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Child Care Under the Family Support Act: Guarantee, Quasi-Entitlement, or Paper Promise?

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With much fanfare and by an overwhelming margin, Congress enacted the Family Support Act (hereinafter FSA or the Act) in 19881 to recognize that moving from welfare to work depends to a significant degree on the provision of child care along with a number of other benefits, including job training and health care. Although the Act has achieved progress in moving persons from welfare to work, its implementation has been problematic. To understand the Act’s implementation problems, one must understand the need for child care in general as well as the complexities of the system created by the FSA.

The American family has been transformed radically in the last thirty years. More single parents head households and more women are in the workforce.2 Not surprisingly, as family patterns, work environments, communities, and personal expectations have evolved, the nation’s child-rearing practices have also changed. Working families at virtually every income level suffer the effects of an imperfect child-care market. The market’s imperfections can be categorized in terms of a trilemma—availability, affordability, and quality.

Recognizing that the child-care trilemma often poses an insurmountable barrier for low-income families struggling to become self-sufficient, the FSA authorized funding for child care for recipients of Aid to Families with Dependent Children (AFDC) who participate in education and training programs and for individuals who have left AFDC for work. However, the supports authorized by the Act have been so inadequate that the success of the reform is in jeopardy. This article first describes the increased importance of out-of-home child care and the specific issues faced by low-income families. Next, the article describes the passage of the FSA and its attempt to address the child-care problems facing AFDC recipients that seek to become self-sufficient. Although implementation of child-care entitlements authorized under the FSA has fallen far short of its potential, the article concludes by arguing that full implementation of the FSA is preferable to replacing the Act with alternatives currently being discussed.

2. PANEL ON CHILD CARE POLICY, RESEARCH COUNCIL, WHO CARES FOR AMERICA'S CHILDREN: CHILD CARE POLICY FOR THE 1990S 16 (Cheryl D. Hayes et al. eds., 1990).
I. THE CHILD-CARE TRILEMMA

A. Child-Care Availability

The large influx of women entering the workforce precipitated an increased demand for child-care services that has not been adequately met by the child-care market. Between 1970 and 1988, the proportion of women who were in the work force with children under age six rose from thirty to fifty-six percent. For 37 million children under age thirteen in 1991, both parents—or their only parent—were in the labor force. These children constituted more than sixty percent of all children living in families in the United States. With fewer parents, especially mothers, in the home to provide child care, families were forced to seek other child-care arrangements.

Child-care arrangements generally take one of two forms: nonmarket informal care provided by family members, relatives, or close friends; and the formal child-care market. During the last ten years, the formal market has grown dramatically. At the same time, there has been a shift away from the informal market. Prior to the mid-1980s, care provided by relatives accounted for about half of all child care. By 1984, care provided by relatives for children under age five had decreased to thirty-nine percent, and by 1990, it had decreased still further. Two factors may have contributed to this shift: (1) growing parental preference for early education experiences for young children; (2) and a lack of available caretaking relatives (who themselves are now in the workforce).

The formal market has not responded adequately to this increase in demand for child care. Many families are dissatisfied with the type of care that is available to them. A national poll of parents of young children, conducted in 1989, found that three out of four parents believed there was an insufficient supply of child care for infants in their communities. The same survey

3. See id.
5. Id.
6. See GWEN G. MORGAN, NATIONAL ASS'N OF CHILD CARE RESOURCE AND REFERRAL AGENCIES, A HITCHHIKER'S GUIDE TO THE CHILD CARE UNIVERSE 6-15 (1992). Morgan describes nonmarket child care as including care by parents working staggered work hours, care by a parent at work, care by a relative in the relative's home or in the child's home, care by a very close friend in the friend's home or in the child's home, care by an older sibling, and self-care by the child. She describes market care as including full-day centers, part-day centers, school-age centers, group child-care homes, family child-care homes, activities for the school-age child, in-home care—such as a housekeeper, nanny, au pair, baby sitter—and shared care where several families hire one person to care for their children in one family's home.
7. See PANEL ON CHILD CARE POLICY, supra note 2, at 31.
8. See MORGAN, supra note 6, at 8.
9. Id.
10. CHILD CARE SECTION, supra note 4, at 8 (citing to RESEARCH AND FORECASTS, INC., KINDER-CARE REPORT: PERSPECTIVES ON CHILD CARE IN AMERICA (1989)).
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showed twenty percent of parents believed there were not enough programs for preschoolers; one third thought more programs were needed for elementary school children.\(^{11}\) Parents also are dissatisfied with the quality of care afforded by their family budget—twenty-five percent would change care if they could.\(^{12}\) The high cost of available child care is the second prong of the child-care trilemma.

B. Child-Care Affordability

According to a recent survey conducted on behalf of the National Association for the Education of Young Children (the NAEYC), employed mothers with at least one child younger than age five who paid for child care spent an average of ten percent of their weekly family income on all types of child care for all children in the family.\(^{13}\) Single mothers and low-income families who paid for care spent a substantially greater share of their income on care than did two-parent or non-poor families.\(^{14}\) Families with annual incomes under $15,000 who paid for any form of child care spent an average of twenty-three percent of their income on child care, an amount comparable to the average family's expenditure on housing.\(^{15}\)

Even though low-income families spend a significant portion of their total income on child care, the amounts they spend are often too little to buy *quality* care. The NAEYC estimates that the full cost of quality care for a full day's care in a center would be $8345 a year per child.\(^{16}\) In contrast, working parents, on average, pay an estimated $3500 a year for child care.\(^{17}\) Thus, if the average working parent cannot afford quality child care, it should not be surprising that AFDC recipients are unable to afford quality child care.

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\(^{11}\) *Id.*


\(^{13}\) *Id.* at 31 (noting also that 10% of family income compares to a family's average expenditures on food).

\(^{14}\) *Id.*

\(^{15}\) *Id.* at 31-32.

\(^{16}\) NATIONAL ASS'N FOR THE EDUC. OF YOUNG CHILDREN, REACHING THE FULL COST OF QUALITY IN EARLY CHILDHOOD PROGRAMS 61 (Barbara Willer ed., 1990) (assuming that child-care teaching staff is paid the same wages as teaching staff in public schools).

\(^{17}\) See WILLER ET AL., supra note 12, at 29-30 (reporting average day care center fees of $1.59 per hour). This author arrived at the estimate of $3500 by assuming that for each child parents use day care centers forty-five hours per week, fifty weeks per year.
C. Child-Care Quality

While child-care affordability and availability are issues for significant numbers of families, quality issues are problems for many more. Quality child care has been shown to have positive effects on children. Studies show that children who have been in quality early childhood programs have significantly better test scores and behave in observably positive ways. Low-quality programs, however, have negative effects on children. Children attending lower-quality centers have been found less competent in language and social development. Despite the recognized important effects of quality day care, most day care is of substandard quality.

There are several important indicators of child-care quality, including staff training, staff turnover, overall group size, the ratio of children to staff, and a variety of indicators associated with physical space and with practices to guarantee the health and safety of children. Dr. Edward Zigler, one of the founders of the country’s Head Start program, estimates that seventy percent of child care in the county is of poor quality at best. As evidence of this poor quality, one study found that only twenty-one percent of the centers used for its sample met all of the Federal Interagency Day Care Requirements (FIDCR).

In addition to the FIDCR, which were never put into effect, the NAEYC has established recommended standards for quality child care. Most state child-care regulations fall far short of these standards. For instance, the recommended child-staff ratio for six-month olds in centers is four to one. In 1989, nineteen states had set higher maximum infant-staff ratios. South Carolina’s standard was eight to one and Idaho’s was twelve to one. Recent data...
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indicates that only seven states met the recommended group size levels for all selected age groups.27

In addition to failing to provide regulations that meet recommended child-staff ratios, some states fail to ensure the most basic protections. Fourteen states fully or partially exempt religious-based programs.28 In 1990, nearly half of all states exempted from regulation family day care programs serving five or fewer unrelated children.29

Although low staff turnover and a well-trained staff are important to quality child care, turnover among child-care staff averages over forty percent yearly.30 There is a direct correlation between high turnover rates and the wages paid to child-care staff.31 Despite generally being well educated,32 child-care workers receive very low pay. The average annual salary for a preschool teacher is $11,500 annually.33 The annual income for a regulated family day care home averages $10,000 per year.34

Policymakers must consider the prongs of the child-care trilemma together. Efforts to solve only one of these problems may have a negative effect on the other two. For instance, quality can be increased by raising staff wages or improving the staff-child ratio. This will drive up cost and price, forcing parents to turn to other forms of care or to reduce their working hours. Likewise, efforts to make child care more affordable by reducing costs often drive down both quality and availability. As child-staff ratios increase, quality decreases.

D. Implications of the Trilemma for Low-Income Families

By no other income group is the trilemma felt more directly than by low-income families. Additional difficulties facing these families act as constraints limiting their child-care options. These additional factors include less money to spend on child care, the likelihood of working unstable jobs with non-traditional work hours, unreliable transportation, and the tendency to live in

27. Id. at 31 (indicating that only Alabama, Connecticut, Maryland, Massachusetts, Oregon, Rhode Island, and Vermont met recommended group size levels for all selected age groups).
29. ADAMS, supra note 25, at 8.
30. CHILD CARE EMPLOYEE PROJECT, supra note 20, at 12.
31. Id.
32. WILLER ET AL., supra note 12, at 19 (noting that 47% of teachers at day care centers have obtained a college degree).
33. Id. at 35.
34. Id.
poor neighborhoods with dilapidated housing and inferior services. All of these factors have an impact on a low-income family's ability to find and pay for quality child care. Finding stable child care is particularly difficult for a parent who does not have a set schedule or who works evenings and weekends. Inferior housing stock and poor levels of services decrease the likelihood that satisfactory child-care alternatives will be available. Logistical difficulties such as not owning an automobile or lack of accessible public transportation can make traveling from the home to the child-care site and to the worksite very complicated. If child care suited to a family's needs is found despite these constraints, paying for it may prove difficult. The vicious cycle continues as child-care facilities in low-income neighborhoods are constrained by the inability of low-income families to pay for child care. Thus, those facilities are unable to provide quality child care absent external funding.

It is not surprising, therefore, that low-income families tend to rely more on informal, nonmarket care than do families in other income groups. This trend continues although all indicators suggest that low-income families seek the same features in their child-care arrangements as do families with more economic resources.

Families receiving assistance under the Aid to Families with Dependent Children program face some of the most difficult constraints of all. The very factors that lead families to rely on AFDC also makes unattainable such child-care arrangements as are made by families at higher income levels. Families relying on AFDC often find AFDC grants inadequate to pay for most market-based care. In addition, several nonmarket-care options are also unavailable. For example, more than thirty-two percent of all families with children younger than age three use parental care—the parents stagger their work schedules—as their primary child-care arrangement. This option is unavailable for most AFDC families, since at least ninety-two percent of AFDC families are headed by a single parent.

36. Id. at 6.
37. See id. at 7.
38. See infra part III.C.1.a.
39. See MORGAN, supra note 6, at 7-8.
40. STAFF OF HOUSE COMM. ON WAYS AND MEANS, 102D CONG., 1ST SESS., OVERVIEW OF ENTITLEMENT PROGRAMS 622 (Comm. Print 1991) [hereinafter GREEN BOOK].
II. THE FAMILY SUPPORT ACT OF 1988

Although the child-care difficulties faced by AFDC recipients cannot be corrected simply, we must address these issues if we hope to enable individuals to move from welfare to work. By definition, Aid to Families with Dependent Children is a program for families with children. Therefore, any attempt to reform AFDC must take into account the needs of both mothers and their children. Unless their net income after subtracting child-care costs is greater than the welfare benefits they received previously, AFDC recipients have little incentive to work. Without a government response addressing these child-care issues, many families receiving AFDC will find the lack of reliable affordable child care an unbreakable barrier to self-sufficiency.

The Aid to Families with Dependent Children program—what many persons consider welfare—has lagged behind demographic changes in a fashion similar to the child-care market. AFDC was created in 1935 to aid needy children without fathers.41 Faced with the modern reality that many mothers work for wages, including forty-eight percent of single mothers with children under six,42 little support may exist for a program designed to allow low-income mothers to stay home with their children.

Despite the general consensus preferring self-sufficient families rather than AFDC-dependent families, passage of FSA, the most sweeping welfare-reform package enacted since the 1960s, was a major feat. The debate over its passage reflected the country’s deep ideological divisions around the best approach to eliminating welfare dependency. Former Health, Education, and Welfare Secretary Joseph Califano aptly termed welfare reform the “domestic political equivalent of the Middle East.”43

FSA represents a new direction for social policy in the United States. For the first time, the federal government guaranteed child care to all AFDC recipients who needed it in order to work or to participate in education and training.44 The program was based on several successful state experiments, including Massachusetts’s Employment and Training Choices program, California’s Greater Avenues to Independence (GAIN) program, Project Chance in Illinois, Michigan’s Opportunities and Skills Training program, and the Realizing Economic Achievement (REACH) program in New Jersey.45 These programs demonstrated that providing child care to welfare recipients

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41. See id. at 566.
42. PANEL ON CHILD CARE POLICY, supra note 2, at 18.
45. FEUERHERD, supra note 43, at 23.
reduced welfare dependency and enhanced the recipients' ability to get and keep a job.\textsuperscript{46}

Despite the great potential of the Act, political and economic realities have worked to render it a mere paper promise for many eligible recipients. This has been particularly disappointing because the Family Support Act could form the basis of a two-generation program providing both meaningful education and training for parents and enriched early childhood experiences for their children. Instead of looking for ways to make FSA work, policymakers across the country are introducing more welfare innovations. These innovations often come in the form of restructuring and reducing AFDC benefits in an attempt to make work more attractive by making welfare completely unpalatable. These reforms often generate substantial amounts of popular support because of the short-sighted promise of saving tax dollars. Before the country moves fully in this direction, the implications of the child-care trilemma, the practical need for child-care entitlements, and the current constraints affecting the implementation of authorized child-care entitlements, must be more fully understood. If the federal government makes regulatory and statutory changes, and holds states accountable for fulfilling their obligations under the Act, quality child care will be more accessible and the country will be much closer to achieving true welfare reform.

A. The Effects of the Political Process

In his 1986 State of the Union address, President Reagan called for fundamental changes in the welfare system to "revise or replace programs enacted in the name of compassion that degrade the moral worth of work, encourage family breakups and drive entire communities into bleak and heartless dependency."\textsuperscript{47} His speech prompted efforts by both conservatives and liberals to reform the welfare system. While the major groups involved in welfare reform agreed it was more desirable for families on AFDC to be in the workforce, they disagreed on how to achieve this goal. Differences existed as to the best method for moving persons from welfare and as to who should pay for the reform. No side ultimately got all it wanted in the final reform package. Rather than recommending any major new initiatives, the President's task force for welfare reform suggested increasing federal waivers so that states and communities could experiment with programs that would


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decrease welfare dependency. Conservative members of Congress wanted a universal program that required work as a condition of receiving welfare grants. Liberals advocated creating a universal benefit level and providing incentives to make work more desirable than welfare. In addition to increased federal funding for the programs, state governors also wanted states to have maximum discretion over structuring the programs.

Different perspectives existed on the method of moving people off welfare. On one side, there was the belief that any work was more desirable than using additional monies for AFDC because poor persons would choose welfare rather than work. That group argued, therefore, for programs that returned AFDC recipients to the workforce as soon as possible and that did not make AFDC any more palatable. The opposing group argued for programs providing AFDC recipients with real economic opportunities based on the belief that most persons would choose to leave AFDC where there was a viable employment alternative. This group stressed basic remedial education and training, and where possible, improvements in AFDC to bring benefit levels more in line with the actual cost of maintaining a household.

Because the debate focused on welfare reform generally, issues involving child-care benefits specifically proved relatively less controversial. Although conservative members of Congress generally opposed many incentives for AFDC recipients, they did not oppose the provision of basic services tied directly to work such as child-care and health-care benefits. Providing transitional child-care benefits swayed several liberal Congressional members who considered withdrawing their support for the bill to ultimately vote in its favor. Similarly, conservatives who stressed mandatory participation in welfare-to-work programs for parents of children over three years of age understood that child-care benefits must accompany such a requirement. Both liberal and conservative members of Congress recognized that lack of child care had been the single greatest barrier to preventing welfare recipients from going to work.

To avoid stalemates between conservatives and liberals, final provisions of the Act gave tremendous latitude to states when structuring the actual

51. See Linda McCart, National Governors' Ass'n, A Governor's Guide to the Family Support Act: Challenges and Opportunities 3 (1990); see also Rom, supra note 50, at 59.
52. See Rom, supra note 50, at 69.
54. See, e.g., 134 CONG. REC. S7951-52 (daily ed. June 16, 1988) (statements of Senators Sanford and Sasser) [hereinafter CONG. REC.].
educational and training programs, so long as certain minimum components were included. For instance, participation is mandatory, but states must take volunteers first.\footnote{45 U.S.C. § 602(a)(19)(b)(ii) (Supp. Ill 1991).} States must offer training services and child-care benefits that emphasize immediate return to the workforce—such as job-search activities—as well as long-range, human-capital development programs—such as general equivalency degree and two-year vocational training programs.\footnote{See § 602(a)(19); 45 C.F.R. § 250.21 (1992).} Many decisions about how to implement the Act’s child care provisions were also left up to the states.

B. The Child-Care Provisions of the Family Support Act

The Family Support Act clearly reflects the political, philosophical, and economic context in which the Act was developed. FSA includes four basic components: (1) child-support provisions to make noncustodial parents share the financial burden of child rearing; (2) education and training programs; (3) supportive services, including child care and transportation; and (4) transitional benefits—one additional year of child care and Medicaid—to enable families to find and to keep low-paying jobs.\footnote{Family Support Act of 1988, § 1(b), Pub. L. No. 100-485, 1988 U.S.C.C.A.N. (102 Stat.) at 2343.} This Article focuses on the child-care provisions of the Act as they relate to the process of helping persons move from welfare to self-sufficiency.

1. Job Opportunities and Basic Skills (JOBS)

FSA established an education and training program (the JOBS program) to replace the Work Incentive Program (WIN) established in 1967. JOBS is funded through a “capped entitlement,” meaning that states will be partially reimbursed for each dollar spent on JOBS until they meet the spending maximum, or the cap. Each state had to have a JOBS program in place by October 1990 and to offer JOBS services statewide by October 1992.\footnote{42 U.S.C. § 682(a)(1)(D)(i) (1989).}

The states have several obligations under the JOBS program. They must make an initial assessment of the education, child-care and other supportive-service needs as well as of the skills, prior work experience and employability of each JOBS’ participant.\footnote{§ 682(b)(1)(a).} On the basis of the assessment, each state must develop an employability plan for each participant.\footnote{§ 682(b)(1)(B).} The range of education and training services offered must include: (1) education activities, including high school or equivalent education, basic and remedial education to achieve...
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a basic literacy level, and education for individuals with limited job proficiency; (2) job-skills training; (3) job-readiness activities; (4) job development and job placement; and (5) supportive services. A state must also offer at least two of the following four activities: (1) job search, (2) community work experience, (3) on-the-job training, and (4) work-replacement programs.

To the extent that resources are available, states must require all non-exempt AFDC recipients to participate in a JOBS program. States must meet minimum participation standards: seven percent of the non-exempt caseload in fiscal 1990 and 1991, eleven percent in fiscal 1992 and 1993, fifteen percent in fiscal 1994, and twenty percent in fiscal 1995.

2. Child Care

Prior to the passage of FSA, AFDC recipients had no federal guarantee of child care. Except in cases where states had received federal waivers, federal support for child care existed only in the form of the “child-care disregard,” and even this was not a mandatory benefit. The “child-care disregard” disregards, or excludes, a portion of a working recipient’s income before the AFDC grant is calculated. The maximum monthly disregard for children over age two is $175 and $200 is the monthly maximum for children two years of age and younger.

Under the FSA, families receiving AFDC who are guaranteed child care fall into two classes: those who need child care in order to participate in education and training, including the JOBS program if the state approves the activity and determines that the individual is participating satisfactorily, and those who need child care in order to work. An individual cannot be required to participate in a JOBS activity if child care is unavailable.

Child care for both groups is paid for as an uncapped entitlement. The state and federal government share the cost for this care. The federal government will reimburse a state for part of each dollar spent on child care at the state’s

61. § 682(d)(1)(A).
62. Id. These services are designed to enable recipients to return to the workforce quickly with a minimum investment from the state and federal government.
63. § 603(l)(3)(A). In addition to targeting by percentages of AFDC caseloads, the Act provides funding incentives for states if 55% or more of their JOBS participants are likely long-term AFDC recipients. These groups include families in which the custodial parent is under age twenty-four and has not completed high school or has had little or no work experience in the preceding year; the youngest child is within two years of becoming ineligible for AFDC; family members have received AFDC for thirty-six months in the preceding sixty-month period; or applicants have received AFDC for any thirty-six months of the previous sixty-month period.
64. Child-care disregards do not work well because $175 or $200 is often insufficient to cover the market cost of child care, see infra note 156 and accompanying text, and because AFDC recipients must make the initial cash outlay and be reimbursed later—a difficult prospect for low-income families.
Medicaid matching rate—between fifty and sixty-six percent of the total cost—as long as the child-care expense falls below a statewide maximum payment limit. This limit must fall between the statutory minimum of $175 per month for children two years of age and older and $200 per month for children less than two years old and the statutory maximum, the local market rate for child care.

Child care may be provided by the state administering agency itself. Alternatively, the state agency may arrange care by the use of contracts or vouchers, provide cash or vouchers in advance or as a reimbursement, or may adopt other arrangements.

In addition to providing child care for AFDC recipients, a state must also guarantee such care in any case where a family has become ineligible for AFDC because of increased earnings, increased workhours, or the loss of earnings-related disregards. This benefit—referred to as Transitional Child Care (TCC)—is limited to the twelve-month period after the family has ceased receiving AFDC. In all cases, the family must contribute to the cost of care based on a sliding-fee scale formulated by the state.

C. Regulatory and Economic Constraints on the Child-Care Guarantee

All the problems related to child care for AFDC recipients cannot be completely surmounted by one piece of federal legislation. The FSA, however, made a significant step forward in addressing the needs related to AFDC and child care. The FSA established the only federal guarantee of child care, it provided a source of unlimited funding, and it acknowledged that the lack of child care is proper justification for failing to participate in education and training.

Although the FSA child-care guarantee provided states with an opportunity to address some of these critical problems, regulatory and economic constraints have limited the states’ ability to take advantage of this opportunity. Unfortunately, the enthusiasm that surrounded the signing of the Act died out even before the ink on the President’s signature was dry. Instead of being attributed to these constraints, failure to reach the guarantee’s full potential

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68. § 602(g)(1)(C).
69. § 602(g)(1)(B).
70. § 602(g)(1)(A)(ii).
71. § 602(g)(1)(A)(iii).
72. § 602(g)(1)(A)(vii).
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might be attributed to poor policy or the lack of need. Thus, child care may be virtually ignored in future welfare-reform policy debates.

1. Federal Regulations

In 1989, the Bush Administration, never a strong supporter of the child-care provisions in FSA, issued regulations that greatly limited the child-care guarantee and diminished the ability of advocates to monitor the guarantee. The regulations have had a chilling effect on the states' efforts to implement the Act's child-care provisions.74

a. Payment Rates. The Act provides no federal match for child-care payments above the “local market rate.”75 The regulations define “local market rate" as the 75th percentile of the cost of care in the community, in effect eliminating twenty-five percent of child care available in that community from the class of fully reimbursable care.76 The Act also states that child care must be guaranteed to working AFDC recipients. The regulations allow states the option of providing only the minimal child-care disregard of $175 or $200 a month to this class of AFDC recipients.77

b. Application for Benefits. Although the statute contained no provision regarding application for TCC, the regulations specify that a family receives TCC only if “the family requests the transitional child care [sic] benefits, provides the information necessary for determining eligibility and fees, and meets appropriate application requirements established by the State.”78 By contrast, a family is not required to apply for Transitional Medicaid benefits; the state must automatically determine eligibility.79 The TCC application provision establishes a significant barrier: a family must be aware both of its right to TCC and of the appropriate application method. Because of the newness of TCC and caseworkers are often unaware of its existence,80 a

76. The 75th percentile is calculated by child-care category, e.g., family day care homes and child-care centers. The states must survey child-care providers and then set payment rates that eliminate the top 25 percent of the child-care slots, or providers, by each category. The regulations do not stipulate how a state must define local market area or how to conduct the market rate survey. See 45 C.F.R. § 255.4(a)(2)(i-iii) (1992).
80. States were not required to offer TCC until April 1990. See U.S. GEN. ACCOUNTING OFFICE, PUB. NO. GAO/HRD-92-118, WELFARE TO WORK: IMPLEMENTATION AND EVALUATION OF TRANSITIONAL BENEFITS NEED HHS ACTION 3 (1992) (report to congressional requesters). Thus it is a relatively new program, and the number of families who receive TCC has remained relatively low. Both of these factors decrease the likelihood that eligible families could hear about the benefit by word of mouth. Consequently,
family’s application is likely to hinge entirely on the extent to which a state communicates information about this benefit.

c. Eligibility Criteria. The statute provides that a family is eligible for TCC (1) if it loses AFDC as a result of employment or because of the time limitations on the earnings disregards, (2) if the family has received AFDC in at least three of the six months immediately preceding the month it became ineligible for AFDC, and (3) if the family has a dependent child. The regulations are explicit, excluding all other reasons for a family’s loss of AFDC. For many families, an increase in family income from a source not related to work could push a family over the eligibility maximum. For example, if a working mother receives child-support payments, causing her income to exceed AFDC eligibility maximums, she cannot qualify for TCC.

d. Recipient Contribution. Although the Act stipulates that families must contribute to TCC based on their ability to pay, the federal regulation requires that all families receiving TCC must contribute toward payment, regardless of family income. This results in states charging fees to families whose incomes are below the poverty line. Additionally, the regulations give states complete flexibility in structuring the sliding-fee scale. States can use this flexibility to require family contributions that are far out of line with a family’s ability to pay.

e. Eligibility Period. The statute provides that families are eligible for TCC for twelve months after losing AFDC benefits. The federal regulations define this period as beginning when a family loses its eligibility for AFDC, as opposed to the month when it ceases to receive AFDC. Typically, because a family reports its income to the state every month, there is a two-month lag between a family’s report of income and the subsequent payment.

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82. 45 C.F.R. § 256.2 (1992).
84. 45 C.F.R. § 256.3(b) (1992).
85. Id.
86. The rationale for using a sliding scale for fees created by the states was explained as follows:

[In response to the strong support for State flexibility in this area [of state sliding fee scales], and in the interest of reducing administrative hurdles to program coordination, we have decided to allow State flexibility in determining the formula for calculating fees. The only requirement we decided to impose at this time is a requirement that all recipients of benefits under this Part make some contribution, however minimal.

88. 45 C.F.R. § 256.2(e) (1992).
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This means that AFDC benefits generally stop two months after a family becomes ineligible, effectively shortening the period of TCC eligibility from twelve to ten months. This is a particular problem for families that would receive more from TCC than they would as AFDC recipients at their income level.

f. Guarantee for Families in Education and Training. The statute guarantees child care for “each individual participating in an education and training activity” if they are in a state-approved activity and participating satisfactorily. Prior to a legal challenge, the regulations interpreted the statute to mean that the child-care guarantee only applied to individuals in state-approved JOBS activities or in similar activities in areas of the state where JOBS had not yet been implemented.

g. Reporting Requirements. Federal regulations make it nearly impossible to hold states accountable for their performance in implementing the child-care guarantee. A recent study of the GAO on the utilization of transitional benefits reported:

Calculating reliable utilization rates requires information for the same period on (1) the number of families that meet all eligibility criteria for transitional benefits and (2) the number that receive the benefits. However, data are not available from the states or HHS that identify the number of families that meet all eligibility criteria for any state. In addition, less than half the states could provide the number of families that began receiving the benefit each month for TCC, and only five states could provide these data for TM [Transitional Medicaid].

The data are unavailable because federal regulations do not mandate that states collect them. The regulations require states to report monthly the number of AFDC recipients who have received child-care benefits, but not the subset of those who are enrolled in JOBS programs. However, AFDC recipients who work are also eligible for child-care assistance. Likewise, the regulations do not require state reporting on the number of individuals eligible for Transitional Child Care. Without this information, it is impossible to compute the true TCC utilization rate. Without such information, it is difficult to develop a utilization target, and states can claim an inability to assess their level of performance in fulfilling their obligations under FSA.

90. 45 C.F.R. § 255.2(g)(2) (1992); see also infra notes 102-05 and accompanying text.
91. U.S. GEN. ACCOUNTING OFFICE, supra note 80, at 8.
93. See supra note 65 and accompanying text.
In summary, the FSA regulations have a dual and detrimental effect: they provide very explicit and narrow definitions of who is eligible, while at the same time allowing states broad latitude on many aspects of implementation, including payment systems, recipient contribution rates, and application procedures. In such a context, both the public and their representatives in Congress need to pay close attention to assure that eligible participants receive quality child care.

2. Economic Constraints

The outcome of a welfare reduction strategy based principally on changing the employment status of adult AFDC recipients rests on a factor largely beyond the control of state governments—the availability of jobs that pay a living wage. In the mid- and late-1980s, when FSA was being debated, the country was experiencing consistent economic growth and low unemployment rates. Even then, policymakers acknowledged that many women leaving AFDC would get low-paying jobs and would need assistance with health care and child care.94

By the time that states began implementing the JOBS program and FSA child-care benefits, even the low-paying jobs were becoming scarce.95 In such an economy, women with little or no work history face the most difficult employment prospects. States, however, continue to offer training and job-search activities even when the prospects of getting a job are very low. In the fall of 1992, for example, the Illinois Department of Public Aid required many AFDC recipients to apply for five jobs per week as a condition of receiving their AFDC grant.96 Such activities, especially for individuals with little prior work experience, could only be perceived as “going through the motions.”

The scarcity of job opportunities is a depressing prospect for AFDC mothers in JOBS programs. In its analysis of Kentucky’s efforts to implement the child-care provisions of FSA, the Kentucky Youth Advocates, a non-profit, state-level, child research and advocacy organization, reported:

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94. See, e.g., CONG. REC. supra note 54.
95. From the first quarter of 1988 to the first quarter of 1989, the number of unemployed persons decreased by 7.9%. From the first quarter of 1990 to the first quarter of 1991, the number of unemployed persons increased by 23.8%. Selected Issues Relating to the AFDC and the JOBS Programs: Oversight Hearing Before the Subcomm. on Human Resources of the House Comm. on Ways and Means, 102d Cong., 1st Sess. 75-76 (1991) [hereinafter AFDC Hearing] (Congressional Budget Office staff memorandum).
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Through our field interviews we found the dilemma for the JOBS participants to be that they are unprepared for what they face upon completion of the training program—that, in many cases, there are no employment possibilities available to them. If JOBS participants are lucky enough to find employment, the wages earned are usually insufficient to allow them to achieve their goal of getting off welfare, especially if they are responsible for child care payments for more than one child.\textsuperscript{97}

The other serious problem generated by the poor economy is that states are unable to meet their funding obligations under the Act. Between 1989 and 1991, forty-three states experienced increases of greater than ten percent in their AFDC caseloads.\textsuperscript{98} In such a context, when there is uncertain payoff for an investment in the JOBS program, public officials have little incentive to do much beyond what is minimally required by the Act and its regulations. Although there is a strong argument that the provision of high-quality child care for children receiving AFDC is cost-effective in the long-run,\textsuperscript{99} many states face difficult choices in the short-run. Instead of putting more effort into making child care and other aspects of FSA work, many states have taken another route. In 1991 budget decisions, forty states either cut or froze AFDC benefits.\textsuperscript{100}

III. CHILD CARE FALLS SHORT OF GUARANTEE

While passage of the FSA provided hope for significant improvement in the ability of low-income families to obtain child care as they struggled toward self-sufficiency, regulatory, economic, and political constraints have weakened the FSA child-care guarantee. The effects of these constraints can be described in terms of utilization of child-care benefits, quality of care, and affordability of care.

\textsuperscript{98} AFDC Hearing, supra note 95, at 44 (testimony of Marta E. Moret, Deputy Commissioner, Connecticut Department of Income Maintenance, on behalf of the American Public Welfare Association).
\textsuperscript{100} AFDC Hearing, supra note 95, at 21 (testimony of Robert Greenstein, Director, Center on Budget and Policy Priorities).
A. Utilization of Child-Care Benefits

Utilization issues differ somewhat for families still on AFDC with parents who are JOBS participants or participants in education and training programs, on the one hand, and those families that leave AFDC for work-related reasons and that are eligible for TCC benefits, on the other hand.

1. AFDC Recipients and Participants in JOBS or Other Education and Training Programs

Because child care is guaranteed to individuals who need it to participate in the JOBS program, the primary way states can control child-care costs for these individuals is by limiting entry into the JOBS program. States appear to be doing just that. Several states have strictly targeted their JOBS programs, denying entry categorically to specific groups of families that would most likely need child care to participate. In 1990, for example, Minnesota restricted eligibility to parents who had been on AFDC for forty-eight of the previous sixty months, who were younger than age twenty-two and were without a high school degree or general equivalency diploma, or who were caretakers in families in which the youngest child was within two years of the age at which the family would become ineligible for AFDC. 101

In 1991, child-care and legal-aid advocates brought suit against the state of California for failure to provide continued child-care assistance to AFDC recipients who had been or would have been terminated from GAIN—California’s JOBS program—due to program reductions, but who continued to participate satisfactorily in their approved education or training activities. 102 The suit had national implications, causing the federal government to change its position. Until this case, federal regulations were interpreted to limit approval of training and education for non-JOBS participants to non-JOBS areas of the state. 103 Now, non-JOBS participants in education and training programs are entitled to child care if the education activity is state approved. 104 Until this case, the federal regulations were interpreted to

104. Id.
preclude federal reimbursement of child-care expenses for participants in education and training unless they were enrolled in the JOBS program or unless they lived in areas of the state where JOBS was not yet available.\textsuperscript{105}

Massachusetts also has strictly limited entry into the JOBS program. In September 1992, Massachusetts abruptly closed down JOBS referrals for eligible AFDC recipients due to lack of funds.\textsuperscript{106} In response, attorneys successfully obtained an injunction compelling the Commonwealth to provide child care for AFDC recipients who had been declared eligible for training and education and to continue to approve training and education for AFDC recipients.\textsuperscript{107} The immediate effect was the authorization of child-care payments for some 2000 children whose parents already had state-approved education or training plans, or both, along with the continued processing of applicants for whom training and education would have been part of their plans.\textsuperscript{108}

The examples from Minnesota, California, and Massachusetts discussed above indicate how some states are attempting to control costs associated with the FSA child-care guarantee. After observing similar attempts to limit state funding obligations for child-care entitlements, Jan Hagen and Irene Lurie, who conducted a study of implementation of JOBS in ten states, remarked:

\begin{quote}
[the approach of states to] child care as a guarantee may be characterized as a “quasi-entitlement” to be guaranteed as long as state and local funding are sufficient. If funding is insufficient for child care, mandatory participants may be “considered to have a barrier to participation” and thus may be excused from JOBS participation.\textsuperscript{109}
\end{quote}

These state and federally imposed barriers to child care for AFDC recipients in education and training programs may be the cause of the low child-care utilization rates for JOBS participants. When comparing the number of AFDC families without earnings that received child care paid for by the Act in 1992, Mark Greenberg found that the state averages ranged from 4% to 120% of the number of families in JOBS programs.\textsuperscript{110} Greenberg concluded that “state figures vary so widely that there must be either serious differences in reporting

\begin{footnotes}
\textsuperscript{105} 45 C.F.R. \textsection 255.2(a)(2) (1992).
\textsuperscript{107} Id.
\textsuperscript{108} Memorandum from Doug Baird, Associated Day Care Services, to Distribution, including Child Care Action Campaign (Nov. 17, 1992) (regarding JOBS child care in Massachusetts) (on file with the Yale Law & Policy Review).
\textsuperscript{109} HAGEN & LURIE, supra note 73, at 95 (reporting the findings of research in Maryland, Michigan, Minnesota, Mississippi, New York, Oklahoma, Oregon, Pennsylvania, Tennessee, and Texas to assess state and local responses to JOBS).
\textsuperscript{110} See MARK GREENBERG, CENTER FOR LAW AND SOCIAL POLICY, WELFARE REFORM ON A BUDGET: WHAT’S HAPPENING IN JOBS 23 (1992). This ratio is the best child-care utilization rate for JOBS participants that can be computed from available federal data.
\end{footnotes}
practices or major differences in how effectively they are implementing the child care [sic] guarantee."\textsuperscript{111}

Some of the differences may be attributed to different state requirements for mandatory JOBS participation. For example, a state that targets families with school-age children for JOBS participation would pay less for child care than a state targeting families with children over age one. Another explanation may be that states are directly or indirectly encouraging individuals to rely on informal care and not informing them that such care, if considered legal by the state, can be paid for under FSA.

2. Transitional Child Care

TCC utilization levels are low throughout the country. The experience of one individual exemplifies the widespread problems that result from poor and inadequate information about TCC for AFDC recipients. Tracey Davis, a mother of two in Chicago, attempted to get TCC after she left AFDC to work in a nursing home at an annual salary of $12,000. Ms. Davis reported:

I first heard about it [TCC] on TV. But when I asked about it, no one at Public Aid knew anything about the program. I kept getting the runaround. One women kept hanging up on me. I spoke to several different people and couldn't get any information. Eventually, someone at family services told me there were no funds and the waiting list was forever.\textsuperscript{112}

The family service worker apparently misunderstood Ms. Davis's request and gave information about a state child-care program that had a waiting list.

Despite assessment difficulties caused by inadequate federal reporting requirements and poor state data, it is clear that the number of people receiving TCC is lower than it should be. The Congressional Budget Office originally estimated that 280,000 children—about thirty-six percent of the population assumed to be eligible—would receive TCC each month beginning in 1991.\textsuperscript{113} However, data collected in individual states indicate extreme underutilization of the TCC benefit. In 1991, for example, the Illinois Department of Public Aid commissioned a study on the patterns of child-care use by AFDC recipients and former recipients. Only nineteen percent of eligible families received TCC.\textsuperscript{114} Such low TCC caseloads are reported throughout the

\textsuperscript{111.} Id. at ii.
\textsuperscript{112.} Id. at 199 (testimony of author).
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country. In September 1991, for example, only 501 families in Michigan and 66 families in the District of Columbia received TCC.\textsuperscript{115}

The number of families receiving TCC can be compared with the number of families whose cases were officially closed for earnings-related reasons. But, this ratio is an inaccurate estimate because not all persons having their AFDC case closed are eligible for TCC. To be eligible for TCC, an individual must have children who are under age thirteen and have been on AFDC for three of the prior six months. Another source of inaccuracy is that many families have their cases closed for reasons other than earnings but should be eligible for TCC. Despite the inaccuracy of the ratio, the General Accounting Office (GAO) surveyed all fifty states and was able to calculate this ratio of TCC use from April 1990 to June 1991 for twenty states. The GAO found that average TCC utilization was twenty percent.\textsuperscript{116} Several of the twenty states served a much smaller fraction of the eligible population—three percent in South Carolina, Oklahoma, and Michigan, five percent in Hawaii and Iowa, and seven percent in California.\textsuperscript{117} Similar analysis by the Center of Law and Social Policy also found low utilization rates in New York, Ohio, Wyoming, Georgia, Mississippi, Arizona, and Maine.\textsuperscript{118}

A significant cause of the under-utilization of FSA child care is inadequate information about the benefit. Very few of the families that are eligible for these child-care benefits know what their rights are.\textsuperscript{119} In many states, few caseworkers are aware of the benefits despite the states’ duty to notify eligible families of such benefits.\textsuperscript{120} The regulations clearly specify a state’s duty to inform eligible families about TCC. A state must:

\begin{quote}
notify all families of their potential eligibility for transitional child care services . . . in writing, and orally as appropriate, at the time they become ineligible for AFDC. The notification must include information on the steps they must take to establish eligibility for benefits and of their rights and responsibilities under the program.\textsuperscript{121}
\end{quote}

This is one area where the regulations are complete and could be effective if notification were made at a reading level understandable to eligible persons or in the proper context of a conversation. However, these regulations have been poorly implemented. The General Accounting Office found thirty-five states not in compliance with the regulations, sending notification about TCC only to former AFDC recipients whose cases were closed officially for

\begin{footnotes}
\item[115] See GREENBERG, supra note 110, at app. J.
\item[116] U.S. GEN. ACCOUNTING OFFICE, supra note 80, at 8-9.
\item[117] Id. at 9.
\item[118] See GREENBERG, supra note 110, at app. J.
\item[119] See, e.g., AFDC Hearing, supra note 95, at 199-200 (statement of author).
\item[120] Id. at 198.
\item[121] 45 C.F.R. § 256.4(c) (1992).
\end{footnotes}
earnings-related reasons. These former AFDC recipients constitute a small part of the eligible population.

Those few individuals who do receive the states’ official notification may not understand it. The GAO analyzed the notification letters from thirty-two states and found that seventy-eight percent were written in language that was at the ninth-grade reading level or above; thirty-one percent of the thirty-two states had notices above the twelfth grade reading level. These notices can be problematic because families that are or who have been on AFDC often have low education attainment, and thus, are likely to have low reading levels.

A study conducted by the Illinois Department of Public Aid indicated that, of all the child-care benefits available in Illinois, public assistance caseworkers were least familiar with TCC. Most of the families that were not receiving TCC indicated either that they were not told about TCC or that they assumed they were ineligible for it. Only twenty-three percent of those families who did not receive TCC believed that they did not need it. The experiences are similar in other states. In 1991, the West Virginia Children’s Policy Institute surveyed the parents of 660 families who left AFDC because of earnings. Seventy-eight percent of the respondents said that the welfare office did not tell them that there might be more financial help for child care.

The reasons why notification is not made vary from state to state. For example, a child care resource-and-referral worker in Lansing, Michigan sends her clients who appear eligible for TCC to the county public assistance office to apply for the benefit. These clients repeatedly tell her that their caseworkers do not know that TCC is available. In Mississippi, the state had no TCC outreach information or materials of any kind ready at the outset of TCC.

122. U.S. GEN. ACCOUNTING OFFICE, supra note 80, at 13.
123. Many individuals leave AFDC because they get jobs, but their cases are closed for other reasons, such as “at client request” or “failure to report monthly earnings.” In most states, these are the simplest ways for caseworkers to close an AFDC case because they do not have to do any income calculations. Therefore, many caseworkers instruct their clients simply to stop sending in their monthly reports when they get a job. There has been no good assessment of the actual number of recipients who left AFDC because of a job but whose cases were closed for other reasons.
124. U.S. GEN. ACCOUNTING OFFICE, supra note 80, at 27.
126. SIEGEL & LOMAN, supra note 114, at 15.
127. Id. at 86.
128. Id. at 87.
130. AFDC Hearing, supra note 95, at 199 (statement of author).
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implementation.131 One year later, the Office of Children and Youth in Mississippi had succeeded only in developing a small poster.132

B. Quality

The FSA did not establish any minimum safety and quality guidelines for child care. Rather, it provided that states must establish procedures to ensure that center-based child care will be subject to state and local requirements designed to ensure basic health and safety.133 A state must also endeavor to develop guidelines for family day care.134 In addition, the federal regulations stipulate that child care must meet "applicable standards of State and local law."135 This means, in effect, that some of the care paid for under the FSA will be unregulated.

Many of the child-care settings, particularly family day care homes and informal child-care arrangements, are not protected by even the most minimal health and safety requirements.136 For fiscal year 1990, the Children's Defense Fund reports that twenty-eight states had either no requirements or only minimal procedural requirements—such as reporting of the provider's name or address—for family day care homes that were otherwise exempt from state licensing or registration requirements.137 Only fourteen states had some quality or health and safety protections in place for such exempt family day care homes.138

As with utilization rates, information about the degree to which FSA child-care subsidies pay for unregulated child care is hampered by inadequate federal reporting requirements. For instance, existing regulations distinguish among five categories of care: (1) care provided by a relative in the home, (2) care provided by a relative outside the home, (3) care provided by a non-relative in the home, (4) care provided by a non-relative in a family day care home, and (5) care provided by a non-relative in a day care center.139 These categories are by no means synonymous with regulated and unregulated care nor do they provide any other indication of the quality of care. For example, thirty-four states provide exemption from regulation and inspection to family day care homes with three or fewer children.140 Similarly, several states

132. Id.
134. Id.
136. See CHILDREN'S DEFENSE FUND, supra note 74, at 11.
137. Id. at 12.
138. Id. at 12.
139. See FAMILY SUPPORT ADMIN., supra note 92, at 6.
140. ADAMS, supra note 25, at 91.
exempt child-care centers run by religious institutions from state child-care regulation.¹⁴¹ Thus, federal reporting data fail to determine the degree to which FSA funds pay for unregulated care.

Another barrier to quality care is the lack of consumer education for parents using FSA child care. First-time users of child care may be anxious about leaving their children with strangers.¹⁴² These concerns are multiplied for low-income parents who also face serious logistical constraints in finding and maintaining quality child care. In her research on low-income families’ child-care choices, Anne Mitchell reports:

In the nine states studied, the client is left virtually alone to assess her own need for child care [sic] information and to determine what is best for her and her family—whether or not she is knowledgeable about child care. A more serious discovery is that the client must often make certain decisions on her first day in the JOBS program, when all she has been told is that child care will be paid for. As one caseworker from the Michigan Opportunity & Skills Training (MOST) program said, “We don’t educate parents about child care, we talk about payment.”¹⁴³

In this context, intensive consumer education to help parents make suitable child-care choices is essential.

C. Affordability

Affordability issues greatly limit the ability of families on AFDC to pay for quality care. AFDC families are unlikely to have access to quality child care because of the federal and state caps limiting the child-care payment rate and because of the income limitations of the families themselves. Studies have shown that at-risk children—a category in which children of parents enrolled in JOBS squarely fit on the basis of income level alone—benefit substantially from high quality, enriched, early childhood programs.¹⁴⁴ These affordability issues make it difficult for parents to find quality care and to pay their share for this care.

¹⁴¹. See supra note 28 and accompanying text.
¹⁴⁴. See CHILD CARE SECTION, supra note 4, at 9.
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1. 75th Percentile

Federal reimbursement is limited to the amount representing the 75th percentile cost of such care in the local area.\textsuperscript{145} In addition to this problem, many states have payment levels that fall far below the 75th percentile.\textsuperscript{146} According to the Children's Defense Fund, in fiscal 1990 nine states paid only the minimum child-care rates of $200 a month for children under age two and $175 a month for children two and over as allowed under FSA.\textsuperscript{147} In at least six other states, child-care rates were only marginally above these minimum levels.\textsuperscript{148}

2. Parental Co-Payment for Care Is Too High

The Act and its regulations give states enormous latitude in formulating the sliding-fee scale based on parents' ability to pay.\textsuperscript{149} In some states, parents have to pay a double charge—paying the parental co-payment and making up the difference between the state's cap on child-care payments and the actual cost of care.\textsuperscript{150} States' sliding-fee scales range from making child care affordable for families to providing little or no support. For fiscal 1990, a mother with two children who was earning 140% percent of the federal poverty level was required to pay more than ten percent of her income for child care in fifteen states and the District of Columbia.\textsuperscript{151} In contrast, eight other states required a mother in similar circumstances to pay less than five percent of her income for TCC.\textsuperscript{152}

Low child-care payment levels make obtaining any child care, let alone quality care, difficult for those AFDC recipients who are working but whose incomes are so low they still qualify for AFDC. Under the Act, states must also guarantee child care to these families. However, states may use the child-care disregard rather than cash as the payment mechanism.\textsuperscript{153} At least ten states have chosen to use the disregard without supplementing it.\textsuperscript{154} In many states, the child-care disregard rate does not even approximate the cost of child

\textsuperscript{145} See supra part II.C.1.a.
\textsuperscript{146} CHILDREN'S DEFENSE FUND, supra note 74, at 19.
\textsuperscript{147} Id.
\textsuperscript{148} Id.
\textsuperscript{150} CHILDREN'S DEFENSE FUND, supra note 74, at 37.
\textsuperscript{151} Id. The states are Arkansas, Georgia, Kansas, Maryland, Nebraska, Nevada, New Jersey, New York, North Carolina, North Dakota, Oregon, Rhode Island, Texas, Virginia, and West Virginia.
\textsuperscript{152} Id. at 60. The states are Alaska, California, Maine, Michigan, Minnesota, Mississippi, Montana, and New Mexico.
\textsuperscript{153} 45 C.F.R. § 255.4(a)(1)(i) (1992) (referring to child-care disregard of $175 per month for each child age two or older and of $200 for each child younger than age two).
\textsuperscript{154} CHILDREN'S DEFENSE FUND, supra note 74, at 22.
Because of the method used to count income, many AFDC recipients still qualify for AFDC after finding a job due to time-limited income disregards of at least three months.

The dilemma faced by individuals who live in states that offer only minimum benefits for working families on AFDC can be illustrated by a hypothetical example:

An AFDC recipient is enrolled in JOBS and has center-based care for her child, costing the state $400 per month. After her training period is over, she obtains a job paying $10,000 a year and finds that she will remain eligible for AFDC for three more months. During this period of time, she finds that she will only receive $175 per month for child care instead of $400 per month. She can supplement that with $225 of her own money—approximately one-third of her take-home pay—or she can take her child out of the center and find cheaper care, perhaps with a neighbor. After the three-month income disregard period has ended, she loses her AFDC eligibility and is eligible for TCC. At this point, she can try to get her child back into a child-care center, but may be faced with a long waiting list.

Although the FSA authorized states to help low-income families move from welfare to work, the states have taken advantage of the wide latitude granted under the Act to ignore the significant opportunity to improve these families' lives. The failure of many states to implement the Act fully has made the Act, in many cases, little more than a paper promise.

IV. MAKING FSA CHILD CARE MORE THAN A PAPER PROMISE

The FSA cannot solve the child-care problems for each American family. Families of all income levels face problems of quality and availability, and many families have trouble finding affordable child care. Until the child-care crisis is addressed comprehensively, many families receiving AFDC will continue to struggle to find and maintain quality child care. However, the FSA, properly implemented, can be a significant source of help to many low-income families. The following recommendations better FSA implementation address each prong of the child-care trilemma. These changes can make a real difference in families' lives and can enable more AFDC recipients to move successfully from welfare to work. Without serious efforts to address the child-care needs of families receiving AFDC, any attempt at welfare reform is doomed to failure. In addition, more meaningful and complete data collection is necessary to allow proper monitoring of programs authorized by the FSA.

155. For an AFDC recipient working a 24-hour work week, $175 will pay for child care at a rate of $1.14 per hour. The profile of child-care settings found that the average hourly rate for centers in the northeast was $2.18 per hour. WILLER ET AL., supra note 12, at 30. Average rates in the midwest and west were $1.71 an hour and $1.63 an hour, respectively. Id.
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A. Increasing the Utilization of FSA Child Care

At least two reforms can increase FSA child-care utilization. First, application for TCC can be made automatic in a fashion similar to Transitional Medicaid application procedures. Families would not have to know about TCC as a precondition for receiving the benefit. This would decrease the adverse effects of caseworkers being unaware of the benefit. Second, TCC eligibility criteria can be broadened so that an individual who leaves AFDC to work is eligible. If TCC is to be a valuable support for families that are attempting to become self-sufficient, the specific reason a working parent leaves AFDC should not be the determining factor for her TCC eligibility.

B. Making FSA Child Care More Affordable

Child-care affordability issues for an AFDC recipient can be mitigated by increasing child-care payment rates and by making sliding fee scales reflect a family’s true ability to pay. The parental co-payment should be based on family income, family size, and the number of children in child care. The 75th percentile reimbursement limitation also must be addressed. The current limit has a chilling effect on state payment rates and inhibits families from purchasing quality child care. Moreover, because fees paid for market child care are often less than the cost of quality child care, the 75th percentile limitation further decreases the likelihood that recipients can obtain quality child care.

To make child care affordable to families who leave welfare for the full length of time necessary to successfully make the transition into the workforce, the eligibility period for TCC should be tied to income instead of to time. A person should become ineligible for TCC at the point in which her income has risen high enough for her to be self-sufficient; she should not be deemed ineligible at the end of an arbitrary twelve-month period.

FSA child care faces many competing interests in state budgets, especially in periods of recession. In order to address this problem, states should be provided with an additional federal share to pay for child care during periods of economic recession. This additional share could be triggered either by state unemployment rates or by rates of increase in the AFDC population. If states receive additional support during periods of economic downturn, they will have fewer incentives to erect bureaucratic barriers that make it difficult for eligible individuals to receive the child care to which they are entitled.

Finally, federal regulatory barriers that inhibit states from making FSA child-care systems uniform with other systems must be removed. Since the

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156. See supra text accompanying notes 126-32 (providing examples of caseworkers being unaware).
passage of FSA, other major federal child-care legislation has been enacted.\footnote{In November 1990, Congress enacted the Child Care and Development Block Grant and amended Title IV-A of the Social Security Act to make child care available to families at risk of becoming dependent on AFDC. \textit{FAMILY SUPPORT ADMIN.}, U.S. DEP'T OF HEALTH & HUMAN SERVS., PUB. NO. CC-FSA-AT-90-1, \textit{CHILD CARE ACTION TRANSMITTAL} (1990).} By enacting legislation and regulations in a piecemeal fashion, the federal government makes it difficult for states to establish comprehensive systems of subsidized child care.

\section*{C. Quality Care for AFDC Recipients}

Child-care quality issues are among the most difficult to address in the absence of any federal minimum standards for child care. Nevertheless, AFDC recipients enrolled in JOBS can be armed with good information about what to look for and can be assisted in making the choice that best suits their individual needs. This can happen only if the information they receive from their caseworkers and others is appropriate and enables them to make informed choices. Accordingly, the federal government should require states to make child-care resource and referral services universally accessible to AFDC recipients and FSA-eligible families. Child-care experts should provide consumer education and support to families making decisions about child care.

\section*{D. Holding States Accountable to the Promises of the FSA}

Federal reporting requirements must be expanded. Policymakers and advocates need information about utilization and quality measures in order to assess states’ performance, to hold states accountable and to evaluate the degree of success of FSA. Congress must also periodically hold oversight hearings on states' performance and work with HHS to continue to improve child-care regulations.

\section*{V. Conclusion}

Although the FSA child-care guarantee has fallen far short of its potential, no one should conclude that the basic concepts incorporated in the FSA are the cause of the Act's failures. The child care guaranteed by FSA, for all its flaws, has the potential to have a positive impact on the lives of families receiving AFDC. Child care is an essential service for both parents and children. Parents need reliable and affordable care if they are to enter and stay in the labor force. Children, with a foundation of high-quality early childhood
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experience, achieve greater success in their early school years.158 This greater success is likely to continue throughout their lives. The Family Support Act provides an opportunity to address the excruciating effects of the child-care trilemma faced by low-income families.

Instead of discarding the education and training programs and the child-care benefits of FSA, policymakers and advocates must work to make FSA child care a true guarantee—not a "quasi-entitlement" or merely a set of clauses in the federal statutory code. Improvements must occur at every level of government. Problems associated with each element of the child-care trilemma must be adequately addressed.

However, current efforts to further "reform" welfare are veering off in an entirely different direction. The country has witnessed a backlash against welfare recipients, which has spurred welfare reforms that attempt to dictate the behavior of AFDC recipients by manipulating AFDC grant levels.159 The debate surrounding these welfare-reform initiatives often excludes discussion of the Family Support Act, despite the fact that it is the most sweeping reform of the AFDC system in nearly thirty years, let alone the child-care guarantee therein.

The Progressive Policy Institute, in its major policy report—Mandate for Change, endorsed primarily those Family Support Act provisions that address additional state latitude for formulating welfare-to-work programs.160 The Institute, in keeping with President Clinton's campaign promise, called for making welfare a temporary two-year program and endorsed many of these recent state initiatives.161 This call for a new reform movement does not address many of the issues that make it impossible for AFDC recipients to become stable members of the workforce, including the unavailability of quality, affordable child care.162

In order effectively to address welfare reform and the attendant child care issues, existing welfare reform should be given a real chance. The Act needs to be broadened beyond moving people off of the welfare rolls to moving people out of poverty—two very different goals. This can only be achieved if quality child care is made available to low-income families for as long as they need it.

158. Vandell, supra note 19, at 1290-91.
161. See id. at 229.
162. The Progressive Policy Institute recommends that "[t]he new administration should convert into vouchers the $4 billion now spent under Title XX of the Social Security Act, AFDC and transitional child care, and the child care and development block grant." Id. at 236. This recommendation does not address any of the issues of the child-care trilemma.