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Child Care in the Postwelfare Reform Era: Analysis and Strategies for Advocates

by Jo Ann C. Gong, Alice Bussiere, Jennifer Light, Rebecca Scharf, Marc Cohan, and Sherry Leiwant

Adequate child care is essential to enable poor women to support their families with work outside the home.[1] In 1994 the U.S. General Accounting Office found that offering a child care subsidy to poor mothers increased the likelihood by 15 percent that the mothers would work.[2] An Illinois study found that 20 percent of parents who left public assistance for work returned to assistance because of child care problems.[3] In Minnesota a study found that lack of child care caused 14 percent of parents awaiting child care subsidies to leave their jobs and rely on public assistance.[4] These studies confirm what advocates know: Poor parents, like other parents, cannot work without child care.

The goal of this article is to assist advocates in helping their clients access quality child care and assuring that they do not lose needed public assistance when child care is unavailable.

I. Changes in Child Care Funding

Like most public benefit programs, child care assistance for the poor changed dramatically in 1996. Under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 Congress, for the first time, required states to impose work requirements on single-parent families with pre-school-age children who receive cash assistance.[5] Such assistance is made through the Temporary Assistance for Needy Families (TANF) block grant.[6] At the same time Congress repealed provisions that guaranteed child care to low-income families.[7] In a nation with limited affordable child care, requiring poor parents to work outside the

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[1] *See, e.g.*, General Accounting Office, Welfare Reform: States' Efforts to Expand Child Care Programs (GAO/HEHS-98-27), 1, 4 (1998); Ellen Kisker & Christine Ross, *Arranging Child Care*, 7 Future of Children: Welfare to Work 99–109, 102 (Spring 1997); Sandra Hofferth, *Child Care in the United States Today*, 6 Future of Children: Financing Child Care 41–61, 57–58 (Summer–Fall 1996); General Accounting Office, Child Care: Working Poor and Welfare Recipients Face Service Gaps (GAO/HEHS-94-87), 1, 3 (1994).

[2] General Accounting Office, Child Care: Child Care Subsidies Increase Likelihood That Low-Income Mothers Will Work (GAO/HEHS-95-20) (1994).

[3] Child Care Law Center, Child Care as Welfare Prevention 11 (1995).

[4] *Id.*

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

[6] 42 U.S.C. § 607(a).

[7] Pub. L. No. 104-193, Title VI, 110 Stat. 2105.

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home for subsistence benefits without guaranteeing them child care creates both a moral and a real-life crisis. To this day, Congress has failed to assure that care will be available for the children of poor parents forced to work outside the home when wages or a welfare check cannot possibly buy quality child care.

Before 1996 the federal government provided child care assistance through entitlement programs for families linked to the Aid to Families with Dependent Children (AFDC) program and the Child Care and Development Block Grant for other low-income families.[8] During its welfare reform efforts, Congress eliminated AFDC-linked child care entitlement programs and rolled their funding into the grant, also called the Child Care and Development Fund (CCDF).[9]

The U.S. Department of Health and Human Services (HHS) administers CCDF and issued final regulations in July 1998.[10] CCDF explicitly aims to give parents a range of options to address their child care needs, promote parental choice, and enhance the quality and supply of child care for all families, including those not receiving CCDF funds.[11] The regulations also establish strong standards in several important areas relating to quality of care, including health and safety, immunizations, and consumer education.

As with other block grant programs, each state must submit to HHS a plan detailing how the state will spend the grant.[12] To develop that plan, CCDF regulations require state lead agencies to coordinate with other state agencies and federal, state, and local child care and development programs; consult with appropriate local government agencies; and hold at least one public hearing regarding the plan in the state.[13]

Although states submitted plans to HHS in 1997, many are still developing regulations to implement those plans. Federal law also provides that the plans may be amended, and states will have to submit new plans in two years.[14] Legal advocates still can coordinate with child care advocates, social service providers, and others to help shape their state's child care policy by meeting with state policymakers and commenting on proposed regulations and policies. Legal advocates must speak out at state child care hearings; they need to explain their clients' real-life child care issues and how the state's plan helps or hinders clients' transition to work. Legal advocates can also assist clients and other advocates who speak at the hearings.

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[8] The 1988 Family Support Act provided the first federal child care entitlement to Aid to Families with Dependent Children (AFDC) families in the Job Opportunities and Basic Skills program and employed parents transitioning off AFDC, Pub. L. No. 100-485, 102 Stat. 2343. In 1990 Congress added the At-Risk Child Care Program, a capped entitlement program for families at risk of needing AFDC if they are not given child care assistance. In 1990 Congress created the Child Care Development Block Grant (CCDBG) primarily to provide child care for low-income families who were working or in school or training.

[9] 42 U.S.C. §§ 9858 *et seq. See also* A. Bussiere, *Child Care for TANF Families: New Block Grant Funds, No Guarantee*, 19 YOUTH LAW NEWS 1 (Mar.–Apr. 1998) (summarizing relationship between Temporary Assistance for Needy Families (TANF) and child care and raising important questions for state advocates). The U.S. Department of Health and Human Services (HHS) calls the new combined funding stream the Child Care and Development Fund (CCDF), but the federal law is called CCDBG. This article refers to the law as the CCDF. For a history of federal child care financing see A. Cohen, *A Brief History of Federal Financing for Child Care in the United States,* 6 FUTURE OF CHILDREN: FINANCING CHILD CARE 26–40 (Summer–Fall 1996).

[10] 45 C.F.R. §§ 98–99; 63 Fed. Reg. 39935 (July 24, 1998); *see also* www.access.gop.gov/su_docs/aces/aces140.html.

[11] 45 C.F.R.§ 98.1 (1998).

[12] 42 U.S.C. § 9858(c) (1998).

[13] The hearing must be held before the state submits its plan to HHS; public notification must take place at least 20 days before the hearing. Lead agencies are also required to make the contents of the plan public prior to the hearing. Also, the plan must describe how the state will meet the needs of families in the TANF program and families who are at risk of needing TANF assistance. 42 U.S.C. § 9858(c)(2)(H); 45 C.F.R. § 98.14.

[14] 45 C.F.R. § 98.17 (1998).

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Although the state must submit a detailed plan, the federal law allows states great freedom regarding the plan contents, and some states provide more than federal law requires. For example, neither TANF nor CCDF provides a federal entitlement to child care, but some states retain a child care guarantee for TANF families, families who leave the TANF program, or low-income families regardless of welfare status.[15] Many states retaining the guarantee limit it with language such as "subject to availability" or "subject to funding."[16] Other states expect to meet the child care needs of TANF families even though state law does not explicitly provide an entitlement.[17] Advocates must carefully examine their state's current child care regulations to determine whether clients have an enforceable entitlement to child care assistance.

II. Federal Protections for Poor Parents

Federal law offers one important protection for TANF-reliant parents. While states may require most adults receiving TANF assistance to participate in "welfare to work" activities, states may not reduce or terminate assistance to single custodial parents of children under six if the parent proves that he or she cannot obtain needed child care.[18]

A. Federal "Unavailability" of Child Care Protection

Acceptable reasons for inability to obtain child care are: (1) unavailability of appropriate child care within a reasonable distance from the individual's home or work site; (2) unavailability or unsuitability of informal child care by a relative or under other arrangements; and (3) unavailability of appropriate and affordable formal child care arrangements.[19]

CCDF rules require states to inform their TANF families of (1) the procedures the TANF agency uses to determine if the parent has a demonstrated inability to obtain needed child care; (2) the criteria or definitions applied by the TANF agency to determine whether the parent has a demonstrated inability to obtain needed child care, including appropriate child care, reasonable distance, unsuitability of informal child care, and affordable child care arrangements; and (3) the clarification that assistance received during the time an eligible parent receives the exception referred to in paragraph (b) of this section of the statute will count toward the time limit on federal benefits.[20]

Many states do not define terms such as "unavailable," "unsuitable," "appropriate," or "affordable" child care, thereby leaving a great deal of discretion to caseworkers.

Although intended to insure that parents retain benefits when they cannot find child care, the protection is limited. First, the federal statute and regulations leave key terms such as "unavailable," "unsuitable," "appropriate," or "affordable" undefined. Many states do not define those terms, thereby leaving a great deal of discretion to caseworkers. Second, the parent must prove that child care is unavailable. Yet federal law does not explain how parents are to do so. Third, the provision protects only from sanctions. It neither guarantees child care nor tolls a parent's TANF time limit.

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[15] On the lack of a federal entitlement to child care see 42 U.S.C. § 9858d(a)(1). Twenty-five states retain some guarantee: 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. HELEN BLANK & GINA ADAMS, CHILDREN'S DEFENSE FUND, STATE DEVELOPMENTS IN CHILD CARE AND EARLY EDUCATION 18–24 (1997).

[16] California, Illinois, Massachusetts, and Texas impose full or partial limitations on the guarantee in this manner.

[17] *See* BLANK & ADAMS, *supra* note 15.

[18] 42 U.S.C. § 607(e)(2).

[19] *Id.*

[20] 45 C.F.R. § 98.33(b) (1998).

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The protection does not apply to two-parent families, parents of children aged six and older, and caregivers other than parents. States may force parents of children as young as six to meet work requirements during after-school hours, even if they cannot find child care. Also, parents with disabled school-age children who require extra care or parental involvement in the child's education are not protected. States can provide greater protections than federal law, and some do. For example, New York law prohibits sanctioning families with children under age 13 or families of older children with special needs who cannot find child care.[21] California excuses parents from participation in mandated activities if child care is not reasonably available for a child 10 years of age or younger.[22]

B. Exemption for Parent of Infants

Federal law permits, but does not require, states to exempt single custodial parents caring for an infant up to one year old from TANF work requirements.[23] However, as with the unavailability exemption, exempted individuals are still subject to TANF time limits, and recipients should use this exemption with care.

Half the states and the District of Columbia have taken this option.[24] Another four states—Massachusetts, New Hampshire, Vermont, and Texas—chose an even more generous approach, exempting parents of older preschool children as well.[25] Fourteen states exempt families of children from birth to six months of age.[26]

Child care advocates in other states should encourage their states to adopt the infant exemption since it benefits welfare recipients, their children, and the state itself. Exempting parents of infants may help a state meet the federal TANF work activity participation requirements, and it is cost efficient. Because infant care is expensive (and often scarce), parents may be unable to find child care.[27] Without the exemption, a state's failure to place those parents in work activities counts against the state in calculating the work participation rate—even if the failure is due to lack of child care.[28]

Exempting parents of infants who wish to remain at home also helps states maintain cost-effective TANF programs. Infant care usually costs more than care for older children. In 40 states the monthly maximum reimbursement rate for infant care in a licensed child care center is more than the entire public assistance grant for a family of three.[29] Therefore, paying subsistence benefits to a parent choosing to

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[21] N.Y. COMP. CODES R. & REGS. tit. 18, § 415.1(b)(1), 415(b)(2) (1998). Tennessee and Arizona also provide for single parents of school-age children. BLANK & ADAMS, *supra* note 15, at 21.

[22] CAL. WELF. & INST. CODE § 11320.3(f)(3) (West 1998).

[23] 42 U.S.C. § 607(b)(5).

[24] Alabama, Alaska, Arizona, Connecticut, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Minnesota, Mississippi, Missouri, Nevada, New Mexico, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Washington, and West Virginia. URBAN INST., ONE YEAR AFTER FEDERAL WELFARE REFORM: A DESCRIPTION OF STATE TANF DECISIONS AS OF OCTOBER 1, 1997 (1998).

[25] *Id.*

[26] Arkansas, California, Delaware, Florida, Hawaii, Michigan, Nebraska, New Jersey, North Dakota, Oregon, South Dakota, Tennessee, Wisconsin, and Wyoming. Only Georgia, Idaho, Montana, and Utah have no age exemptions or leave it to the counties. *Id.*

[27] Bernice Weissbourd & J. Ronald Lally, *Welfare Reform, Child Care, and Families with Infants and Toddlers,* ZERO TO THREE 28 (Apr.–May 1994); *see also* CHILD CARE ACTION CAMPAIGN, ISSUE BRIEF: CHILD CARE FOR INFANTS AND TODDLERS AND DURING THE NON-TRADITIONAL HOURS (1997).

[28] 42 U.S.C. § 607.

[29] CHILD CARE BUREAU, ADMINISTRATION FOR CHILDREN & FAMILIES, DEPARTMENT OF HEALTH & HUMAN SERVS., CHILD CARE AND DEVELOPMENT BLOCK GRANT, REPORT OF STATE PLANS 63–66 (1998) [hereinafter CHILD CARE AND DEVELOPMENT BLOCK GRANT, REPORT OF STATE PLANS]; H.R. COMM. ON WAYS & MEANS, 104TH CONG., 1996 GREEN BOOK: BACKGROUND MATERIAL AND DATA ON PROGRAMS WITHIN THE JURISDICTION OF THE COMMITTEE ON WAYS AND MEANS (NOV. 4, 1996).

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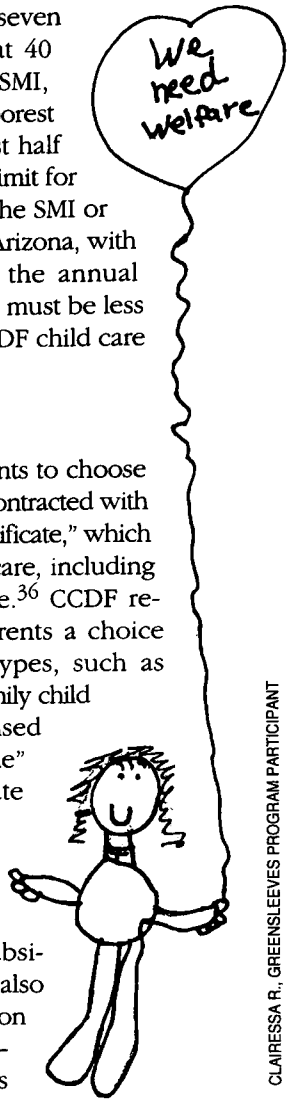
care for her own child during his or her first year of life is more cost efficient than requiring the parent to go to work and providing child care.

C. Federal Eligibility Standards for Child Care and Development Fund Assistance

Federal law provides broad eligibility standards for CCDF child care assistance. Generally, in order to receive assistance, children must be under 13; the family income can be no more than 85 percent of the state median income (SMI) for families of the same size; and the child must be living with parent(s) who are working or attending a job training or educational program or the child must be receiving child protective services, or living with a parent and at risk of needing child protective services.[30]

States may serve a child over 13 if the child has a mental or physical incapacity or is under court supervision.[31] (The upper age limit for CCDF eligibility is 21 years old for a child with a mental or physical incapacity and 19 years old if under court supervision.) Federal law sets forth the minimum requirements, but states may impose additional limitations on eligibility; advocates must consult their state's child care law for applicable eligibility parameters.[32]

States vary greatly as to the maximum income eligibility levels. Although at least ten states maintain maximum eligibility at 75 percent of SMI, seven others cut off eligibility at 40 percent to 49 percent of SMI, thereby serving only the poorest of needy families.[33] Almost half of the states set the upper limit for eligibility at 59 percent of the SMI or less.[34] Thus, in a state like Arizona, with a 48 percent SMI cutoff, the annual income of a family of three must be less than $18,000 to receive CCDF child care assistance.[35]



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D. Parental Choice

States must allow parents to choose either a provider who has contracted with the state or a child care "certificate," which they can use to purchase care, including kinship and sectarian care.[36] CCDF requires that states give parents a choice among legal child care types, such as licensed center-based or family child care, and legally unlicensed care, such as "in-home" care.[37] States may regulate child care, and may even impose more health and safety or licensing requirements on subsidized providers than on nonsubsidized ones.[38] (States may also impose greater restrictions on CCDF-funded exempt providers of care in the child's

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[30] "Parent" includes a guardian or someone standing *in loco parentis*. 42 U.S.C. § 9858n(9). *See also id.* § 9858n(4).

[31] 45 C.F.R. § 98.20. If a state provides child care to these children, the state must include the age limit in its CCDBG plan. Only four states (Arizona, Florida, Ohio, and Wisconsin) do not allow care for children 13 and over who are incapable of self-care. Approximately 63 percent of states allow CCDBG funds to be used for children 13 and above who are under court supervision, with the upper age limit ranging from 17 to 19 years old. CHILD CARE AND DEVELOPMENT BLOCK GRANT, REPORT OF STATE PLANS, *supra* note 29, at 49.

[32] 42 U.S.C. § 9858d(a)(2).

[33] States using 75 percent of the state median income eligibility include California, Connecticut, Hawaii, Minnesota, Montana, Nevada, New Mexico, North Carolina, Texas, and West Virginia. CHILD CARE AND DEVELOPMENT BLOCK GRANT, REPORT OF STATE PLANS, *supra* note 29, at 47–48. *See also id.* at 46.

[34] *Id.*

[35] CHILD CARE AND DEVELOPMENT BLOCK GRANT, REPORT OF STATE PLANS, *supra* note 29, at 47.

[36] 42 U.S.C. § 9858C (c)(2)(A)(i).

[37] *Id.* § 9858c (c)(2)(A), 45 C.F.R. § 98.30 (e)(1).

[38] 45 C.F.R. § 98.40 (b).

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own home.) Yet states may not significantly restrict parental choice by expressly or effectively excluding a category of care, type of provider, or a significant number of providers of a certain type of care.[39] HHS may refuse funding to states that restrict parental choice.[40] Advocates can use this provision to ensure that states do not prohibit families' choices through overly restrictive regulation of particular providers.

E. Equal Access

Parental choice can also be affected by the payment rates that the state authorizes for child care providers. Payment rates should be high enough for equal access to child care comparable to that available to children not receiving child care subsidies.[41] States must conduct a market rate survey every two years and must show how their rates are based upon the survey.[42] Payment rates must also be consistent with CCDF provisions regarding parental choice.

States are required to establish a system of copayments based on family size and income.[43] They have the option of waiving the fees for families with incomes below the poverty level. (In a departure from prior law, TANF families may now be charged copayments.)[44] In their applications for federal funding, states must show that copayments do not make child care unaffordable for CCDF families.[45] Despite these requirements, a report by the Inspector General of HHS concluded that low provider payment rates and high copayment rates restricted parental choice in many states.[46] HHS's comments on the CCDF regulations indicate that child care copayments below 10 percent of the family's income, no matter how many children are in care, will help ensure equal access.[47] Yet the Inspector General's report found that at least 22 states required copayments greater than that amount.[48] When states develop a copayment system, advocates should urge them to consider the consequences of the fee scale. Advocates need to give examples from their clients' lives to show the difficulties families will face under a system of exorbitant fees.

F. Required Consumer Education and Information Activities

The law requires states to disseminate to parents specific information, including educational materials describing the full range of legal providers and the health and safety requirements providers must meet.[49] States must "collect and disseminate" information to parents and the general public to promote "informed child care choices." State plans must also describe "comprehensive" consumer education activities to increase parental choice and improve child care quality and availability.[50]

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[39] *Id.* § 98.30 (f).

[40] *Id.* The Administration for Children and Families, the HHS agency that administers CCDF, investigates state practices if it receives complaints that a state has reduced parental choice. If that agency finds a significant restriction of parental choice, it may sanction the state. 57 Fed. Reg. 34413 (1992).

[41] 42 U.S.C. § 9858c(c)(4)(A).

[42] In the comments on the regulations HHS states that payment rates based on 75 percent of the market rate will be considered sufficient to ensure equal access. 63 Fed. Reg. 39959 (1998). Approximately 50 percent of states set rates of up to 75 percent of the market rate for some or all types of care. Others offer much lower reimbursement rates. (E.g., in Massachusetts providers are paid at just 55 percent of the market rate.)

[43] 45 C.F.R. § 98.42 (1998).

[44] Louisiana, Maine, Mississippi, Missouri, Oklahoma, and Wyoming are among those charging copayments to TANF recipients. BLANK & ADAMS, *supra* note 15, at 29.

[45] 45 C.F.R. § 98.43.

[46] OFFICE OF THE INSPECTOR GEN., STATES' CHILD CARE CERTIFICATE SYSTEMS: AN EARLY ASSESSMENT OF VULNERABILITIES AND BARRIERS ii (1998).

[47] 63 Fed. Reg. 39960 (1998).

[48] *See supra* note 46.

[49] 45 C.F.R. § 98.33 (a).

[50] *Id.* §§ 98.16(h), 98.33

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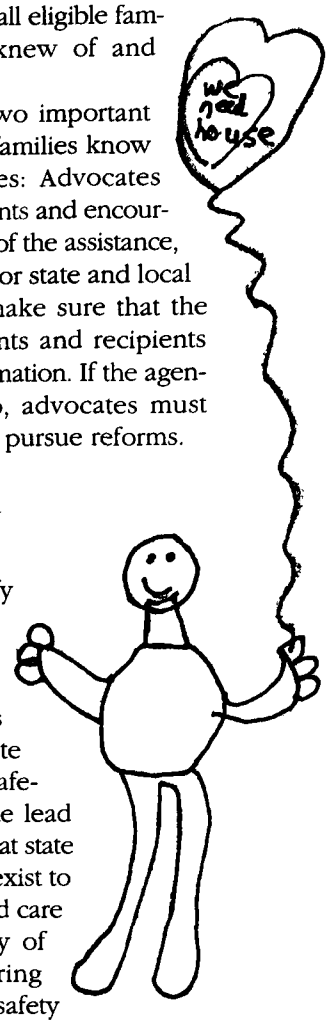
Unfortunately many poor parents never receive information critical to their understanding of their child care rights. Most poor parents believe they lose cash assistance if they cannot find child care. So misinformed, families hastily arrange any child care they can find—often inappropriate care that is not only less than ideal but also detrimental to the child. At the same time many state welfare agencies are not forthcoming about the availability of child care subsidies for poor families. Parents are told only that they must meet work requirements and find child care for their children.[51] If the TANF office does not give a parent a complete explanation of her child care rights, she may never get this information.

Even before welfare reform, states and localities had a poor track record of informing families of child care options. Studies of women entitled to child care subsidies under prior law show that most of those eligible did not know about subsidies and, consequently, did not use them.[52]

More recently a Children's Defense Fund survey concluded that even state officials did not believe that eligible families knew of child care subsidies.[53] Officials from 17 states and the District of Columbia candidly admitted that all eligible families probably did not know about the subsidies, and another 15 states' officials were unsure.[54] At the same time officials in 32 states and the District of Columbia doubted that they had adequate funding to serve all eligible families if the families knew of and requested aid.[55]

Advocates have two important roles in ensuring that families know of child care subsidies: Advocates should inform their clients and encourage them to tell others of the assistance, and they should monitor state and local welfare agencies to make sure that the agencies give applicants and recipients correct child care information. If the agencies are not doing so, advocates must publicize that fact and pursue reforms.



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G. Health and Safety Requirements

States must certify that they have procedures to ensure that all child care providers receiving CCDF funds comply with basic state and local health and safety requirements.[56] State lead agencies must certify that state or local requirements exist to protect children in child care by assuring the safety of buildings and requiring minimum health and safety training requirements appropriate to the provider setting.[57]

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[51] Rachel Swarms, *Mothers Poised for Workfare Face Acute Lack of Day Care*, N.Y. TIMES, Apr. 14, 1998, at A1, B8.

[52] Marcia Meyers & Theresa Heintze, *The Child Care Subsidy Shortfall: Is the Subsidy System Working for Those Working Their Way Off Welfare?* 73 Soc. Serv. Rev. (forthcoming); Laurie Miller & Kitty Barnes, *Parents Need Transitional Child Care*, CHILD CARE ACTION NEWS 1 (Nov.–Dec. 1997).

[53] G. ADAMS ET AL., CHILDREN'S DEFENSE FUND, LOCKED DOORS: STATES STRUGGLING TO MEET THE CHILD CARE NEEDS OF LOW-INCOME WORKING FAMILIES tbl. A3.

[54] State officials making the candid admission are those of California, Colorado, Hawaii, Illinois, Kansas, Kentucky, Maryland, Massachusetts, Nebraska, Nevada, New Hampshire, New Mexico, South Carolina, Utah, Virginia, West Virginia, and Wyoming. *Id.* Unsure officials are those of Alaska, Arizona, Arkansas, Idaho, Iowa, Missouri, New Jersey, New York, North Dakota, Oklahoma, Pennsylvania, South Dakota, Texas, Vermont, and Washington. *Id.*

[55] Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Indiana, Iowa, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Texas, Vermont, Virginia, and West Virginia. *Id.* at tbl. A4.

[56] 42 U.S.C. § 9858c(c)(2)(G) (1998).

[57] 45 C.F.R. § 98.41 (1998).

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Elaborating on the health requirements, HHS insists that all children who receive CCDF funds be immunized at appropriate ages.[58] States may exempt children cared for by certain relatives, children receiving care in their own homes, children whose parents object on religious grounds, and children who cannot be immunized for medical reasons.[59]

States must also certify that they have child care licensing laws.[60] Federal law does not require them to license any particular type of care.[61] States may define what forms of child care are legal yet exempt from licensure under state law.[62] Licensed, regulated, or registered child care providers (as defined by state or local law) are eligible to receive CCDF funds, as are legally exempt providers. The statute also allows CCDF payments to providers over 18 years old who are the child's grandparents, great grandparents, aunts, uncles, or siblings (if residing elsewhere) by blood, marriage, or court decree.[63]

III. Advocacy Strategies

CCDF does not set forth standards to ensure the fair administration of child care by the states and localities. Neither does it obligate states to establish and maintain an administrative hearing mechanism.[64] HHS regulations fail to include protections against arbitrariness. However, despite the tremendous discretion given to states, advocates can make a profound difference in insuring fair treatment for their clients through the use of the strategies set forth below.

At the legislative and program level, at administrative hearings, and in the courts advocates have opportunities to fight for sufficient standards and adequate oversight of the work of the staff charged with implementing CCDF at the state or local level. Issues likely arise around adequate notification of option and rights, timely processing of applications, and consistency in decision making. In this section we touch upon several possible strategies. Attorneys contemplating such advocacy are encouraged to contact us.

A. Legislative and Administrative Advocacy

As discussed above, CCDF and implementing regulations confer considerable discretion on the states to design and implement child care programs. Advocates need to inform policymakers about the specific child care needs of TANF families as well as those of low-income working families. In some states further devolution of child care funding and oversight of child care programs creates an opportunity for advocates to have a significant effect on child care policies and practices on a local level. Some specific advocacy strategies are identified in earlier sections.

In many instances advocates need to work in coalition with child care provider networks, social service organizations, educators, or large-scale employers. Each has an interest in securing access to child care for low-income families. Advocates may want to affect the application process as well as the establishment of a provider approval and reimbursement process. Advocates need to ensure that the eligible low-income families are not deterred from using child care simply because the bureaucracy is insurmountable.

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[58] *Id.* § 98.41(a)(1)(i) (1998).

[59] *Id.* § 98.41 (a)(1)(ii) (1998).

[60] 42 U.S.C. § 9858c(c)(2)(E) (1998).

[61] *Id.*

[62] For a discussion and survey of regulation-exempt family child care *see* CHILD CARE LAW CTR., REGULATION-EXEMPT FAMILY CHILD CARE IN THE CONTEXT OF PUBLICLY SUBSIDIZED CHILD CARE: AN EXPLORATORY STUDY (Summer 1996).

[63] 45 C.F.R. §§ 98.2, 98.16(g)(2) (1998).

[64] This stands in stark contrast to the TANF block grant rules, which assume that there will be an appeals process. The state TANF plan must set forth "an explanation of how the State will provide opportunities for recipients who have been adversely affected to be heard in a State administrative or appeal process." Social Security Act § 402(a)(1)(B)(iii), *as amended by* § 103(a), Pub. L. No. 104-193, 110 Stat. 2105. The reference to "recipients" could be read as suggesting a different treatment for applicants.

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B. Administrative Hearing Rights

Inevitably low-income families need to challenge the acts or failures to act of those responsible for the administration of the child care block grant in states and localities. As discussed below, the failure of Congress to build hearing rights into the block grant does not leave clients without a remedy.

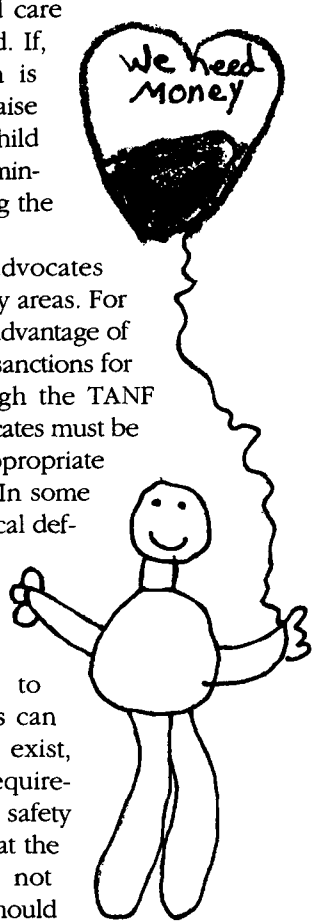
1. State Child Care Hearings

At the outset child care applicants and recipients may find hearing rights in the state's child care statutory or regulatory scheme. For example, Arizona specifically states that recipients may request administrative hearings to challenge adverse decisions related to child care assistance.[65] Similarly New York's child care regulations explicitly incorporate by reference detailed fair hearing protections created for the cash public assistance program.[66]

2. State Hearings on Temporary Assistance for Needy Families

When TANF recipients are sanctioned due to failure to meet work requirements and the reason is lack of child care, advocates should look to their state's TANF hearing process to challenge the sanction. Most states have detailed fair hearing schemes in their TANF implementing statutes and regulations. In fact, many states retained the administrative hearing systems implemented under the AFDC program.[67] At a minimum these administrative hearing procedures typically give timely notice, an opportunity for a fact finding hearing before an impartial hearing officer, and aid continuing pending the outcome of the hearing.

In particular, advocates can use the state's TANF fair hearing system to challenge sanctions imposed on clients when the clients are unable to comply with program requirements due to lack of child care for a pre-school-age child. As discussed, federal law prohibits states from sanctioning families for failure to comply with work requirements if the reason is lack of appropriate child care for a pre-school-age child. If, nevertheless, a sanction is imposed, advocates can raise the lack of appropriate child care as a defense at an administrative hearing appealing the sanction.



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In these instances advocates have to address many gray areas. For example, in order to take advantage of TANF protections against sanctions for lack of child care through the TANF hearing mechanism, advocates must be prepared to show that appropriate child care is unavailable. In some states there are state or local definitions of what "appropriate" or "available" means. However, if state law narrowly defines "appropriate care" or fails to define it at all, advocates can use whatever law does exist, such as state licensing requirements or other health and safety requirements, to argue that the care offered clients is not appropriate care. Clients should not be sanctioned for failure to accept care that does not meet state standards. However, in order to prevail at a hearing challenging a sanction, an advocate must be able to demonstrate some problem with the care either generally or for that particular child.

Also, as discussed above, the TANF protection against sanctions does not cover all families who may be unable to comply with work requirements due to lack of child care. Even for those families, however, if child care problems are particularly acute—for example, if the parent is needed at home after school to care for a school-age special-needs child for whom alternative after-school programs

[65] ARIZ. REV. STAT. ANN. § 46-804 (1998).

[66] N.Y. COMP. CODES R. & REGS., tit. 18, §§ 358, 415 (1998).

[67] States which submitted applications retaining their AFDC fair hearing systems include Louisiana, Massachusetts, New Hampshire, Florida, New York, Michigan, Colorado, Illinois, Pennsylvania, California, and Ohio. The District of Columbia did likewise.

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do not exist—advocates can craft, at the fair hearing level, persuasive arguments that imposition of a sanction is unfair.

3. Additional Bases for Hearing Rights

Although a TANF recipient challenging a sanction can raise lack of child care as a defense in a TANF hearing, what is not so clear is if denial of child care subsidies or other child care problems can be challenged through an administrative hearing in all states. In some states advocates may be able to find independent authority for an administrative hearing in states' Administrative Procedure Acts. Many states' Administrative Procedure Acts mandate administrative hearings for persons seeking to contest an agency's action or failure to act, and denial of a child care subsidy should come within such a provision.

In the absence of express statutory authority, advocates can use the Due Process Clause of the U.S. Constitution for the requirement that notice be given and a hearing be held when child care assistance is improperly denied or terminated. In *Goldberg v. Kelly* the Supreme Court found that the Fourteenth Amendment guarantee of due process prevented the welfare benefits from being terminated without notice and an opportunity to be heard.[68]

The *Goldberg* decision turned on the Court's determination that recipients have a protectible interest in receiving welfare benefits. The lesson of *Goldberg* is that an interest protected by the Due Process Clause exists when rules governing a benefit program restrict the decision makers' discretion such that the recipient has a reasonable expectation of continuing to receive the benefit.[69] *Goldberg* was decided in the cash welfare benefits context, but courts have also found individuals' interests in licenses for businesses and licensed activities to be protectible property interests.[70]

Thus courts generally find a decision maker's discretion sufficiently limited to create a property interest when specific eligibility rules govern a program. That is, if the authorities' ability to choose the applicants who will receive a benefit is limited by specific criteria, courts have generally found a property interest to have been established.[71] The application of this doctrine in the child care context is readily apparent when the state establishes a program that determines eligibility for child care services and benefits pursuant to clearly articulated standards and provides for continued receipt of those benefits so long as the recipient satisfies eligibility criteria.

There is some question as to whether applicants have the same property interest as recipients. Many states that provide hearing mechanisms in their TANF legislation specify that applicants as well as recipients may request fair hearings.[72]

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[68] Goldberg v. Kelly, 397 U.S. 254 (1970) (Clearinghouse No. 1799). *See also id.* at 262, 267–70. Some readers suggest that the *Goldberg* Court held that due process protections were implicated only if a statute specifically said that a benefit was an entitlement. We do not read the case that way. In any event, subsequent case law clarifies means other than specific legislative language by which interest is established.

[69] For an excellent discussion of the issues presented in the text see Nancy Morawetz, *A Due Process Primer: Litigating Government Benefits Cases in the Block Grant Era*, 30 CLEARINGHOUSE REV. 95 (June 1996).

[70] For the business-license context see Stivers v. Pierce, 71 F.3d 732 (9th Cir. 1995) (property interest in private investigation, private patrolmen, process server's license). For the licensed-activities context see Walz v. Smithtown, 46 F.3d 162, 168 (2d Cir. 1995) (property interest in excavation permit due to restriction on authorities' ability to deny permit).

[71] *See* Madera v. Secretary of the Executive Office of Communities & Dev., 636 N.E.2d 1326, 1331 (Mass. 1994) (Clearinghouse No. 50,123) (explaining that property interests are created when "[applicant] selection by authorities leave room for the exercise of discretion only in the application of clearly defined legal criteria, and not for other unspecified reasons").

[72] E.g., Illinois, Arizona, California, Ohio, Pennsylvania, Michigan, and Georgia specifically include applicants in their due process procedures. ARIZ. REV. STAT. ANN. § 46-804 (West 1998); CAL. WELF. & INST. CODE § 11327.8 (West 1998); GA. CODE ANN. § 49-4-14(b) (1998); ILL. COMP. STAT. 5/9A-11 (West 1998); MICH. COMP. LAWS § 400.37 (1998); OHIO REV. CODE ANN. § 5101.35 (West 1998); 62 PA. CONS. STAT. ANN. § 423 (1998).

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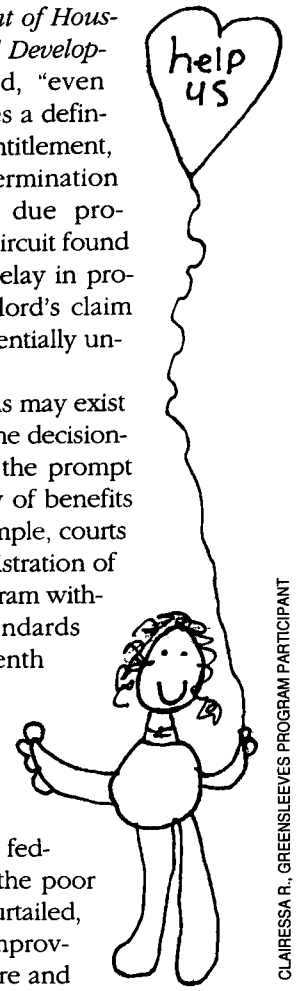
Most courts that have addressed the issue find that applicants have a property interest and are entitled to due process protections.[73] But some imply that a definite distinction may exist.[74] The Supreme Court has yet to rule on the issue.

C. Litigation

In the absence of detailed rules and regulations governing the operation of the child care system, the opportunity for standardless decision making and arbitrary action is greatly increased. Devolution of the application process from state agencies to counties or localities and, in some instances, not-for-profit agencies or private contractors may increase the likelihood of action that is arbitrary and based on prejudice or mistake of fact or law. It may also increase the possibility of understaffed programs and poorly trained workers. In the context of child care, where individual family circumstances dictate the need for careful consideration of eligibility and the best child care arrangements for each family, advocates must be particularly vigilant in ensuring fairness in administration. Where child care subsidies are paid directly by the state to providers, payment delays that impose burdens on those providers can lead to denial of care for families who need it.

Advocates may wish to advance applicants' rights to timely processing of the application. Courts have held that delays in eligibility decisions and payments in relation to a plaintiff's property interest violate due process.[75] In *Kraebel v. Department of Housing Preservation and Development*, the court held, "even before the state makes a definitive decision as to entitlement, the road to that determination must be paved by due process."[76] The Second Circuit found the year and a half delay in processing plaintiff landlord's claim for rent subsidies potentially unconstitutional.[77]

Similar protections may exist to ensure fairness in the decision-making process and the prompt and effective delivery of benefits and services. For example, courts have held that administration of a public benefits program without ascertainable standards violates the Fourteenth Amendment guarantee of due process of law.[78]



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IV. Conclusion

Even in an age where federal entitlements for the poor have been severely curtailed, strategies exist for improving access to child care and insuring that welfare-reliant families do not suffer sanctions if they cannot find child care for their young children. Knowing the federal, state, and local law that governs child care under TANF

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[73] *See* Daniels v. Woodbury County, 742 F.2d 1128 (8th Cir. 1984) (Clearinghouse No. 31,331); Holbrook v. Pitt, 643 F.2d 1261, 1278 n.35 (7th Cir. 1981) (Clearinghouse No. 21,940); White v. Roughton, 530 F.2d 750 (7th Cir. 1976) (Clearinghouse No. 17,756).

[74] In Harper v. Secretary of Health & Human Servs., 978 F. 2d 260 (6th Cir. 1992), the court discussed the applicant/recipient distinction at length, although such decision was not necessary for its decision. The court found support for the distinction in a treatise and in the Supreme Court's *Lyng v. Payne* decision which stated, "We have never held that applicants for benefits have a legitimate claim of entitlement protected by the Due Process Clause." 476 U.S. 926, 942 (1986).

[75] *See* Kelly v. Railroad Retirement Bd., 625 F.2d 486 (3d Cir. 1980) (Clearinghouse No. 29,586) (almost four-year delay in processing application for disabled child's annuity unconstitutional).

[76] Kraebel v. New York City Dep't of Hous. Preservation & Dev., 959 F.2d 395, 405 (2d Cir. 1992).

[77] Courts have declined to set a specific length of time, which establishes a due process violation, preferring to balance the severity of the deprivation to the plaintiff and the costs to the defendant of addressing the issue in a timely manner. *Kraebel,* 959 F.2d at 405.

[78] *See, e.g.*, Holmes v. New York City Hous. Auth., 398 F. 2d 262 (2d Cir. 1968) (Clearinghouse No. 386).

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Clairvesa R.

Welfare

I think we poor people
Need house and money
to sruvie. and we
Need to be albe to
feed our Children and
to Keep our Welfare
We need Welfare!

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and under CCDF is the first step. Legal services programs and child care providers can work in coalition with other groups to improve child care access and delivery. They can use lack of child care defensively to challenge sanctions and can challenge the denial of child care subsidies or failure to provide child care assistance when needed. Most of all, in thinking about ways to improve the lives of low-income families, make work possible for them without penalizing their children, and provide representation that meets their needs in the post welfare reform era, policymakers and advocates for the poor need consistently to make the issue of child care central.

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