities, or families at risk of becoming dependent on welfare.¹¹ The fund's regulations allow states to expand eligibility for children with disabilities; most states have done this.¹² States are required to define children with "special needs" and give them priority and may pay a higher rate to providers for their care.¹³ States must spend at least 4 percent of CCDF funds annually on improving child care quality.¹⁴

The U.S. Department of Health and Human Services is the federal agency responsible for administering CCDF and TANF.¹⁵ For each program, states select a lead agency and submit certified state plans.¹⁶ The department monitors compliance with the CCDF statute and regulations and the state plan.¹⁷ States are subject to penalties and sanctions for noncompliance.¹⁸

II. Child Care Issues for Low-Income Families Leaving Welfare

Low-income families are likely to face one or more special issues that make finding

appropriate and affordable child care difficult, for example, reimbursement rates for child care providers, license-exempt child care versus center-based care, child care for children with disabilities, immigrant status, the need for child care during nontraditional hours, and domestic violence. The lack of due process rights also can create barriers to child care access.

A. Provider Reimbursement Rates

CCDF regulations require families in which parents are eligible for child care subsidies to have "equal access" to child care that is comparable to that provided to families not eligible for subsidies.¹⁹ Despite this mandate, inadequate provider reimbursement rates and high family copayments prevent many low-income families from obtaining appropriate, affordable child care.²⁰

Some states set their provider reimbursement rates up to the seventy-fifth percentile of the current local market rate with the goal of ensuring that eligible fam-

¹¹ See 42 U.S.C.S. § 418(b)(2) (LEXIS through 2000).

¹² States may extend these services from ages 13 to 19 for children with a "mental or physical incapacity." 45 C.F.R. § 98.20(a)(1)(ii) (1999). For state definitions of this term, see Nat'l Child Care Info. Ctr., Definitions of "Physical or Mental Incapacity" from Child Care and Development Fund State Plans (for the period 10/01/99-9/30/01) (2000) (on file with Child Care Law Center). For a list of states that have expanded eligibility for children with disabilities, see CHILD CARE BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD CARE AND DEVELOPMENT BLOCK GRANT: REPORT OF STATE PLANS FOR 1/01/1997 TO 9/30/1998 49 (1998).

¹³ See 45 C.F.R. §§ 98.16(f), 98.44 (1999) (requiring states to define children with "special needs" and give them priority). For an example of a state paying a higher rate to child care providers for children with special needs, see CAL. EDUC. CODE § 8265.5 (West 1994 & Supp. 2000).

¹⁴ See 45 C.F.R. § 98.51(a) (1999).

¹⁵ See 42 U.S.C.S. § 416 (LEXIS through 2000).

¹⁶ See *id.* § 402(a)(4) (requiring states to select a lead agency for TANF); 45 C.F.R. §§ 98.2, 98.10 (1999) (requiring states to select a lead agency for CCDF); *id.* § 98.16 (requiring states to submit certified plans for each program).

¹⁷ See 45 C.F.R. § 98.90 (1999). However, the U.S. Department of Health and Human Services has certified plans that do not meet requirements of law. See Arlo Chase, *Maintaining Procedural Protections for Welfare Recipients: Defining Property for the Due Process Clause*, 23 N.Y.U. REV. L. & SOC. CHANGE 571 (1997).

¹⁸ See 42 U.S.C.S. § 9858g(b) (LEXIS through 2000); 45 C.F.R. § 98.92 (1999).

¹⁹ 42 U.S.C.S. § 9858c(c)(4)(A) (LEXIS through 2000); 45 C.F.R. §§ 98.15(b)(7), 98.43 (1999).

²⁰ See OFFICE OF INSPECTOR GEN., U.S. DEP'T OF HEALTH & HUMAN SERVS., PUB. NO. OEI-05-97-00320, STATES' CHILD CARE CERTIFICATE SYSTEMS: AN EARLY ASSESSMENT OF VULNERABILITIES AND BARRIERS 7-10 (1998); HELEN BLANK & NICOLE OXENDINE POERSCH, CHILDREN'S DEF. FUND, STATE DEVELOPMENTS IN CHILD CARE AND EARLY EDUCATION 1999 15-20 (2000). Paid by the family, copayments are fees that are calculated by using a sliding-fee scale based on family income.

ilies have access to 75 percent of local providers.²¹ To ensure that reimbursement rates accurately reflect the cost of care, CCDF regulations require states to conduct local market rate surveys every two years and show that payment rates are adequate to ensure equal access.²² Regular market surveys with reimbursement rates adjusted accordingly help ensure that rates do not become outdated.²³ However, nearly one-third of states are paying rates based on out-of-date market rate surveys.²⁴

If reimbursement rates are inadequate, providers may refuse to accept children with subsidies or require families using subsidized child care to pay the differential between the actual cost of care and the amount of the subsidy. Inadequate payment rates may cause providers to reduce ratios of staff to children; this often adversely affects the quality of care. Inadequate rates also may cause providers to close down, especially in poor neighborhoods, because they can no longer afford to stay in business. The net effect of these practices is to limit parental child care choices for low-income

families; such parents may be driven to choose the lowest-cost care that their subsidies will purchase.

Parents receiving child care subsidies must contribute to the cost of child care by paying child care fees based on family size and income, although states have the option of waiving fees for families below the poverty level.²⁵ High copayments or fees may limit parental choice by making some categories of child care, including higher-cost quality care, inaccessible. To keep child care affordable, experts recommend that families pay no more than 10 percent of their income for child care.²⁶ However, many states require copayments greater than that percentage.²⁷

B. License-Exempt Child Care Versus Center-Based Care

Studies of families leaving welfare show that the majority of those making the transition from welfare to work use relatives, friends, and neighbors to care for their young children.²⁸ CCDF regulations require states to have licensing requirements that apply to child care pro-

²¹ See NAT'L CHILD CARE INFO. CTR., *supra* note 10, at 60.

²² 45 C.F.R. § 98.16(k)(1) (1999).

²³ Some states pay different rates based on the type of care provided. E.g., West Virginia recently raised its reimbursement rates to the seventy-fifth percentile of the market rate but sets rates at the eighty-fifth percentile for accredited programs and provides a \$3-a-day differential for day care provided during nontraditional work hours. See BLANK & OXENDINE POERSCH, *supra* note 20, at 33.

²⁴ See NAT'L CHILD CARE INFO. CTR., *supra* note 10, at 61.

²⁵ See 45 C.F.R. § 98.42 (1999).

²⁶ See preamble to 45 C.F.R. § 98.42 (recommending that fees be no greater than 10 percent of a family's income regardless of the number of children in the family). 63 Fed. Reg. 39936, 39960 (July 24, 1998).

²⁷ For single parents earning \$12,000 a year with a 3-year-old child in center-based care, only three states required no copayments while six states required copayments of more than \$100 a month, which was more than 10 percent of families' annual income. See RACHEL SCHUMACHER & MARK GREENBERG, CTR. FOR LAW & SOC. POLICY, *CHILD CARE AFTER LEAVING WELFARE* 3 (1999).

²⁸ Studies in Massachusetts, Mississippi, New Jersey, New York, North Carolina, Oklahoma, South Carolina, Washington, and Wisconsin all showed that a majority relied on informal care. See *id.* at 15; BLANK & OXENDINE POERSCH, *supra* note 20, at 27. In New Jersey 70 percent of employed Work First New Jersey recipients with children under 6 relied on relatives, friends, or neighbors for child care, and 82 percent of those with infants used such care. See Anu Rangarajan & Robert G. Wood, Mathematica Policy Research Inc., *How WFNJ [Work First New Jersey] Clients Are Faring Under Welfare Reform: An Early Look* 53 (1999), at www.mathematica-mpr.com/wfnj.pdf. For more information on license-exempt child care providers, see Daniel J. Lesser, *A Vital Child Care Quality Initiative: Addressing the Needs of License-Exempt Home Child Care Providers*, 34 CLEARINGHOUSE REV. 444 (Nov.-Dec. 2000).

viders but give states discretion in designing these requirements.²⁹ In many states, providers caring for a small number of children, especially when they are relatives of the children, are exempt from licensure.³⁰ The fund's regulations impose only minimal health and safety requirements on providers who receive subsidies, but states may impose additional requirements on license-exempt child care providers.³¹

Child development professionals often view license-exempt child care as being of lower quality than regulated care.³² However, often parents have good reasons for choosing this type of care, including the following: trust in a relative or neighbor, confidence that a known caregiver will care for the child with love, and reluctance to have a stranger care for a child; flexibility of hours and convenience of location; difficulty in finding appropriate licensed child care, especially during nontraditional hours, for infants and children with special needs; desire to have a child in a culturally and linguistically appropriate child care setting; and desire to increase the income of a relative or neighbor.³³

The important issue with respect to child care type is not that one type is better for all families but that each family should know its options and make in-

formed choices for its children. Studies of the type of care used by those receiving child care subsidies indicate that children with subsidies are more likely to be placed in center-based care than in family day care or relative care; this could mean that more families would use center-based care if they received subsidies.³⁴ Using relatives or friends as child care providers does not mean that a family should not receive a subsidy. Some relatives and friends, caring for children eligible for subsidies, might be eligible for payment as informal providers of care if they qualify under state requirements.³⁵

C. Child Care for Children with Disabilities

Working families who are leaving welfare and have children with disabilities face particular challenges in obtaining child care. Statistics show that approximately 12.3 percent of noninstitutionalized children aged 5 to 17 have one or more limitations in performing activities, and children of low-income families are almost twice as likely to have such limitations.³⁶ The Americans with Disabilities Act (ADA) is a valuable tool when advocating on behalf of children who have disabilities and need child care. The Act applies to most privately owned or operated child care programs and those oper-

²⁹ 45 C.F.R. § 98.40(a)(1), (a)(2) (1999).

³⁰ For child care licensing regulations for all fifty states, see the National Resource Center for Health and Safety in Child Care at <http://nrc.uchsc.edu/states.html>.

³¹ 45 C.F.R. §§ 98.16(g), 98.30(e)(1)(iv) (1999) (permitting states to impose additional requirements on license-exempt care). Some requirements imposed by CCDF regulations are prevention and control of infectious diseases and age-appropriate immunization. *Id.* § 92.41.

³² See, e.g., BRUCE FULLER & SHARON LYNN KAGAN, UNIV. OF CALIF., BERKELEY & YALE UNIV., REMEMBER THE CHILDREN: MOTHERS BALANCE WORK AND CHILD CARE UNDER WELFARE REFORM (2000).

³³ See Lesser, *supra* note 28, at 446–47. See also Melissa Healy, *Lattinos at Center of Chicken-Egg Debate over Child-Care Funds*, L.A. TIMES, Sept. 29, 1998, at A1.

³⁴ See SCHUMACHER & GREENBERG, *supra* note 27, at 15.

³⁵ That a child care provider should receive the minimum wage when caring for children may be argued. E.g., the Fair Labor Standards Act applies to business enterprises engaged in commerce or in the production of goods for commerce. Fair Labor Standards Act, 29 U.S.C.S. § 206(a)(1) (LEXIS through 2000). See also 45 C.F.R. §§ 98.16(g), 98.30(e)(1)(iv) (1999).

³⁶ See FED. INTERAGENCY FORUM ON CHILD & FAMILY STATISTICS 1999, AMERICA'S CHILDREN: KEY NATIONAL INDICATORS OF WELL-BEING 56, 57 (1999), available at <http://childstats.gov/ac1999/AC99pt1.pdf> (reporting that 18.1 percent of children in families with incomes below the poverty level had difficulties performing everyday activities compared to 10.9 percent of children in families at or above the poverty level).

ated by state and local governments directly or by private organizations under contract.³⁷ It also applies to state and local laws governing or affecting the operation of child care programs.³⁸

The ADA protects children with physical or mental impairments that substantially limit one or more major life activities if those conditions are not corrected by glasses, medication, or other treatment or equipment.³⁹ Children with attention deficit disorder, other learning disabilities, and asthma and other recurring chronic conditions are included.⁴⁰ Children with contagious diseases and many other con-

ditions also are included.⁴¹ The Act also protects children regarded by others as having disabilities, those with a record of a past disability, and those who have no disabilities but experience discrimination because of a relationship or association with someone with a disability.⁴²

Under the ADA, child care programs may not exclude children with disabilities on the basis of their disability except in limited circumstances, such as when a child poses a direct threat to the health and safety of others that cannot be eliminated with reasonable modifications of policies or practices.⁴³ Programs may not

³⁷ Americans with Disabilities Act (ADA), 42 U.S.C.A. § 12181(7)(K) (West 1995) (applying the Act to most privately owned or operated child care programs); *id.* § 12131 (applying the Act to programs operated by state and local governments directly); 28 C.F.R. § 35.130(b)(1), (3) (1999) (applying the Act to programs operated by private organizations under contract). Child care centers operated by religious organizations and some private clubs are exempt from coverage. *See* 42 U.S.C.A. § 12187 (West 1995). However, if they receive federal financial assistance, they are covered by section 504 of the Rehabilitation Act. Rehabilitation Act, 29 U.S.C.A. § 794 (West 1999).

³⁸ *See* 28 C.F.R. § 35.130(b)(6) (1999). For a detailed discussion of the application of the ADA to child care, see Maria Gil de Lamadrid, *Child Care and the Americans with Disabilities Act: Expanding Available Care for Children with Disabilities Through Litigation*, 30 CLEARINGHOUSE REV. 799 (Dec. 1996). *See also* Herbert Semmel & Cary LaCheen, *Temporary Assistance for Needy Families and the Americans with Disabilities Act*, 31 CLEARINGHOUSE REV. 475 (Jan.-Feb. 1998).

³⁹ 42 U.S.C.A. § 12102(2) (West 1995). Major life activities include caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, and learning. *See* 28 C.F.R. §§ 35.104, 36.104 (1999). They also include sleeping, concentrating, and interacting with others. *See* U.S. Equal Employment Opportunity Comm'n, Notice 915.002, EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities (Addendum) ¶ 3 (rev. Feb. 1, 2000), available at www.eeoc.gov/docs/psych.html. *See also* Sutton v. United Airlines, 527 U.S. 471 (1999) (Clearinghouse No. 52,331). Children with disabilities that are not corrected with treatment or equipment and children who experience serious side effects from medication or other treatment continue to be protected.

⁴⁰ *See* 28 C.F.R. §§ 35.104, 36.104 (1999) (attention deficit disorder and other learning disabilities); U.S. Equal Employment Opportunity Comm'n, *supra* note 39 (asthma and other recurring chronic conditions).

⁴¹ *See* Bragdon v. Abbott, 524 U.S. 624 (1998) (Clearinghouse No. 52,089) (human immunodeficiency virus (HIV)); Sch. Bd. of Nassau County v. Arline, 480 U.S. 273 (1987) (tuberculosis). The ADA may cover people with HIV even when the virus is asymptomatic. *See* Bragdon, 524 U.S. at 639.

⁴² 42 U.S.C.A. § 12102(2) (West 1995) (protecting children regarded by others as having disabilities and those with a record of a past disability); *id.* § 12182(b), 28 C.F.R. § 35.130(g) (1999) (protecting children who have no disabilities but experience discrimination because of a relationship or association with someone with a disability).

⁴³ 42 U.S.C.A. § 12182(b)(1)(A)(i) (West 1995), 28 C.F.R. § 35.130(a) (1999) (prohibiting child care programs from excluding children with disabilities on the basis of their disability); 42 U.S.C.A. § 12182(b)(3) (West 1995) (permitting exceptions in limited circumstances). Fear that insurance costs will increase if programs accept children with disabilities is not a legitimate rationale for exclusion. *See* 28 C.F.R. § 36.212(c) (1999). Although ADA Title II regulations have no "direct threat" exception, the exception has been applied to state and local government programs as well. *See, e.g.,* Bay Area Addiction Research and Treatment Inc. v. City of Antioch, 179 F.3d 725 (9th Cir. 1999) (Clearinghouse No. 52,798).

exclude children who need one-to-one care, although they may require families to provide or pay for such care.⁴⁴ Programs must make reasonable modifications for children with behavior problems and should consider the possibility that behavior problems are disability related before excluding a child for inappropriate behavior.⁴⁵ Children with disabilities have the right to attend child care programs serving children without disabilities, even when separate programs for children with disabilities exist, unless a separate program is necessary for a particular disabled child to benefit from the program.⁴⁶

Programs may not exclude children who need medication, help with braces or other equipment, gastrostomy-tube (G-tube) feeding, glucose tests, or other similar procedures or treatment, and they must provide these services or assistance as reasonable modifications if doing so does not fundamentally alter the nature of the pro-

gram.⁴⁷ Programs may not charge families of children with disabilities extra for these services, although they may require parental consent and medical documentation and may require families to supply medication and equipment.⁴⁸

Many providers fear liability if they perform these procedures and problems occur, but a finding of liability is unlikely if instructions are followed.⁴⁹ The U.S. Department of Justice has taken the position that programs may ask parents to waive their right to sue in exchange for the program agreeing to perform such procedures.⁵⁰ State and local licensing requirements restricting the services that child care programs may perform are common, but these requirements often violate the ADA.⁵¹

The ADA requires child care facilities to be physically accessible. Different standards cover private child care programs and state and local government pro-

⁴⁴ Providing extended one-to-one care is probably an undue financial burden for most programs, and program changes that would be an undue burden are not required. See 42 U.S.C.A. § 12182(b)(2)(A)(iii) (West 1995); 28 C.F.R. § 35.130(b)(7) (1999). See also Disability Rights Section, U.S. Dep't of Justice, Commonly Asked Questions About Child Care Centers and the Americans with Disabilities Act ¶ 7 (1997), at www.usdoj.gov/crt/ada/childq%26a.htm (explaining that child care programs may not exclude children who need one-to-one care but that programs generally are not required to apply constant one-to-one supervision).

⁴⁵ Refusal to get a child tested for disabilities may make this theory unavailable. See *J.H. v. ABC Child Care Inc.*, 953 F. Supp. 675, 680–81 (D. Md. 1996).

⁴⁶ See 42 U.S.C.A. § 12182(b)(1)(A)(iii), (b)(1)(B) (West 1995); 28 C.F.R. § 35.130(b)(1)(iv) (1999). See also 28 C.F.R. 35.130(d) (1999) (requiring state and local governments to serve people with disabilities in the most integrated setting appropriate to their needs).

⁴⁷ See 42 U.S.C.A. § 12182(b)(2)(A)(ii) (West 1995); 28 C.F.R. § 35.130(b)(7) (1999).

⁴⁸ See 28 C.F.R. §§ 35.130(f), 36.301(c) (1999) (prohibiting programs from charging families of children with disabilities extra for certain services); Disability Rights Section, U.S. Dep't of Justice, *supra* note 44, ¶ 20 (suggesting that providers obtain parental consent for performing care related to diabetes).

⁴⁹ See *de Lamadrid*, *supra* note 38, at 806.

⁵⁰ See settlement agreements in *Stuthard v. KinderCare Learning Ctrs. Inc.*, Nos. DJ 202-58-18 and DJ 202-26S-3 (U.S. Dep't of Justice Sept. 12, 1996) (Clearinghouse No. 51,546), available at www.usdoj.gov/ctr/ada/kinder1.htm#anchor203831, and in *McKinnon v. Smyrna Playschool Inc.*, No. 202-14-46 (U.S. Dep't of Justice 1998) (Clearinghouse No. 53,283), available at www.usdoj.gov/crt/ada/cumberld.htm.

⁵¹ By pointing out that the state policy prohibiting the feeding of children with gastrostomy tubes (G-tubes) in child care facilities violated the ADA, California advocates persuaded the state licensing agency to allow child care centers to feed children through G-tubes without obtaining state waivers. See CAL. DEP'T OF SOC. SERVS., CHILD CARE EVALUATOR MANUAL POLICY §§ 101226, 102417 (2000) (outlining the new policy that "[t]here is nothing to prohibit licensees and staff from administering routine gastrostomy-tube (G-tube) feeding . . . to an infant or child in care. . . ."). For further information, contact the Child Care Law Center, 415.495.5498 or cpalamountain@childcarelaw.org.

grams.⁵² All buildings designed and constructed for first occupancy after January 26, 1993, must conform to design access standards.⁵³ Programs must ensure effective communication with applicants, recipients, and the public and must provide sign language interpreters, telecommunication devices, and other communication aids unless doing so would fundamentally alter the program or be an undue burden.⁵⁴

A strong argument exists that child care programs should not ask about a child's disability or health condition during the application process even though the ADA does not specifically prohibit such questions. Medical inquiries are unnecessary early in the child care admission process because programs generally are not permitted to screen out children

with disabilities.⁵⁵ The U.S. Department of Justice states that public accommodations may not make "unnecessary inquiries" about disabilities of program applicants and members.⁵⁶ After accepting a child, programs should be able to request medical and disability-related information needed to serve the child appropriately.

The primary funding sources for child care for children with disabilities are CCDF, the Individuals with Disabilities Education Act, and Head Start.⁵⁷ The Act funds special education for children under 21 with disabilities; this may include child care for children below school age.⁵⁸ Under the Head Start Child Development and Family Support program (including the Early Start child care program for chil-

⁵² Privately funded child care programs must remove physical access barriers to child care programs when doing so is readily achievable. See 42 U.S.C.A. § 12182(2)(A)(iv) (West 1995). The financial resources of the program and the cost of the changes are relevant to this determination. See *id.* § 12181(9). Barriers must be removed in front entrances, play areas, bathrooms, playgrounds, and any transportation provided by the program. See 28 C.F.R. § 36.310 (1999) (requiring accessible transportation). When changes are not readily achievable, other reasonable measures must be taken to achieve access. See *id.* § 36.201(b). State and local government child care programs must be accessible "when viewed in their entirety." See *id.* § 35.150(a). This means that they must provide meaningful and equal access to child care even if each program site is not accessible. Architectural changes are not required if program access can be provided in other ways. See *id.* § 35.150(b)(1).

⁵³ See 42 U.S.C.A. § 12183 (West 1995); 28 C.F.R. § 35.151 (1999). The standards can be found at 28 C.F.R. pt. 36 app. A (1999).

⁵⁴ See 42 U.S.C.A. § 12182(b)(2)(A)(iii) (West 1995); 28 C.F.R. § 35.164 (1999).

⁵⁵ See 42 U.S.C.A. § 12182(A)(2)(i) (West 1995).

⁵⁶ See U.S. DEP'T OF JUSTICE, TITLE ADA III TECHNICAL ASSISTANCE MANUAL § 4.1300 (1993).

⁵⁷ Individuals with Disabilities Education Act, 20 U.S.C.A. §§ 1400 *et seq.* (West, WESTLAW through 2000); Head Start, 42 U.S.C.A. §§ 9801 *et seq.* (West, WESTLAW through 2000). States may also transfer TANF funds into CCDF, and may, as Missouri has done, designate those funds for special-needs children and other kinds of child care in short supply. See SUSAN GOLONKA ET AL., NGA [NAT'L GOVERNORS' ASS'N] CTR. FOR BEST PRACTICES, SERVING CHILDREN AND YOUTH THROUGH THE TEMPORARY ASSISTANCE FOR NEEDY FAMILIES BLOCK GRANT 7 (2000), available at www.nga.org/Pubs/IssueBriefs/2000/000204TANF.asp.

⁵⁸ The Individuals with Disabilities Education Act entitles every eligible child to a "free appropriate public education," 20 U.S.C.A. §§ 1400(d)(1)(A), 1412(a)(1) (West, WESTLAW through 2000), in the "least restrictive environment," *id.* § 1412(a)(5). For children aged 3 to 5, and, at state discretion, those turning 3 within the school year, this includes preschool if needed to minimize delay. See *id.* § 1419. For children from birth to 3 years old, this includes early intervention services, which should be provided at the child care site if needed to minimize developmental delay or, at state option, to minimize the risk of delay. See *id.* §§ 1431(a)(1), 1432(5). Older children also may be entitled to after-school care as a necessary "related service." Related services are those necessary for a child to benefit from special education, including after-school or other child care. See 34 C.F.R. § 300.24(a) (2000). Schools must take steps to provide nonacademic and extracurricular activities, including after-school programs, so that children with disabilities have an equal opportunity for participation. See *id.* § 300.306, 300.553.

dren below age 3), 10 percent of children served must have disabilities.⁵⁹ Each Head Start program also must develop a disabilities service plan with strategies for meeting the needs of children with disabilities and their parents.⁶⁰

D. Immigrant Status

Working immigrant families leaving welfare face particular barriers to accessing child care benefits.⁶¹ For example, CCDF regulations currently require that states report the social security numbers of heads of households to the U.S. Department of Health and Human Services not to prove eligibility but to ensure program integrity.⁶² Collecting social security numbers from immigrant parents of U.S. citizen children may discourage parents from applying for child care assistance. Moreover, accessing benefits through complex application procedures is particularly difficult for immigrant families whose first language is not English.⁶³

E. Child Care During Nontraditional Hours

Nationally one-quarter of former wel-

fare recipients report that many working in the retail or service industries are required to work outside the standard hours of 6:00 a.m. to 6:00 p.m.⁶⁴ Few child care providers offer child care during nontraditional hours; center-based care is particularly scarce.⁶⁵ Thus many low-income parents need child care dur-

Because exposure to domestic violence can interfere with a child's emotional, psychological, academic, and physical development, child care providers must be able to recognize the signs of domestic violence in children and learn how to address their needs.

ing hours when most child care providers are closed.⁶⁶ Relatives and informal care providers who can care for children in their own homes or in a homelike setting may be the best alternative for families who must obtain care for their children late at night.⁶⁷

⁵⁹ See 45 C.F.R. §§ 1305.6(c), 1305.2(a) (1999).

⁶⁰ See *id.* § 1308.4(a).

⁶¹ For general information about the eligibility of immigrant children for various benefits, see Gillian Dutton, *The Effect of Welfare Reform on Immigrant Children*, 32 CLEARINGHOUSE REV. 503 (Jan.-Feb. 1999). See also Tanya Broder, *State and Local Policies on Immigrants and Public Benefits: Responding to the 1996 Welfare Law*, 31 CLEARINGHOUSE REV. 503 (Jan.-Feb. 1998).

⁶² 45 C.F.R. § 98.71(a)(13) (1999).

⁶³ See Child Care Bureau, U.S. Dep't of Health & Human Servs., Program Instruction ACYF-PI-CC-00-04, Clarifying Policy Regarding Limits on the Use of Social Security Numbers Under the CCDF and the Privacy Act of 1974 ¶ 8 (2000), available at www.acf.dhhs.gov/programs/ccb/policy1/current/pi0004/pi0004.htm.

⁶⁴ See SCHUMACHER & GREENBERG, *supra* note 27, at 18. In Washington State 51 percent of current and former TANF families and other low-income families worked a combination of weekends and weekdays, and 38 percent worked a nonday schedule. See *id.*

⁶⁵ See MAYOR'S ADVISORY COMM. ON EARLY CHILDHOOD DEV., EVENING, OVERNIGHT AND WEEKEND CHILD CARE AVAILABILITY: FINDINGS OF A SURVEY OF CHILD CARE PROVIDERS IN THE DISTRICT OF COLUMBIA 10 (1998) (reporting that only 12 percent of D.C. child care providers surveyed reported that they offered evening care, and even fewer provided weekend care).

⁶⁶ See U.S. Dep't of Health & Human Servs., *supra* note 6, at 11 (stating that 40 percent of mothers of preschoolers work nonday shifts and that this number increases to 52 percent for families below 22 percent of the poverty level). E.g., in Massachusetts 32.1 percent of low-income parents surveyed indicated that they needed care during nontraditional hours compared to just 11.5 percent for both middle- and high-income parents. See RANDY ALBELDA & CAROL CONSENZA, UNIV. OF MASS., BOSTON, CHOICES AND TRADEOFFS: THE PARENT SURVEY ON CHILD CARE IN MASSACHUSETTS: A REPORT FOR PARENTS UNITED FOR CHILD CARE 14 (1995).

⁶⁷ See discussion of license-exempt care, *supra* section II.B.

Some states and the District of Columbia are addressing this problem. For example, Illinois invested \$1 million in a pilot program to serve providers willing to offer child care during nontraditional hours. The District of Columbia encourages caregivers to provide care during nontraditional hours by paying 10 percent to 15 percent more for such services.⁶⁸

F. Domestic Violence

The problems that working low-income families leaving welfare face in securing appropriate, affordable child care can be especially difficult for families living with domestic violence.⁶⁹ Almost one million women are victims of violent crime (including murder, rape, and assault) at the hands of a current or former spouse or intimate partner every year.⁷⁰ Low-income women are even more likely to be victims of domestic violence. Studies consistently show violence rates at between 20 percent and 30 percent for poor women.⁷¹ Children in homes where

violence occurs are adversely affected by it. Reports indicate that 87 percent of the children of battered women witness domestic violence.⁷² Reports also indicate that child abuse occurs in 30 percent to 60 percent of families that experience domestic violence.⁷³

Stable, appropriate child care is essential for both adult and child victims of family violence. Economic disempowerment is one of the most significant factors compelling women to remain in violent homes. Access to an independent source of income, as well as to child care and transportation, is essential for women trying to escape their abusers.⁷⁴ Child care also can benefit the development of children who are at risk due to domestic violence, and child care sites, providing a point of entry for more intensive services for families who need them, may serve as resource centers for families.⁷⁵ Because exposure to domestic violence can interfere with a child's emotional, psychological, academic, and physical development, child care providers

⁶⁸ See Betty Holcolmb et al., *Child Care: How Does Your State Rate?* WORKING MOTHER, July–Aug. 1999, at 28.

⁶⁹ For a more thorough discussion of this and related topics, see Alice Bussiere & Roslyn Powell, *Welfare Reform and Child Care: Needs of Families Living with Domestic Violence*, 32 CLEARINGHOUSE REV. 385 (Jan.–Feb. 1999).

⁷⁰ See CALLIE MARIE RENNISON & SARAH WELCHANS, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, INTIMATE PARTNER VIOLENCE 6 tbl.6 (May 2000), available at www.ojp.usdoj.gov/bjs/pub/pdf/ipv.pdf. See also LAWRENCE GREENFELD ET AL., U.S. DEP'T OF JUSTICE, VIOLENCE BY INTIMATES: AN ANALYSIS OF DATA ON CRIMES BY CURRENT OR FORMER SPOUSES, BOYFRIENDS, AND GIRLFRIENDS 3 (1998).

⁷¹ See, e.g., JODY RAPHAEL & RICHARD M. TOLMAN, TRAPPED BY POVERTY, TRAPPED BY ABUSE 5 (1997); JODY RAPHAEL & SHEILA HAENNICKE, TAYLOR INST., KEEPING BATTERED WOMEN SAFE THROUGH THE WELFARE TO WORK JOURNEY: HOW ARE WE DOING? FINAL REPORT 4 (1999); GEN. ACCOUNTING OFFICE, PUB. NO. GAO/HEHS-99-12, DOMESTIC VIOLENCE: PREVALENCE AND IMPLICATIONS FOR EMPLOYMENT AMONG WELFARE RECIPIENTS 2 (1998).

⁷² See Post-Bulletin, Domestic Violence, at www.postbulletin.com/domestic/zfacts.html (based on Bureau of Justice Factbook, FBI, National Coalition Against Domestic Violence). See also LENORE E. WALKER, THE BATTERED WOMAN SYNDROME 59 (1984).

⁷³ See Jeffrey L. Edleson, The Overlap Between Child Maltreatment and Woman Abuse ¶ 8, at www.vaw.umn.edu/Vawnet/overlap.htm (last modified Apr. 2000) (listing published studies reporting percentages mostly between 30 percent and 60 percent). See also Howard A. Davidson, *Child Abuse and Domestic Violence: Legal Connections and Controversies*, 29 FAM. L.Q. 357, 358 (1995) (stating that child abuse occurs in 25 percent to 70 percent of the families experiencing domestic violence).

⁷⁴ See NAT'L COUNCIL OF JUDICIAL & FAMILY COURT JUDGES, EFFECTIVE INTERVENTION IN DOMESTIC VIOLENCE AND CHILD MALTREATMENT CASES: GUIDELINES FOR POLICY AND PRACTICE 19 (1999).

⁷⁵ See Martha G. Roditti, *Child Day Care: A Key Building Block of Family Support and Family Preservation Programs*, 24 CHILD WELFARE 1043, 1055–58 (1995).

must be able to recognize the signs of domestic violence in children and learn how to address their needs.⁷⁶

CCDF is an important resource for families experiencing domestic violence. The fund's regulations allow states to waive income and family fees for children defined as at risk of or currently receiving protective services.⁷⁷ States may define "protective services" as they choose, and several state definitions explicitly include the children of battered women.⁷⁸ Children experiencing domestic violence may be categorized within other state protective service categories and thus also be eligible for subsidized child care.⁷⁹

Families already in the child welfare system often are entitled to subsidized child care, which can be a valuable support to help keep the family together.⁸⁰ However, for families not involved with

the child welfare system, the designation of needing or being at risk of needing protective services carries the serious risk of unwanted or unnecessary child protective services intervention into a family. This may result in a state or local agency labeling the child as at risk of abuse or neglect or, in some states, opening a child protective services case.

States may provide respite care for children falling within a protective services category and may pay a higher reimbursement rate for their care.⁸¹ Some states also grant first priority in accessing non-TANF subsidized child care to children receiving or at risk of receiving protective services.⁸²

G. Procedural Protections

In 1996 Congress repealed statutory entitlements to both welfare and child

⁷⁶ See Lucy Salcido Carter et al., *Domestic Violence and Children: Analysis and Recommendations*, in 9 THE FUTURE OF CHILDREN 10 (Winter 1999) (recommending that child care providers and other professionals in regular contact with families "receive ongoing training on domestic violence and its impact on children").

⁷⁷ 45 C.F.R. § 98.20(a)(3)(ii) (1999).

⁷⁸ States must define certain key terms in their CCDF plans, including "protective services," but have wide discretion in doing so. See *id.* § 98.16(f)(7). E.g., New York's definition of protective services includes families who have incomes under 200 percent of the state income standard and are in a battered women's shelter and "need child care in order to participate in an approved activity"; Washington state includes families receiving services from a domestic violence shelter. See Nat'l Child Care Info. Ctr., Child Care and Development Fund Plan, app. 2 (Eligibility and Priority Terminology Definitions of "Protective Services" (for the period 10/1/99-9/30/01)) (appendix on file with Child Care Law Center).

⁷⁹ E.g., the California definition of "protective services" under CCDF includes children identified by a legal, medical, or social service agency or emergency shelter as at risk of abuse, neglect, or exploitation; some service providers have included under this definition some children experiencing domestic violence. See Nat'l Child Care Info Ctr., *supra* note 78, app. 2.

⁸⁰ Federal child welfare funds may be used to provide child care for at-risk families. See Title IV-B of the Social Security Act, 42 U.S.C.A. §§ 620 *et seq.* (West, WESTLAW through 2000). States must link eligible families with other community supports. See 45 C.F.R. § 1317.15(m)-(o) (2000). States must also ensure that child care is provided in a child's best interests. See 42 U.S.C.A. § 622(b)(2) (West, WESTLAW through 2000).

⁸¹ See 45 C.F.R. § 98.16(f)(7) (2000) (permitting states to provide respite care for children falling within a protective services category); see also 63 Fed. Reg. 39936, 39948 (July 24, 1998). See 45 C.F.R. § 98.43 (2000) (permitting states to pay a higher reimbursement rate for care of children falling within a protective services category); see also 63 Fed. Reg. 39936, 39958 (July 24, 1998).

⁸² At least eight states and Puerto Rico include children receiving or at risk of receiving child protective services in their definition of "special needs" for priority purposes: Alaska, Kansas, Minnesota, Missouri, Nebraska, New Jersey, South Dakota, and Texas. See Nat'l Child Care Info. Ctr., Definitions of "Special Needs Child" from Child Care and Development Fund State Plans (for the period 10/01/99-9/30/01) (2000) (on file with Child Care Law Center). One state, Minnesota, also specifically includes children exposed to "intra-familial violence." See *id.* at 5.

care assistance.⁸³ CCDF regulations give states considerable discretion to design and implement child care programs and do not require states to ensure the fair administration of the fund's child care subsidy programs or to establish and maintain a fair hearing mechanism for families denied access to subsidies.⁸⁴

However, some states have retained their child care entitlement for some low-income families, including those no longer receiving TANF benefits.⁸⁵ Many retain extensive fair hearing systems, which existed under Aid to Families with Dependent Children, including fair hearings for child care benefits.⁸⁶ Some states specifically give fair hearings for low-income parents deprived of child care assistance.⁸⁷

Even in the absence of state entitlements to child care, advocates may look to state administrative procedure acts for administrative hearing rights. Many states' administrative procedure acts provide for administrative hearings for persons seeking to contest an agency's action or failure to act, and denial of a child care subsidy may come within such a provision.⁸⁸ Child care policies also may be challenged under state administrative procedure acts. In California, for example, advocates are challenging the California Department of Education's child care guidelines; they

claim that they were not promulgated in accordance with the state administrative procedure act and resulted in the loss of child care to eligible families.⁸⁹

In the absence of express statutory authority, advocates may use the due process clause of the U. S. Constitution as well as that of their state constitutions to argue that notice be given and a hearing be held when child care assistance is denied or terminated improperly.⁹⁰ In *Goldberg v. Kelly* the U.S. Supreme Court held that the Fourteenth Amendment's due process guarantee prohibited the termination of welfare benefits without notice and an opportunity to be heard.⁹¹ As a result, in states that have retained a child care guarantee for low-income families, families must be given notice and an opportunity to be heard before child care benefits can be reduced or terminated.

III. Advocacy Strategies for Effective Child Care Policies

Many difficult issues face low-income families who need child care to work outside the home. Advocates can have an impact on ensuring that those families have access to quality, affordable child care. Some advocacy strategies are as follows:

- Reviewing CCDF state plans to ensure that the child care needs of families

⁸³ See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105.

⁸⁴ 45 C.F.R. § 98.1 (1999).

⁸⁵ The following states have retained some child care guarantees for some low-income families: Alabama, Alaska, Arizona, Arkansas, California, Delaware, Georgia, Indiana, Kansas, Kentucky, Maine, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, and Tennessee. See HELEN BLANK & GINA ADAMS, CHILDREN'S DEF. FUND, STATE DEVELOPMENTS IN CHILD CARE AND EARLY EDUCATION 18-24 (1997).

⁸⁶ States are required under TANF to have some administrative mechanism for appealing adverse decisions. See 42 U.S.C.A. § 602(a)(1)(B)(iii) (West 2000).

⁸⁷ E.g., New York provides the same administrative fair hearing rights to applicants for and recipients of child care assistance only as it does to those receiving cash public assistance. See N.Y. COMP. CODES. R. & REGS., tit. 18 §§ 358, 415 (1998).

⁸⁸ See, e.g., CAL. GOV'T CODE §§ 11405 *et seq.* (West 1999); MASS. GEN. LAWS ch. 30A, § 1 (1998); N.Y. ADMIN. PROC. ACT § 301 (McKinney 1999).

⁸⁹ See *Rose v. Eastin*, No. 30956 (Cal. Super. Ct.) (filed Jan. 28, 2000) (Clearinghouse No. 52,968).

⁹⁰ State constitutions often grant more expansive rights than does the federal constitution. See W.J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495 (1977).

⁹¹ *Goldberg v. Kelly*, 397 U.S. 254 (1970) (Clearinghouse No. 1799).

leaving welfare are considered in allocating child care subsidies and advocating seamless child care systems to ensure a smooth transition from TANF to post-TANF child care.

- Conducting outreach to families leaving TANF and other low-income workers concerning their possible right to child care assistance through government subsidies and urging the state to give information in a variety of formats and languages to clients about their right to child care subsidies.

- Reviewing state child care provider reimbursement rates and market rate surveys and advocating updated rates, fee policies requiring families to pay no more than 10 percent of their income on child care, and higher reimbursement rates for child care provided during nontraditional hours and for children with special needs.

- Working to change licensing and other laws preventing child care providers

from serving children with disabilities and urging providers to eliminate admission and other policies that have a discriminatory effect on children with disabilities.

- Working with child care providers and families to access funding for and increase the supply of child care for families experiencing domestic violence.

- Analyzing state administrative fair hearing processes and state administrative procedure acts, preparing "Know Your Rights" materials for families, offering legal analysis and model briefs to other advocates, and advocating policy changes on due process issues.

- Ensuring that advocates are aware of the child care subsidy program and that they can help families with children access benefits. Lack of child care often can be the underlying reason for other problems that bring families into a legal services office.

Note on the Authors

Sujatha Jagadeesh Branch is a senior staff attorney, and Cynthia Godsoe is a Skadden Fellow, Child Care Law Center, 973 Market St., Suite 550, San Francisco, CA 94103; 415.495.5498; sbranch@childcarelaw.org; cgodsoe@childcarelaw.org. Sherry Letwant is a senior staff attorney, and Roslyn Powell is a staff attorney, NOW Legal Defense and Education Fund, 395 Hudson St., New York, NY 10014; 212.413.7532; sleitwant@nowldef.org; rpowell@nowldef.org. Cary LaCbeen and Rebecca Scharf are senior staff attorneys, Welfare Law Center, 275 Seventh Ave., Suite 1205, New York, NY 10001; 212.633.6967; lacbeen@welfarelaw.org; scharf@welfarelaw.org.