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Action Plan to Improve Access to Child Care Assistance for Low-Income Families in the South:

An Analysis of Legal Issues

August 2001

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The Southern Regional Task Force on Child Care Action Plan to Improve Access to Child Care Assistance for Low-Income Families in the South: An Analysis of Legal Issues

Prepared for

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Center for Law and Social Policy, August 2001

In *Sound Investments: Financial Support for Child Care Builds Workforce Capacity and Promotes School Readiness* (December 2000), the Southern Regional Task Force on Child Care identified a number of steps to take to promote the accessibility of affordable, quality child care in the Southern states. One aspect of implementing the Action Plan involves determining which steps can be taken under current law and identifying any instances in which implementation of a step needs clarification of or changes in the law.

This document reviews each step identified in the Task Force's Action Plan and seeks to identify any legal issues affecting the ability to implement the step when a state is using funds under the Child Care and Development Fund (CCDF) or the Temporary Assistance for Needy Families (TANF) block grant. CCDF and TANF are the two principal federal funding streams that can be used to provide child care assistance for low-income families. A set of federal requirements applies when a state uses federal CCDF funds for child care. In addition, a state can use TANF funds for child care either by transferring the funds to the state's CCDF program or by directly spending the funds without transferring them. If TANF funds are transferred to CCDF, they become subject to CCDF rules; if TANF funds are spent directly without being transferred, they are subject to the requirements that apply to the expenditure of TANF funds.

For each step, this document indicates that either a proposed step involves no legal issues (e.g., "educate the business community…."), is clearly permissible under one or both funding streams, clearly necessitates a change in federal law, or raises issues needing further clarification. While implementation of a few steps would require changes in federal law, the great majority either raise no legal issue or are clearly permissible under current laws.

GOAL 1

Federal, state, local and private funds should be sufficient to meet 100% of need for direct child care assistance, based on initial eligibility levels at 85% of the state median income. Redetermination levels should allow families to retain child care assistance until they reach 100% of the state median income.

Additional funds would be necessary to meet this goal, but no change in federal law is needed for a state to set initial eligibility levels for child care assistance at 85% of state median income (SMI). However, a state cannot use CCDF funds to provide child care services to families with incomes above 85% of SMI, and it is unclear whether a state could use TANF funds to do so. A state could, of course, use private funds for these purposes.

Federal CCDF funds may be used to provide child care services to families with incomes up to 85% of SMI. 45 C.F.R. §98.20(a)(2). However, a state cannot use CCDF funds to provide child care services to families with incomes between 85% and 100% of SMI.

Under federal law, a state can directly spend TANF funds to provide child care subsidies to families who are considered "needy," as defined by the state. The definition of "needy" must be based on the family's income and may, at state option, include an asset test. There is no explicit federal ceiling on the definition of "needy," and a state has broad discretion in setting its definition of needy families (See 69 Fed. Reg. 17826, April 12, 1999). Accordingly, a state would likely have a strong argument that it was reasonable for the state to set a definition of needy families for child care services that corresponded to the CCDF income level. While federal law does not expressly say that a state cannot set its definition of "needy" higher than the CCDF income level, a legal question could arise as to whether this income level is so high that the families could no longer reasonably be considered needy.

Action Steps

1.1. Educate federal and state policymakers on the need for action.

No legal barrier.

1.2. Educate the business community on the need for leadership in achieving state, federal and community resources to meet 100% of need.

No legal barrier.

1.3. Increase federal funding for the Child Care and Development Fund to fulfill current policy allowing federal matching funds for child care assistance up to 85% of the state median income.

Future funding levels for CCDF and TANF will be determined during 2002, as both block grants are scheduled for reauthorization.

1.4. Increase state funding to provide child care subsidies to all eligible families who seek child care assistance.

No federal legal barrier to increasing expenditure of state funds.

1.5. Mobilize federal, state and community resources in support of families who need child care assistance.

No legal barrier.

GOAL 2

States and communities should broaden their child care eligibility and subsidy policies to meet the economic, work and education needs of families.

Action Steps

2.1. Establish co-payments not to exceed 10% of gross family income.

There is no federal legal barrier to accomplishing this step; the issues states face in doing so are design and fiscal issues.

Federal law requires that states impose co-payments under sliding fee scales for CCDF-funded child care services. 45 C.F.R. §98.42. The U.S. Department of Health and Human Services has expressly recommended that states set sliding fee obligations that do not exceed 10% of family income. While the 10% cap is not a formal federal legal requirement, the law does require that a state's payment rates be sufficient to provide "equal access" to the care available to families whose income is high enough not to qualify for subsidies. 45 C.F.R. §98.43. HHS has indicated that in determining whether a state has met the equal access requirements of the law, one consideration is whether the 10% standard is being satisfied. Preamble language to federal CCDF regulations provides the following guidance:

> [One] essential element of equal access is that any co-payment or fee paid by the parent is affordable for the family and sliding fee scales should not be designed in a way that limits parental choice. We wish to emphasize that Lead Agencies have flexibility in establishing their sliding fee scales. However, in our view, co-payment scales that require a low-income family to pay no more than ten percent of its income for child care, no matter how many children are in care, will help ensure equal access….
>
> Sliding fee scales must continue to be based on family size and income, as Sec. 98.42(b) has not changed. We note that this regulation provides Lead Agencies with the flexibility to take additional elements into consideration when designing their fee scales, such as the number of children in care. However, as was stated in the preamble to the regulations published on August 4, 1992, basing fees on the cost or category of care is not allowed (57 FR 34380). Similarly, multiple fee scales based on factors such as a family's eligibility status would be precluded.
>
> A family is required by the statute at section 658E(c)(5) to share in the cost of subsidized child care, unless the Lead Agency waives the fee pursuant to Sec. 98.42(c) and Sec. 98.20(a)(3)(ii). Those sections allow co-payments to be waived for those whose income is at or below the poverty level and for children in protective services on a case-by-case basis. The State has flexibility in deciding the amount of the fee charged and whether to waive the fee.

63 Fed. Reg. 39960 (July 24, 1998).

When a state uses TANF funds to directly provide child care services, there is no requirement that the state require co-payments from participating families.

2.2. Provide child care assistance to students who qualify under the income guidelines.

Under current federal law, a state can use both CCDF and TANF funds to provide child care services to low-income families in which a parent is engaged in educational activities.

Under 45 C.F.R. §98.20(a)(3), in order for a child to be eligible for CCDF services, the child must reside with a parent or parents (as defined for CCDF purposes) who are working or attending a job training or educational program or receive or need to receive protective services. Thus, CCDF services can be extended to students.

A state also may use TANF funds to provide child care for low-income families engaged in education. However, the state will probably find it more attractive to use CCDF rather than TANF funds unless the families participating in education are also employed or are already receiving other TANF assistance. The reason flows from the distinction between TANF "assistance" and "nonassistance." Generally, when TANF is used to provide child care for employed families, the child care is considered TANF "nonassistance;" when TANF is used for a family that is not employed, the child care is considered TANF assistance unless the child care can be considered a "nonrecurrent short-term benefit." 45 C.F.R. §260.31. When child care is considered TANF assistance, then any months of receipt of such care would count against TANF time limits and be subject to TANF work requirements, child support assignment, and data collection requirements. So, if the state wants to provide child care to a student who is not receiving TANF assistance and is not working, the state will likely prefer to use CCDF funds to pay for that care.

2.3. Explore broad use of income exemptions to address affordability of child care.

Federal law does not define "income" for purposes of determining eligibility for CCDF services or amount of the CCDF co-payment. Thus, a state is free to use any income exemptions, which the state wishes to use, so long as there is a reasonable basis for the state's income exemption policies. For example, the state might provide for disregards of a part of employment income, or of child support, or of a child's earnings, etc.

Federal law does not expressly state whether a state could provide child care assistance under CCDF to a family with gross income exceeding 85% of state median income if the family's countable income, under the state's reasonable exemption policies, was less than 85% of SMI. Since federal law is silent, it appears that a state probably could do so as long as the state was proceeding under reasonable income exemption policies.

In TANF, there is no federal definition of income, so states are free to use any income exemptions they wish to use in design of their eligibility rules, so long as there is a reasonable basis for the state's rules.

2.4. Eliminate asset testing (e.g. automobile or savings account) from criteria for child care assistance.

There is no federal legal barrier to eliminating asset testing. Under both CCDF and TANF, a state may impose asset rules but is not required to do so.

2.5. Index income eligibility levels for inflation.

A state is free to index income eligibility levels for inflation, so long as the income eligibility for CCDF does not exceed 85% of state median income.

GOAL 3

Outreach initiatives should be designed and aggressively implemented to assure that families have accessible and easy-to-understand information on child care assistance and are provided assistance in applying.

Action Steps

3.1. Provide information on child care subsidies through multiple sources, venues and the media.

No legal barrier.

3.2. Ensure that information is accurate, family friendly, employer friendly, culturally sensitive and provided in multiple languages, as appropriate.

No legal barrier.

3.3. Present information in a manner that would remove the stigma associated with receiving subsidies.

No legal barrier.

3.4. Provide literature and assistance to help parents make informed provider choices.

No legal barrier.

3.5. Coordinate ongoing and strategic outreach activities among common organizations and providers.

No legal barrier.

3.6. Offer cross-training and information to providers, community organizations, faith organizations and state agencies to inform them about child care assistance programs and how to assist families in filing applications.

No legal barrier.

GOAL 4

The child care application and redetermination processes should be uncomplicated and family friendly.

Action Steps

4.1. Simplify applications for child care assistance.

A state is free to have a very short initial application form along with a more detailed supplement for information not sought in the initial application. In reducing the amount of information sought, a state may want to examine its application form, and ask whether the underlying substantive requirements are all necessary and/or desirable. For example, since a state is not required to have a resource test and is free to develop its own definition of income, the state should consider whether resource and income rules are adding unneeded complexity to the process.

Under federal law, the key eligibility requirements that must be determined for CCDF are:

- Presence of a child and age of child under age 13 or meeting an allowable exception;
- Living arrangement, i.e., that child is living with parent or person acting in *loco parentis*;
- Family size;
- Basis for needing care, i.e., work, education, protective services;
- Income;
- Extent of need, i.e., hours (or full/part time) need for care;
- Residency;
- Citizenship/alienage status of child.

A state would likely wish to ensure that all of this information is reflected on the application, or at least in some supplement to the application. In addition, for those applicants seeking subsidy for existing child care arrangements, the application or a supplement would need to collect sufficient information concerning existing child care arrangements to determine whether the provider is an eligible provider. And, in order to ensure that the state is able to meet the CCDF disaggregated data collection requirements, the state will need additional information, though the state can decide whether to include this information in an initial application or at a later point in the eligibility determination process.

For TANF, the required information to determine basic eligibility is less than that required by CCDF, though as a practical matter, the state may determine that it wishes to have and ultimately will need all of the above information. The state needs to ensure that child care is being provided to a needy family with a child (though the child need not be under age 13); that care is needed; and that TANF citizenship/alienage requirements are met. If the child care being provided falls within the definition of "TANF assistance," the state ultimately needs to be able to comply with TANF disaggregated data collection requirements, though the state can determine the extent to which this information is sought during the initial application process.

4.2. Allow filing by mail, phone, fax or internet.

No legal barrier to allowing filing by mail or fax. If an application is initiated by phone, there would need to be some subsequent signed document. Neither CCDF nor TANF prohibit a state from developing a process to initiate an application over the internet. However, a state would need to address a set of technical issues in doing so; those issues are not addressed here.

4.3. Minimize requests for documentation at initial application and utilize documents already on file.

Federal law does not explicitly establish verification requirements for child care services under either CCDF or TANF, with the exception of the need to verify that a child is a citizen or qualified alien (for CCDF) and to determine family citizenship/alienage status (for TANF).

4.4. Provide applications at multiple sites.

No legal barrier.

4.5. Offer non-conventional hours of operation for eligibility offices and provide toll-free phone lines to include evening and weekend hours.

No legal barrier.

4.6. Explore presumptive eligibility or otherwise provide immediate eligibility contingent upon final approval.

Neither CCDF nor TANF regulations expressly discuss the concept of presumptive eligibility. A state is free, of course, to determine eligibility based on preliminary information. The legal question, though, is whether a state would be considered to have made an overpayment or misexpenditure of funds if it turned out that the family was then lacking an aspect of eligibility under federal law, e.g., the parent wasn't actually working, income exceeded 85% of state median income, there was no child needing care, etc.

In the preamble to CCDF regulations, HHS has said: "[A]ny payments not made in accordance with the Act, regulation or approved State Plan may not be charged to the program and will be disallowed pursuant to Sec. 98.66. Should a State choose not to pursue fraudulent payments because to do so may not be cost-effective, the amount of that fraudulent payment may not be charged to the CCDF." 63 Fed. Reg. 39969 (July 24, 1998). This language doesn't address the question of whether a state could expressly write into its State Plan its presumptive eligibility procedures, so that payments made pursuant to the state's presumptive eligibility procedures would not be considered made in violation of the state plan.

While federal regulations are silent, HHS staff have indicated that presumptive eligibility would be a permissible interpretation of the state's flexibility to determine eligibility in CCDF under the following conditions: Such payments would not be considered unallowable expenditures if the presumptive eligibility period was for a limited number of weeks and a good faith eligibility determination was made under presumptive eligibility criteria and procedures as described in the state's CCDF plan. The expenditures would not be considered unallowable even if subsequent verification was never received or resulted in a determination that the family was ineligible, so long as the state terminated services at the earlier of the point of determining ineligibility or the end of the presumptive eligibility period.

As to TANF, federal law does not mandate that a state seek to recover overpayments or payments made to individuals ineligible under the state's program or plan. The law does provide that a state can be penalized for misuse of TANF funds, with an additional penalty for intentional misuse. 45 C.F.R. §§262.1(a)(1),(2). The law's misuse of funds penalties address only the use of funds in violation of federal law, and do not address whether expenditures inconsistent with the state's plans or state rules and procedures would be considered a misexpenditure of funds.

Note that for CCDF purposes, it is important to ensure that income is below 85% of SMI, but so long as that requirement is satisfied, erroneous information about the amount of income would only matter for purposes of sliding fee scale obligation, not income eligibility. Similarly, for TANF, if actual income turns out to be different from initially determined income, the family would still be eligible under federal law so long as the family met the state's definition of "needy."

4.7. Eliminate requirements for a face-to-face interview both for initial application and for redetermination.

No legal barrier. There is no legal requirement for a face-to-face interview under either CCDF or TANF.

4.8. Provide consultation on making appropriate choices when excessive requests for provider changes are filed.

No legal barrier.

4.9. Establish a 12-month redetermination period where there are no changes in income or job status.

Under both CCDF and TANF, there are no federal requirements specifying the length of the eligibility period. However, it appears that a state can reasonably opt for a 12-month redetermination period under both CCDF and TANF.

A state's discretion in determining the length of a CCDF eligibility period was expressly discussed by the Administration for Children and Families in ACYF-PIQ-CC-99-02 (February 8, 1999)**.** The discussion focused on length of eligibility when a child is in a collaboratively funded slot, i.e., one funded with Head Start, Early Head Start, or Pre-K programs. However, the principles seem equally applicable to CCDF eligibility determinations generally.

The Policy Interpretation Question (PIQ) was issued in response to questions about whether the period of eligibility for children in collaboratively funded slots could be different from that of other CCDF-funded children, and whether CCDF eligibility, once determined, could be effective for a set period of time consistent with the Head Start, Early Head Start or Pre-K eligibility period, even if the family's circumstances change during that time. In response, the key language says:

> The Child Care and Development Block Grant Act (CCDBG) does not prescribe a specific eligibility period for families receiving CCDF-funded child care. Nor does the Act address the frequency of, or need for, redetermining eligibility once it is established.
>
> In the implementing regulations, ACF left the Lead Agency flexibility to establish its eligibility process. Hence, the Lead Agency may establish a different eligibility period for children in Head Start, Early Head Start or State Pre-K/child care collaborative programs than generally applies to CCDF-funded children.
>
> While the Lead Agency has considerable flexibility in determining the CCDF eligibility period, such flexibility must be exercised on a rational basis with a programmatic reason for the period chosen. That is, the Lead Agency must be able to articulate the reason for the eligibility period(s) it chooses.
>
> The Lead Agency should articulate in section 4.1 of its CCDF State Plan the time period(s) for eligibility and a rationale for those periods. This is especially important where the Lead Agency establishes a different eligibility period for Head Start, Early Head Start or State Pre-K /child care collaborative projects. For example, the Lead Agency could establish a general policy of ongoing, continuous eligibility with a redetermination every 6 months, but provide for a CCDF eligibility period of 2 years for children in Head Start, Early Head Start or State Pre-K/child care collaborations.

The PIQ further notes that, while a state has broad discretion in determining the length of the CCDF eligibility period(s), the following factors should be considered:

- If the Lead Agency chooses to establish a different eligibility period in order to collaborate with Head State, Early Head Start or Pre-K programs, a very careful assessment of the actual need for these services should be conducted to ensure efficient use of CCDF funds.

- The assessment is to ensure that these services are being offered to parents who need them to support continued workforce participation.

A Lead Agency's rationale for its eligibility period(s) — as stated in the CCDF State Plan — should reflect these considerations.

Given this language, and the authority to establish a two-year redetermination period for a child in a collaboratively funded slot, it would certainly seem to follow that a state could allow for a one-year redetermination period so long as the state could articulate a "rational basis" for doing so.

Note that the PIQ does not expressly address what action a state should take if a family's income exceeds 85% of state median income during the eligibility period. As a practical matter, this is not likely to occur frequently. Since the PIQ says that the state may set a longer eligibility period for a collaboratively funded slot even if circumstances change during that time, a state would have a strong argument that eligibility could be fixed for that period even if income exceeded 85% of SMI. At the same time, HHS has also cautioned that in setting a longer period, the state needs to ensure that the state is making efficient use of CCDF funds and offering services to families who need the services to support continued workforce participation, which may suggest that the state may wish to review and reconsider a family's circumstances if there was a significant increase in income.

In TANF, there are no regulatory requirements concerning the length of the eligibility period, and it would seem to follow that a state's discretion is at least as broad, if not broader, than the discretion that can be used under CCDF. HHS has said:

> States may establish their own criteria regarding redeterminations of a family's financial eligibility to continue to receive benefits. They may also establish their own criteria regarding the scope and frequency of reporting requirements.
>
> We remind States that all Federal and MOE expenditures are subject to audit and must be substantiated for the auditors. Therefore, while entirely the State's decision, it might be prudent for a State to conduct redeterminations no less often than annually. Regardless, for audit purposes, it is important that States have clear policies, procedures, and systems in place for ensuring that their expenditures are appropriate, that they meet TANF requirements, and that they support the goals of TANF.

See http://www.acf.dhhs.gov/programs/ofa/polquest/usefunds.htm, Use of Funds Question #26.

4.10. Continue eligibility for full subsidy for 12 weeks if family loses employment but can document that a job search is underway.

CCDF rules do not address how long a state may continue to provide child care services after a parent loses employment. However, in light of the above discussion, and the broad discretion available to states in determining redetermination periods, it would certainly seem to follow that a state could elect a policy of continuing subsidy for 12 weeks (or a reasonable longer period) after loss of employment.

More generally, one basis for CCDF eligibility occurs when an otherwise eligible child is residing with a parent who is “working.” 45 C.F.R. §98.20(a)(3). States are required to include their definition of "working" in their biennial state plans. 45 C.F.R. §98.16(f)(6). If a state includes “job search” within its definition of “working,” the state may use CCDF funds to pay for child care for job search purposes.

In TANF, a state is free to continue child care services for a non-employed family, but the issue for states would be to determine the point at which the child care for a non-employed family must be considered “assistance.” A state could clearly continue child care for 12 weeks after loss of employment without considering the child care assistance, because one category of nonassistance under TANF is a “nonrecurrent short term benefit” which does not last longer than four months. 45 C.F.R. §260.31(b)(1). So, at the point at which a family loses employment, the child care could be designated as a nonrecurrent, short-term benefit and, therefore, nonassistance, for the next 12 weeks.

GOAL 5

Establish a coordinated, seamless eligibility system so that funding sources are invisible to families and support continuity of child care.

Action Steps

5.1. Eliminate the need for families to reapply when eligibility categories change by automatically searching to exhaust all eligibility categories before closing cases.

No legal barrier.

5.2. Explore the potential for policy and procedural changes to achieve linkages with or combined applications for child care assistance, Head Start, Pre-K and Title I.

A state or locality wishing to implement a common application form across programs would face a number of legal and non-legal issues that are not fully analyzed here. A threshold issue is that the entity responsible for each program may be different, and a state or locality interested in exploring the potential for a common application process would need to bring together the entities in an effort to reach consensus about how the process would work. In efforts to design a common application process, a set of issues could arise around reaching agreement about: what information must be collected; confidentiality and information sharing; whom would be responsible for receiving, processing and acting on applications; how information would be verified; how costs would be allocated; whom would be responsible for correctness of determinations, etc.

5.3. Continue eligibility in programs with multiple funding sources to assure continuity of care in the event that eligibility has expired or terminated in one program.

There are two types of continuity to keep in mind: continuity in collaboratively funded programs and continuity when eligibility for child care services under a particular categorical program or priority system is lost.

As to continuity in collaboratively funded slots, as noted above, in ACYF-PIQ-CC-99-02 (February 8, 1999), HHS has said that a state may elect to ensure that CCDF eligibility continues for the length of a collaboratively-funded slot with Head Start; it appears that a state could extend the same principle to TANF-funded slots. And, there does not appear to be any bar to extending the same principle to ensure continuity of an extended day or extended year slot when a child is participating in a Pre-K or Title I program.

The other type of continuity might involve, e.g., continuing child care services when a family ceases to be eligible or eligible under a priority in a particular program, e.g., a family reaches the end of transitional child care or ceases to be eligible for a priority because the family is no longer receiving TANF-funded cash assistance. Here, there is no legal barrier to continuing funding using TANF or CCDF funds. The issues a state faces are likely to be resource and policy issues, e.g., does the state wish to ensure continuity for a family reaching the end of a transition year if that means giving a preference over other families on a waiting list; and systems issues, e.g., does the system require a new application, do information systems allow the agency to determine if funding is available under another funding stream.

5.4. Work collaboratively with all public and private programs and funding sources to assure that children receive stable and consistent early child care services.

No legal barrier.

GOAL 6

Establish customer service outcome goals and set standards to ensure that all families are treated with dignity and respect and are served in an efficient manner.

Action Steps

6.1. Provide professional and well-trained eligibility staff who are culturally and linguistically sensitive.

No legal barrier.

6.2. Facilitate quick eligibility determination through reasonable caseloads and/or administrative structure.

No legal barrier.

6.3. Conduct periodic, independent and thorough consumer satisfaction assessments, assuring the confidentiality of information collected.

No legal barrier.

6.4. Provide adequate support for child care resource and referral services.

No legal barrier.

GOAL 7

Design the subsidy system so that rate structures assure that families receiving child care assistance have access to all types of child care and disallow charges above established co-payments.

Action Steps

7.1. States should cap reimbursement rates at no less than the 75th percentile based on a market rate survey conducted every two years that accurately reflects the price of all types of care in communities across the state.

Under 45 C.F.R. §98.43(b), a state's CCDF plan must provide a summary of the facts relied on to determine that its payment rates ensure "equal access" to child care services for families receiving CCDF subsidies comparable to that available for families with incomes high enough to not qualify for CCDF subsidies. Among other things, the summary of facts must show "how payment rates are adequate based on a local market rate survey conducted no earlier than two years prior to the effective date of the currently approved Plan." While the regulations do not require that payments be made at no less than the 75th percentile of the local market, HHS has advised states that:

> In establishing payment rates we suggest a benchmark for States to consider. Payments established at least at the 75th percentile of the market would be regarded as providing equal access…

63 Fed. Reg. 39959 (July 24, 1998). The preamble further notes that:

> Lead Agencies may pay rates higher than the 75th percentile as we have not established the 75th percentile as the payment standard or limit. Rather, rates established at the 75th percentile would be considered to ensure equal access, although such rates may be too low to purchase some child care services, for example, where there are acute shortages during non-traditional hours….

63 Fed Reg. 39959-60.

7.2. Establish and evaluate reimbursement policies that encourage provider participation and are responsive to family needs.

No legal barrier; encouraged under federal law.

7.3. Prohibit providers from charging above the established co-payments.

Under CCDF, a state can negotiate with providers for agreements under which providers agree not to charge parents amounts in excess of CCDF co-payment levels. However, it is unclear whether a state can prohibit providers from charging families amounts in excess of the CCDF co-payment level, because the state needs to ensure that its CCDF policies do not violate CCDF parental choice and equal access requirements. A state could be at risk of a legal challenge if the state set its payment rates below the 75th percentile and then barred providers accepting CCDF subsidies from charging families the difference between the provider's customary rate and the CCDF payment rate. A state would probably have a strong argument that the state could prohibit participating providers from charging above established co-payments so long as the state's payment rates to providers reached or exceeded the 75th percentile; even in that situation, however, an individual might argue that a rule barring a parent from using a voucher with a higher-charging provider might violate parental choice or equal access requirements.

In the CCDF regulations preamble, HHS explains:

> Comment: A number of commenters wanted us to clarify whether providers can charge amounts above the payment rates established by the Lead Agency; and if so, how this might deny equal access. Similarly, a few commenters wanted a clarification of how a combination of low payment rates and high co-payments can limit or deny equal access.
>
> Response: A payment rate, which provides for equal access does not necessarily provide access to every provider, irrespective of the provider's charge. There is no statutory basis for preventing a family from choosing a particular provider whose charges exceed the Lead Agency's payment rate. Nor is there an obligation on the part of the Lead Agency to pay an amount that is higher than the rate it determined is sufficient to provide equal access. In cases such as these, some States have created a contractual requirement that the provider will not charge the family the difference between its usual charge and the Lead Agency's rate. By offering the provider speedy,

> assured payments, the Lead Agency has been able to convince the providers to accept this stipulation.

63 Fed. Reg. 39960.

Based on this language, a state needs to ensure that conditions imposed on providers do not impermissibly restrict equal access or parental choice. For example, suppose the combination of a state's payment and family co-payment is below the provider's customary charge. If the state's payment rates are below the 75^{th} percentile, then a requirement that providers accepting CCDF funds not charge families additional amounts above the co-payment level could have the effect of impermissibly restricting parental choice of and equal access to providers, because the combination of CCDF payment and family co-pay would be insufficient to pay the customary charge.

However, even if the state is satisfied that its rate structure satisfies equal access requirements, it is still possible that an individual might bring a challenge to a bar on additional charges, on the basis that such a bar has the effect of impermissibly restricting the individual's choice of providers. For example, suppose the payment rate at the 75^{th} percentile is $30/day, and a family wishes to use a provider whose customary charge is $40, and is willing to pay the additional $10. The family's argument would be that the bar on using this provider violates 45 C.F.R. §98.30(f)(3), which says that CCDF requirements may not significantly restrict parental choice by excluding a significant number of providers in any category of care or of any type. The state's counter-argument would be that this language must be read together with the equal access requirements of 45 C.F.R. §98.43, and that payment rates sufficient to satisfy equal access are also adequate to meet parental choice requirements. While the state would seem to have a strong argument, it is not entirely clear how a court would resolve this question. Accordingly, a state adopting a restriction such as this should, at minimum, seek to ensure that the state's overall payment rate and copay rules ensure access to a broad range of providers.

Finally, when TANF funds are directly spent, the above CCDF requirements would not apply, so the state would be free to bar providers accepting TANF child care funds from imposing additional charges.

GOAL 8

Create partnerships with employers to expand child care assistance for working families.

Action Steps

8.1. Educate employers about the bottom line benefits associated with public and private child care assistance.

No legal barrier.

8.2. Enlist business leaders to champion the involvement of southern businesses and to serve as mentors to other businesses.

No legal barrier.

8.3. Provide information to employers on all available tax benefits related to child care assistance, including deductions for donations to tax-exempt child care organizations, capital costs for constructing a child care center and establishing a pre-tax dependent care assistance plan.

No legal barrier.

8.4. Facilitate collaborative initiatives that enable employers to share ideas as well as pool their resources to address child care needs.

No legal barrier.

8.5. Provide matching funds or other tax or financial incentives for employers to invest in child care.

A state can make CCDF or TANF funds available to employers on a matching or unmatched basis for child care services for eligible families. The service expenditures need to be limited to families eligible under the respective (CCDF or TANF) funding stream.

Note that some states may be interested in exploring use of business donations as state match under CCDF. Under HHS regulations, donated funds may count toward state match if the funds are donated without any restriction that would require their use for a specific individual, organization, facility or institution; do not revert to the donor's facility or use; and are not used to match other federal funds. 45 C.F.R. §98.53(e)(2). The question that arises is whether a state can count funds donated with the condition that they be for services for families at the XYZ Company as state match. While the above language doesn't seem to expressly address this question, HHS staff indicate that while an employer can donate funds earmarked for individuals in a particular geographic area, funds earmarked for the employees of the business do not meet the terms of allowable match.

A state also can make matching or unmatched funds available under CCDF for, e.g., resource and referral or other employee assistance purposes relating to addressing child care needs. Under 45 C.F.R. §98.51(a)(2)(i), one allowable use of CCDF quality funding is "[o]perating directly or providing financial assistance to organizations (including private non-profit organizations, public organizations, and units of general purpose local government) for the development, establishment, expansion, operation, and coordination of resource and referral programs specifically related to child care."

A state probably cannot not spend TANF funds to pay the full cost of an employer's child care resource and referral services generally available to all workers, though TANF funds could be used for the share of costs reasonably attributable to needy families.

8.6. Establish incentives for employers to create child care benefit programs for their employees or to contribute to child care purchasing pools in their state or community.

See discussion under 8.5.

8.7. Reduce the administrative burden on employers participating in any joint public/private child care assistance program.

See discussion under 8.5.

GOAL 9

Provide child care assistance to working families through federal and state tax laws.

Action Steps

9.1. Make the federal child and dependent care tax credit refundable.

Would require a change in federal statute.

9.2. Establish refundable child and dependent care tax credits in states with income taxes.

No legal barrier to doing so. A state could use TANF funds to pay for the refundable portion (i.e., the amount in excess of tax liability) for a state refundable child and dependent care tax credit. It is unclear whether a state could use CCDF funds for the same purpose.

9.3. Raise federal and state child care tax credit expense limits to accurately reflect the price of quality care.

Would require a change in federal law (and state law, if applicable).

9.4. Index for inflation the state and federal child and dependent care tax credit income eligibility and expense limits.

Would require a change in federal law (and state law, if applicable).

9.5. Ensure that child and dependent care tax credits are clearly identified and easy to claim by filers using either the short or long form.

While federal law specifies the rules governing the Child and Dependent Care Tax Credit (CDCTC), federal law does not mandate the layout of the tax form, and the Internal Revenue Service could modify the form to enhance clarity.

9.6. Encourage the use of effective state tax strategies to provide financial support for child care.

No legal barrier.

GOAL 10

States should have effective, coordinated systems to guide child care and early childhood policy decisions and direct use of resources.

Action Steps

10.1. Facilitate greater coordination in eligibility policies across child care and early childhood education programs at state and local levels.

This action step is framed in a general way; specific questions may arise as states explore specific efforts to coordinate eligibility policies across programs.

10.2. All southern states and the District of Columbia should participate in a collaborative effort to develop and collect common data elements across states.

Under current law, there are a set of required data elements mandated of all states under CCDF and TANF. Participating states could voluntarily agree to collect additional data. The details of federal data-collection requirements will likely be among the issues considered in reauthorization of TANF and CCDF.

The Southern Regional Task Force on Child Care
Action Plan to Improve Access to Child Care Assistance for Low-Income Families in the South: An Analysis of Legal Issues

Summary Chart

Prepared by Center for Law and Social Policy for the Southern Institute on Children and Families

August 2001

Goal/Action Step	Use of CCDF Funds	Use of TANF Funds	Comments
Goal 1: Federal, state, local and private funds should be sufficient to meet 100% of need for direct child care assistance, based on initial eligibility levels at 85% of the state median income. Redetermination levels should allow families to retain child care assistance until they reach 100% of the state median income.	CCDF funds may only be used for families with incomes below 85% of state median income.	TANF funds used for child care are generally restricted to "needy families." The state sets its own reasonable definition of needy families. It is unclear whether a state could elect to set a definition as high as 100% of state median income.	The principal issue here is likely to be need for increased resources to expand services to potentially eligible population.
1.1. Educate federal and state policymakers on the need for action.	No legal barrier.	No legal barrier.	
1.2. Educate the business community on the need for leadership in achieving state, federal and community resources to meet 100% of need.	No legal barrier.	No legal barrier.	

Goal/Action Step	Use of CCDF Funds	Use of TANF Funds	Comments
1.3. Increase federal funding for the Child Care and Development Fund to fulfill current policy allowing federal matching funds for child care assistance up to 85% of the state median income.	CCDF funding levels will be determined during CCDF reauthorization in 2002.	TANF funding levels will be determined during TANF reauthorization in 2002.	
1.4. Increase state funding to provide child care subsidies to all eligible families who seek child care assistance.	No legal barrier.	No legal barrier.	
1.5. Mobilize federal, state and community resources in support of families who need child care assistance.	No legal barrier.	No legal barrier.	
GOAL 2: States and communities should broaden their child care eligibility and subsidy policies to meet the economic, work and education needs of families.	See discussion of individual action steps.		
2.1. Establish co-payments not to exceed 10% of gross family income.	No legal barrier.	No legal barrier.	
2.2. Provide child care assistance to students who qualify under the income guidelines.	No legal barrier; state may provide child care services under CCDF to income-eligible students.	No legal barrier, though if child care is provided on ongoing basis to nonemployed individual, it will be considered "TANF assistance" and subject to TANF time limits and other requirements.	

Goal/Action Step	Use of CCDF Funds	Use of TANF Funds	Comments
2.3. Explore broad use of income exemptions to address affordability of child care.	Federal law does not define “income.” State may develop its own reasonable definitions of countable income and exemptions.	Federal law does not define “income.” State may develop its own reasonable definitions of countable income and exemptions.	
2.4. Eliminate asset testing (e.g. automobile or savings account) from criteria for child care assistance.	No legal barrier. State may decide whether to have an asset test for CCDF.	No legal barrier. State may decide whether to have an asset test for TANF.	
2.5. Index income eligibility levels for inflation.	Permissible so long as income eligibility does not exceed 85% of state median income.	No legal barrier.	
GOAL 3: Outreach initiatives should be designed and aggressively implemented to assure that families have accessible and easy-to-understand information on child care assistance and are provided assistance in applying.	See discussion of individual action steps.		
3.1 Provide information on child care subsidies through multiple sources, venues and the media.	No legal barrier.	No legal barrier.	
3.2. Ensure that information is accurate, family friendly, employer friendly, culturally sensitive and provided in multiple languages, as appropriate.	No legal barrier.	No legal barrier.	
3.3. Present information in a manner that would remove the stigma associated with receiving subsidies.	No legal barrier.	No legal barrier.	

Goal/Action Step	Use of CCDF Funds	Use of TANF Funds	Comments
3.4. Provide literature and assistance to help parents make informed provider choices.	No legal barrier.	No legal barrier.	
3.5. Coordinate ongoing and strategic outreach activities among common organizations and providers.	No legal barrier.	No legal barrier.	
3.6. Offer cross-training and information to providers, community organizations, faith organizations and state agencies to inform them about child care assistance programs and how to assist families in filing applications.	No legal barrier.	No legal barrier.	
GOAL 4: The child care application and redetermination processes should be uncomplicated and family friendly.	See discussion of individual action steps.		
4.1. Simplify applications for child care assistance.	Federal law leaves content of application form to state discretion, so state can implement simplified form. Key federal eligibility requirements that must be determined are: · Presence of a child and age of child under age 13 or meeting an allowable exception; · Living arrangement, i.e., that child is living with parent or person acting in	Federal law leaves content of application form to state discretion, so state can implement simplified form. Key federal eligibility requirements that must be determined are: · Presence of a child; · Needy family; · Need for care; · That family members are not ineligible immigrants. (State will likely want	

Goal/Action Step	Use of CCDF Funds	Use of TANF Funds	Comments
	loco parentis; · Family size; · Basis for needing care, i.e., work, education, protective services; · Income; · Extent of need, i.e., hours (or full/part time) need for care; · Residency; · Citizenship/alienage status of child.	additional information, e.g., income, family size, etc.)	
4.2. Allow filing by mail, phone, fax or internet.	No legal barrier to allowing initiation of process through such vehicles.	No legal barrier to allowing initiation of process through such vehicles.	
4.3. Minimize requests for documentation at initial application and utilize documents already on file.	Federal law does not explicitly establish verification requirements for child care services under CCDF, with the exception of the need to verify that a child is a citizen or qualified alien.	Federal law does not explicitly establish verification requirements for child care services under TANF with the exception of the need to verify citizenship/alienage status.	
4.4. Provide applications at multiple sites.	No legal barrier.	No legal barrier.	
4.5. Offer non-conventional hours of operation for eligibility offices and provide toll-free phone lines to include evening and weekend hours.	No legal barrier.	No legal barrier.	

Goal/Action Step	Use of CCDF Funds	Use of TANF Funds	Comments
4.6. Explore presumptive eligibility or otherwise provide immediate eligibility contingent upon final approval.	State may provide for presumptive eligibility if it is for a limited number of weeks and a good faith eligibility determination was made under presumptive eligibility criteria and procedures as described in the state's CCDF plan. If subsequent verification is never received or results in a determination that the family was ineligible, state must terminate services at the earlier of the point of determining ineligibility or the end of the presumptive eligibility period.	Federal law does not address presumptive eligibility; state may develop own reasonable policy so long as funds are not spent in violation of federal law.	
4.7. Eliminate requirements for a face-to-face interview both for initial application and for redetermination.	No legal barrier; no federal requirement for face-to-face interview.	No legal barrier; no federal requirement for face-to-face interview.	
4.8. Provide consultation on making appropriate choices when excessive requests for provider changes are filed.	No legal barrier.	No legal barrier.	
4.9. Establish a 12-month redetermination period where there are no changes in income or job status.	Federal law does not specify a particular time frame for redeterminations. State has flexibility but must have rational basis and programmatic reason for period chosen.	Federal law does not specify a particular time frame for redeterminations. HHS indicates it would be "prudent" for states to conduct redeterminations at least annually.	

Goal/Action Step	Use of CCDF Funds	Use of TANF Funds	Comments
4.10. Continue eligibility for full subsidy for 12 weeks if family loses employment but can document that a job search is underway.	State may include a reasonable "job search" period within its definition of "working" for purposes of CCDF eligibility.	State may use TANF funds to provide child care for job search. State may treat child care for a 12-week job search as a nonrecurrent short-term benefit (and therefore need not consider it TANF "assistance").	
GOAL 5: Establish a coordinated, seamless eligibility system so that funding sources are invisible to families and support continuity of child care.	See discussion of individual action steps.		
5.1. Eliminate the need for families to reapply when eligibility categories change by automatically searching to exhaust all eligibility categories before closing cases.	No legal barrier.	No legal barrier.	
5.2. Explore the potential for policy and procedural changes to achieve linkages with or combined applications for child care assistance, Head Start, Pre-K and Title I.	Multiple issues, many of which are not principally legal, are not discussed within this analysis.	Multiple issues, many of which are not principally legal, are not discussed within this analysis.	
5.3. Continue eligibility in programs with multiple funding sources to assure continuity of care in the event that eligibility has expired or terminated in one program.	State may foster continuity of care as eligibility categories change; whether a particular funding stream can be used depends on reason eligibility is ending.	State may foster continuity of care as eligibility categories change; whether a particular funding stream can be used depends on reason eligibility is ending.	

Goal/Action Step	Use of CCDF Funds	Use of TANF Funds	Comments
5.4. Work collaboratively with all public and private programs and funding sources to assure that children receive stable and consistent early child care services.	No legal barrier.	No legal barrier.	
GOAL 6: Establish customer service outcome goals and set standards to ensure that all families are treated with dignity and respect and are served in an efficient manner.	See discussion of individual action steps.		
6.1. Provide professional and well-trained eligibility staff who are culturally and linguistically sensitive.	No legal barrier.	No legal barrier.	
6.2. Facilitate quick eligibility determination through reasonable caseloads and/or administrative structure.	No legal barrier.	No legal barrier.	
6.3. Conduct periodic, independent and thorough consumer satisfaction assessments, assuring the confidentiality of information collected.	No legal barrier.	No legal barrier.	
6.4. Provide adequate support for child care resource and referral services.	No legal barrier.	No legal barrier.	
GOAL 7: Design the subsidy system so that rate structures assure that families receiving child care assistance have access to all types of child care and disallow charges above established co-payments.	See discussion of individual action steps.		

Goal/Action Step	Use of CCDF Funds	Use of TANF Funds	Comments
7.1. States should cap reimbursement rates at no less than the 75th percentile based on a market rate survey conducted every two years that accurately reflects the price of all types of care in communities across the state.	Biennial market rate survey is required under federal regulations. Setting rates at not less than 75th percentile encouraged by U.S. Department of Health and Human Services.	State has discretion to determine payment rates for TANF-funded child care.	
7.2. Establish and evaluate reimbursement policies that encourage provider participation and are responsive to family needs.	No legal barrier.	No legal barrier.	
7.3. Prohibit providers from charging above the established co-payments.	May present legal issue. State must ensure that its payment policies do not violate federal CCDF requirements for parental choice and equal access.	No legal barrier.	
GOAL 8: Create partnerships with employers to expand child care assistance for working families.	See discussion of individual action steps.		
8.1. Educate employers about the bottom line benefits associated with public and private child care assistance.	No legal barrier.	No legal barrier.	
8.2. Enlist business leaders to champion the involvement of southern businesses and to serve as mentors to other businesses.	No legal barrier.	No legal barrier.	

Goal/Action Step	Use of CCDF Funds	Use of TANF Funds	Comments
8.3. Provide information to employers on all available tax benefits related to child care assistance, including deductions for donations to tax-exempt child care organizations, capital costs for constructing a child care center and establishing a pre-tax dependent care assistance plan.	No legal barrier.	No legal barrier.	
8.4. Facilitate collaborative initiatives that enable employers to share ideas as well as pool their resources to address child care needs.	No legal barrier.	No legal barrier.	
8.5. Provide matching funds or other tax or financial incentives for employers to invest in child care.	A state can make CCDF funds available to employers on a matching or unmatched basis for child care services to CCDF-eligible families.	A state can make TANF funds available to employers on a matching or unmatched basis for child care services to TANF-eligible families.	
8.6. Establish incentives for employers to create child care benefit programs for their employees or to contribute to child care purchasing pools in their state or community.	See discussion at 8.5.	See discussion at 8.5.	
8.7. Reduce the administrative burden on employers participating in any joint public/private child care assistance program.	See discussion at 8.5.	See discussion at 8.5.	

Goal/Action Step	Use of CCDF Funds	Use of TANF Funds	Comments
GOAL 9: Provide child care assistance to working families through federal and state tax laws.	See discussion of individual action steps.		
9.1. Make the federal child and dependent care tax credit refundable.			Would require change in federal law.
9.2. Establish refundable child and dependent care tax credits in states with income taxes.			Would require change in state law.
9.3. Raise federal and state child care tax credit expense limits to accurately reflect the price of quality care.			Would require change in federal law.
9.4. Index for inflation the state and federal child and dependent care tax credit income eligibility and expense limits.			Would require changes in federal and state law.
9.5. Ensure that child and dependent care tax credits are clearly identified and easy to claim by filers using either the short or long form.			Would require action by Internal Revenue Service.
9.6. Encourage the use of effective state tax strategies to provide financial support for child care.			Development of state child care tax policies is a matter of state law.

Goal/Action Step	Use of CCDF Funds	Use of TANF Funds	Comments
GOAL 10: States should have effective, coordinated systems to guide child care and early childhood policy decisions and direct use of resources.	See discussion of individual action steps.		
10.1. Facilitate greater coordination in eligibility policies across child care and early childhood education programs at state and local levels.	Issues will depend on specific eligibility policies.	Issues will depend on specific eligibility policies.	
10.2. All southern states and the District of Columbia should participate in a collaborative effort to develop and collect common data elements across states.	No legal barrier to voluntary collection of additional data beyond what is required by federal law.	No legal barrier to voluntary collection of additional data beyond what is required by federal law.	Federal data-collection requirements for CCDF and TANF may be considered during reauthorization of each block grant in 2002.