

The Billion Dollar Baby: Reforming Regulation of Day Care in California

This article describes the funding and regulatory structure of day care in California. It examines the ambiguous and often burdensome regulations governing the operation of publicly-subsidized day care facilities. It then proposes a regulatory program that permits greater flexibility in the operation of day care facilities in the hope of lowering day care costs to both government and parents.

There is a dramatic need for child care services within California and the United States.¹ An increasing number of single parents and working mothers are entering the work force each year.² As a result of these increases in the work force plus the federal government's efforts to encourage welfare-dependent persons to find work,³ many families need day care services for their chil-

¹ In the United States less than seven percent of the nearly twenty-nine million children under seventeen years of age with working mothers and who need day care services can be placed in licensed day care openings. In California, despite progressive efforts to provide day care services, less than one-third of the million children in need of this service and whose mothers work can be served by licensed day care facilities. COMMISSION TO FORMULATE A STATE PLAN FOR CHILD CARE AND DEVELOPMENT SERVICES IN CALIFORNIA, CALIFORNIA STATE DEPARTMENT OF EDUCATION, CHILD CARE AND DEVELOPMENT SERVICES 5 (1978) [hereinafter cited as CHILD CARE AND DEVELOPMENT SERVICES REPORT].

² 125 CONG. REC. S77 (daily ed. Jan. 15, 1979) (Remarks of Sen. Cranston). In 1970, Department of Labor statistics indicated that the number of working mothers with children under the age of eighteen was 42 percent. By 1978, this percentage had increased to fifty-three percent. *Id.*

³ Title XX of the Social Security Act, 42 U.S.C.A. § 1397 (West Cum. Supp. 1978) authorizes appropriations for the purpose of encouraging states to furnish services directed at the goals of:

- (1) achieving or maintaining economic self-support to prevent, reduce, or eliminate dependency, (2) achieving or maintaining self-sufficiency, including reduction or prevention of dependency, (3) preventing or remedying neglect, abuse, or exploitations of children and adults unable to protect their own interests, or preserving, rehabilitating, or reuniting families, (4) preventing or reducing inappropriate institutional care by providing for community-based care, home-based care, or other forms of less intensive care, or (5) securing referral or admission for institutional care when other

dren.⁴ Licensed day care openings, however, are not keeping pace with these increases in the work force.⁵ The ultimate result of these factors is an increasingly inadequate supply of child care services.

Despite this need for child care, California⁶ and federal⁷ day care regulations hamper the operation and the supply of subsidized day care services⁸ in California.⁹ Federal regulations require more extensive day care services than California, which increases the costs of establishing and maintaining day care programs. The

forms of care are not appropriate, or providing services to individuals in institutions.

⁴ 125 CONG. REC. S77 (daily ed. Jan. 15, 1979) (Remarks of Sen. Cranston). Less than one-third of the one million children in California whose mothers work can be served by licensed day care facilities. *Id.*

⁵ *Id.*

⁶ The California day care regulations are found in CAL. ADMIN. CODE, tit. 5, § 17906, *Id.* § 18201-18208, CAL. ADMIN. CODE, tit. 22, §§ 31191-31323, *Id.* § 80001-81215, *Id.* §§ 86001-86039. Sections 17906 and 18201-18208 apply to children's centers and child development programs. Sections 31191-31323 apply to day care centers. The day care centers' regulations are under revision. Sections 80001-81215 apply to the licensing of community care facilities such as day care facilities. Finally, Sections 86001-86039 apply to day care homes.

⁷ The federal day care regulations are known as the Federal Interagency Day Care Requirements (FIDCR). They are located at 45 C.F.R. §§ 71.1 to 71.20 (1978). The U.S. Dep't of HEW is currently revising the FIDCR. The federal government intended to release alternative sets of possible day care regulations in October of 1978. The release of these alternatives has been indefinitely delayed. Once released, public hearings across the United States will be held to solicit input. The federal government's reassessment of the proposals and the comments will lead to a Proposed Set of Regulations. After additional public comment, the federal government will issue the Final Regulations. OFFICE OF THE ASSISTANT SECRETARY FOR PLANNING AND EVALUATION, U.S. DEP'T HEW, THE APPROPRIATENESS OF THE FEDERAL INTERAGENCY DAY CARE REQUIREMENTS, at iii (1978) [hereinafter cited as the APPROPRIATENESS REPORT].

⁸ This article uses the term "day care programs" to mean publicly-subsidized programs, unless otherwise noted. "Publicly-subsidized licensed day care" refers to any day care program supported in whole or in part by local, state, or federal funds, and licensed under California law. "Private" programs are those supported entirely by parental fees or other non-governmental funds.

⁹ This article, except where noted, deals only with publicly-subsidized licensed day care programs. Private day care programs, while outside the scope of the present inquiry, play a significant part in California day care. There are 169,000 licensed spaces in private day care programs in California. The majority of these spaces are funded through non-public funds. Private day care programs are permitted flexibility that is denied to publicly-subsidized day care centers because private facilities that do not accept public funds do not have to comply with federal and state regulations, except licensing regulations. CHILD CARE AND DEVELOPMENT SERVICES REPORT, *supra* note 1, at 9.

vagueness and inflexibility of the federal regulations further increase the costs of day care programs. These costs discourage potential day care providers from entering the day care market, despite the availability of state and federal funds to meet day care costs.¹⁰ Consequently, there are not enough spaces available for California children who need low-cost day care.¹¹

This article examines the present funding and structure of publicly-subsidized day care programs in California. California and the federal government, which are the sources of those subsidies, impose extensive regulations upon day care programs. An examination of the regulations reveals two defects in the current regulatory structure which raise the cost of providing day care services: the vagueness of federal day care regulations and the substantial differences between state and federal regulations. In suggesting means to assure quality day care and to develop additional publicly-subsidized child care programs, this article will propose several reforms of the current structure.

I. CALIFORNIA DAY CARE PROGRAMS

Public and private day care programs are generally distinguishable according to their source of funds.¹² A private program is funded entirely from non-governmental sources, such as private foundation grants or parental fees. The basic characteristic of public day care programs is that they operate with state and federal funds, though they may receive a portion of their funds from private sources. Any parent receiving public assistance¹³

¹⁰ See text accompanying notes 22-40 *infra*.

¹¹ See note 1 *supra*.

¹² Day care programs can also be distinguished on the basis of the needs of the parents and children they serve. The factors that influence day care programs include the age of the children served, the hours of service, the specific needs of the children served, and the program's source of funds and applicable regulations. Individually, parents and children often have varying needs for child care services. For example, a day care program may serve only infants, preschool children, or disabled children. Another program may offer working parents extended day care for their children. OFFICE OF EDUCATIONAL LIAISON, CALIFORNIA HEALTH AND WELFARE AGENCY, CHILD CARE: THE FINAL REPORT 75 (1975) [hereinafter cited as CHILD CARE: THE FINAL REPORT].

¹³ The following families do not pay a fee for child care: (1) families who are currently eligible for AFDC or SSI/SSP payments; (2) income eligibles whose annual gross income for a family of four does not exceed \$9,582 (\$821 per month); and (3) persons needing child day care services for protection for their children regardless of income if they are actually receiving protective services for their children and the need for day care is established by the protective

qualifies for free publicly-subsidized child care for their children.¹⁴ In administering the distribution of federal funds the California State Department of Education (SDE) contracts with and subsidizes public and private day care providers throughout the state to establish day care programs.¹⁵ Depending upon a program's source of funds, it must comply with one or more sets of day care regulations.¹⁶ By attaching conditions to the receipt of public funds, the California and federal governments ensure that day care programs are designed to meet government formulated goals. The conditions attached to day care funding are also a means of ensuring quality and that day care services are provided at specified levels.¹⁷

Despite the number of children currently enrolled in publicly-subsidized day care programs, there is a significant unmet demand for additional day care.¹⁸ This need is demonstrated by the fact that in 1978 over 62,000 children were on day care center waiting lists.¹⁹ Even this figure understates the problem because waiting lists have been closed in many communities.²⁰ Another indication of the unmet demand for publicly-subsidized day care is the large number of families relying on private day care programs.²¹ Arguably, many of the families using private day care

services staff of the county welfare/social services department.

DEPT. OF SOC. SERV., ADULT AND FAMILY DIVISION, CALIFORNIA HEALTH AND WELFARE AGENCY, COMPREHENSIVE ANNUAL SERVICES PROGRAM PLAN, JULY 1, 1978-JUNE 30, 1979 at 126 (1978) [hereinafter cited as COMPREHENSIVE ANNUAL SERVICES PLAN].

¹⁴ *Id.*

¹⁵ CHILD CARE AND DEVELOPMENT SERVICES REPORT, *supra* note 1, at 6.

¹⁶ See text accompanying notes 41-67 *infra*.

¹⁷ Federal law provides that "no payment may be made under this section (Title XX) with respect to the provision of any child care services, unless in the case of care provided outside the child's home, the care meets the FIDCR as approved. . . ." 42 U.S.C.A. § 1397a(9)(A)(ii) (West Cum. Supp. 1978).

¹⁸ CHILD CARE AND DEVELOPMENT SERVICES REPORT, *supra* note 1, at 5.

¹⁹ OFFICE OF CHILD DEVELOPMENT, CALIFORNIA STATE DEPARTMENT OF EDUCATION, ANNUAL REPORT ON PUBLICLY-SUBSIDIZED CHILD CARE SERVICES 1977-78 at 19 (1978). Day care center is the term used in the federal regulations and refers to a program serving thirteen or more children for part of a twenty-four hour day. 45 C.F.R. § 71.3 (1978). A day care nursery is the California term which is substantially equivalent to a day care center and is defined as a facility serving more than ten children of varying ages in a non-residential setting. CAL. ADMIN. CODE, tit. 22, § 30019(c). Therefore, the term day care center is used throughout this article to refer to both centers and nurseries.

²⁰ CHILD CARE AND DEVELOPMENT SERVICES REPORT, *supra* note 1, at 15.

²¹ In 1977-78, there were over 169,000 licensed day care spaces in the private sector. CHILD CARE AND DEVELOPMENT SERVICES REPORT, *supra* note 1, at 9.

programs would use publicly-subsidized programs if spaces were available.

A. *Funding of Day Care Programs in California*

Federal funds are the major source of financial support for California day care programs.²² These funds are available from several federal programs.²³ The largest single federal expenditure for day care comes from Title XX of the Social Security Act.²⁴ Congress provides funds under Title XX to establish programs which help people become economically independent and which prevent the abuse and neglect of children.²⁵ To help the federal government attain these required Title XX goals in California, the California Legislature mandates that counties offer several social service programs, including day care services.²⁶

The channeling of Title XX funds to California is done in a circuitous manner. The funds come from the federal government to the California Health and Welfare Agency.²⁷ By state statute, however, the SDE is designated as the agency responsible for administering child care services.²⁸ By interagency agreement,²⁹ the SDE is authorized to spend Title XX funds but must certify to the Health and Welfare Agency that the funds are spent in

²² The federal share of direct financial support to publicly-subsidized day care in California in 1975 was over fifty percent of all funds spent in the state for day care. *CHILD CARE: THE FINAL REPORT*, *supra* note 12, at 56.

²³ Some of the federal programs providing funds for day care include: Consolidation of Educational Programs—Educational Innovation and Support, 20 U.S.C. § 1831 (1976); Youth Employment Demonstration Program, 29 U.S.C.A. § 894(a)(3)(K) (West Cum. Supp. 1978); Aid to Families with Dependent Children, 42 U.S.C. §§ 620-626 (1976); Work Incentive Program, 42 U.S.C. §§ 630-644, School Lunch Program—Child Care Food Program, 42 U.S.C.A. § 1766 (West 1978); Economic Opportunity Program, 42 U.S.C. §§ 2701-2996 (1976); Head Start, 42 U.S.C. §§ 2931-2933 (1976).

²⁴ In fiscal year 1977, approximately \$800 million from Title XX funds were spent nationally on day care. *See* note 2 *supra*.

²⁵ *See* note 3 *supra*.

²⁶ *COMPREHENSIVE ANNUAL SERVICES PLAN*, *supra* note 13, at 2, 63.

²⁷ *CHILD CARE: THE FINAL REPORT*, *supra* note 12, at 31-32. Title XX funds go to the California Health and Welfare Agency because the funds are designed to provide social services for welfare dependent persons. These funds do not go to the California State Department of Education because that department does not have responsibility for administering social services programs.

²⁸ *CAL. EDUC. CODE* § 8204 (West 1978).

²⁹ An interagency agreement is a contract between state agencies which sets out the responsibilities which each agency must perform. This article uses "contracting out" in reference to the existence of interagency agreements.

furtherance of Title XX goals.³⁰

California supplements in several ways the federal funds it receives for day care.³¹ Title XX requires that every three dollars of federal aid be matched by one dollar of state money.³² Besides matching funding, California has provided all the funds for the Alternative Child Care Programs.³³ The Alternative Child Care Program has encouraged innovative programs aimed at reducing day care costs. Day care costs under the Alternative Child Care Program have been reduced by using state funds, thus avoiding the costs imposed by federal regulations.³⁴ In addition, costs were reduced by waiving state Education Code requirements for certain day care services.³⁵

The state and federal governments also provide indirect assistance to parents in meeting day care costs through an income tax credit.³⁶ Families with child care expenses may subtract a percentage of those expenses from their federal and state income tax liability, regardless of whether the day care programs chosen are

³⁰ CAL. EDUC. CODE § 8206 (West 1978).

³¹ California subsidizes child care in three ways: (1) through a number of publicly-funded programs administered by the State Department of Education for low income families who are working; (2) through an "income disregard" system maintained by the State Department of Social Services which allows employed families on welfare to deduct child care expenses before their grant is computed and which serves sixty thousand children; and (3) through indirect assistance in the form of an income tax credit available mainly to working families of moderate and middle incomes. CHILD CARE DEVELOPMENT SERVICES REPORT, *supra* note 1, at 6. See text accompanying notes 36-40 *infra*.

³² 42 U.S.C.A. § 1397(a) (West Cum. Supp. 1978).

³³ In fiscal year 1977-78, California spent nearly eighteen million dollars on the Alternative Child Care Programs. OFFICE OF CHILD DEVELOPMENT, CALIFORNIA STATE DEPARTMENT OF EDUCATION, ANNUAL REPORT ON PUBLICLY-SUBSIDIZED CHILD CARE SERVICES 1977-78 at 87 (1978). The intent of the Alternative Child Care legislation is to design effective and economical methods for meeting the future requirements of California families eligible for subsidized child care. CAL. EDUC. CODE § 8400 (West 1978). See text accompanying notes 102-116 *infra*. The second major piece of legislation is the Child Development Act, CAL. EDUC. CODE §§ 8200-8397 (West 1978).

³⁴ See text accompanying notes 80-86 *infra*.

³⁵ CAL. EDUC. CODE § 8411 (West 1978). The requirements of the Child Development Act, *Id.* §§ 8200-8397 (West 1978), are not applicable to programs established under the Alternative Child Care Programs.

³⁶ CAL. REV. & TAX CODE § 17052.6 (West Cum. Supp. 1978) and I.R.C. § 44(a). Tax credits are computed according to the taxpayer's expenditures on child care in the relevant tax year. A percentage of the qualified expenditures is deductible from the taxpayer's tax liability, up to a specified maximum credit.

public or private.³⁷ The tax credit is used mainly by working parents in families with moderate and middle incomes.³⁸ By reducing the real cost of day care services, the tax credit provides a benefit to parents who might otherwise receive no financial assistance for day care costs.³⁹ Day care programs benefit from increased enrollment because the tax credit enables more parents to obtain day care services for their children. The combined tax credits are an important part of the total government support for California day care.⁴⁰

B. Regulatory Structure of California Day Care

The applicability of California and federal day care regulations⁴¹ depends upon the number of children served in a day care facility, as well as a program's source of funds. California regulates day care *centers*⁴² more exhaustively than day care *homes*,⁴³

³⁷ The federal tax credit is twenty percent of child care expenses up to two hundred dollars for one child and four hundred dollars for two children. The state tax credit for child care expenses may not exceed one hundred and twenty dollars per family. CHILD CARE AND DEVELOPMENT SERVICES REPORT, *supra* note 1, at 8.

³⁸ CHILD CARE AND DEVELOPMENT SERVICES REPORT, *supra* note 1, at 6.

³⁹ *Id.* at 44.

⁴⁰ The Internal Revenue Service estimates that the child care tax credit results in an annual forty-four million dollar loss to the United States Treasury. In California, the state Franchise Tax Board estimates a loss of nearly twelve million dollars annually. *Id.* at 6.

⁴¹ While the focus of this analysis is on federal and state regulation, local zoning regulations may foster or inhibit the development of day care programs within communities.

The current zoning of day care facilities raises three problems. First, local zoning regulations restrict day care facilities to a few areas within the community. *But see* City of Los Angeles v. Dep't of Health, 63 Cal. App. 3d 473, 133 Cal. Rptr. 771 (2d Dist. 1976) (A state statute designating family care homes serving mentally disordered persons as a residential use preempts municipal zoning regulations.) Second, it is often necessary to secure a conditional use permit for a facility, and as a result incur a significant time delay. Finally, rigid zoning standards are another cost disincentive to the creation of day care facilities. For example, it can be quite costly to comply with a large lot requirement in a residential district.

When a local regulation is more restrictive than state regulation, it can be a substantial impediment to the creation of a day care facility. To the extent local regulation is consistent with state regulation, it is duplicative and poses no additional barrier to the placement of day care centers or homes in communities. See OFFICE OF CHILD DEVELOPMENT, BUREAU OF CHILD DEVELOPMENT SERVICES, U.S. DEP'T HEW GUIDES FOR DAY CARE LICENSING 56-57 (1973).

⁴² See note 19 *supra*.

⁴³ Day care homes serve ten or less children in a residential setting. A family

which may serve no more than ten children. Both the California and federal regulations require publicly-funded programs to provide a variety of day care services, such as educational,⁴⁴ health,⁴⁵ nutritional,⁴⁶ and social services.⁴⁷

The minimum level of regulation for both publicly-subsidized and private day care programs is established by California's day care licensing requirements.⁴⁸ In California a license is required to operate any type of day care facility whether public or private.⁴⁹ The purpose of licensing is to protect the health and safety of all children receiving day care services.⁵⁰ Licensing regulations establish the standards for the personal care and supervision of children in day care programs.⁵¹

A second, and more extensive, level of regulation occurs when a day care provider uses state funds. If the provider contracts with the SDE to provide services under the Child Development Act,⁵² sections of the California Education Code⁵³ and the California Administrative Code apply.⁵⁴ The Education Code requires child care facilities under the Child Development Act to provide child developmental activities, social services, health screening, and nutritional services.⁵⁵ The California Administrative Code

or small day care home serves up to six children. With more than one adult present, a family day care home may serve up to twelve children. CAL. ADMIN. CODE, tit. 22, § 86029.

⁴⁴ 45 C.F.R. § 71.14 (1978). CAL. EDUC. CODE § 8211(a) (West 1978).

⁴⁵ 45 C.F.R. § 71.16 (1978). CAL. EDUC. CODE § 8211(h), (i), (j) (West 1978).

⁴⁶ *Id.*

⁴⁷ 45 C.F.R. § 71.15 (1978). CAL. EDUC. CODE § 8211(g) (West 1978).

⁴⁸ The California Community Care Facilities Act details licensing regulations for a day care center. The Act covers the entire process from the filing of the license application to the suspension and revocation of a license. Any violation of the regulations may result in revocation or suspension of a license. These regulations do not impair the flexibility under the Alternative Child Care Programs. See CAL. HEALTH & SAFETY CODE, §§ 1500-1565 (West Cum. Supp. 1978).

⁴⁹ CAL. HEALTH & SAFETY CODE § 1503 (West Cum. Supp. 1978).

⁵⁰ CAL. HEALTH & SAFETY CODE § 1501(b)(5) (West Cum. Supp. 1978). In a day care home, licensing and inspection are more important than in a publicly-run day care center because the probability of other significant contact with the State is minimal. The increased significance of the licensing and inspection program also occurs where a program is operated under the provisions of the Alternative Child Care Program legislation because of the waivers available under that legislation.

⁵¹ *Id.* § 1531 (West Cum. Supp. 1978).

⁵² CAL. EDUC. CODE §§ 8200-8397 (West 1978).

⁵³ *Id.*

⁵⁴ CAL. ADMIN. CODE, tit. 5, §§ 18201-18208.

⁵⁵ CAL. EDUC. CODE § 8211 (West 1978).

sets out teacher-child and adult-child ratios.⁵⁶ These regulations apply in addition to the licensing requirements faced by all day care programs. The services required under these regulations are more extensive than those required by the licensing standards, which only make minimal provision for the health and safety of children in day care programs.

The degree of state regulation of publicly-subsidized day care programs in California varies according to the number of children enrolled in a program. Fewer state regulations apply to a day care home, where ten or fewer children are served,⁵⁷ than to a day care center, where more than ten children are served. For example, while state regulations for day care centers set a minimum square footage requirement for indoor play space,⁵⁸ they set no express requirement for play space in day care homes.⁵⁹ In contrast, except for staffing ratios,⁶⁰ federal regulations make no distinction based on the size of day care programs.⁶¹ Still, state day care regulations are not the maximum level of day care regulation that a day care provider encounters.

Day care providers face the maximum level of day care regulation when receiving both federal and state funds. With the exception of the Alternative Child Care Programs, almost all publicly-subsidized California day care programs rely upon federal funds.⁶² Receipt of Title XX funds requires compliance with the Federal Interagency Day Care Requirements (FIDCR),⁶³ as well as state regulations. The Secretary of the United States Department of Health, Education and Welfare (HEW) and the Director of the United States Office of Economic Opportunity promulgated the FIDOR in 1968 as a means of standardizing and coordinating the day care programs administered by those two departments.⁶⁴

⁵⁶ CAL. ADMIN. CODE, tit. 5, §§ 18203-18206.

⁵⁷ See note 6 *supra*.

⁵⁸ CAL. ADMIN. CODE, tit. 22, § 31304.

⁵⁹ *Id.* § 31190.2.

⁶⁰ See text accompanying notes 117-122 *infra*.

⁶¹ 45 C.F.R. § 71.3 (1977).

⁶² See note 6 *supra*.

⁶³ See note 17 *supra*. The Comprehensive Employment and Training Act of 1973, 29 U.S.C.A. §§ 802-993(i) (West Cum. Supp. 1978), 29 C.F.R. § 79a (1977), the National School Lunch Act, 42 U.S.C.A. §§ 1751-1769(a) (West 1978), 7 C.F.R. § 226 (1978), and the Head Start Economic Opportunity and Community Partnership Act of 1974, 42 U.S.C.A. §§ 2701-2996(1) (West Cum. Supp. 1978), Office of Child Development, U.S. Dep't HEW, Head Start Program Performance Standards (1975), all have separate regulations governing the day care programs that they fund.

⁶⁴ Economic Opportunity Amendments, Pub. L. No. 90-222, § 107(a), 81 Stat.

While California regulations generally parallel the FIDCR in the services required, there are substantial differences between the terms of state and federal day care regulations.⁶⁵

Thus, the current funding structure of day care potentially requires compliance with several levels of day care regulations. Private day care programs are subject to the minimal regulation while programs receiving state and federal funds are subject to greater levels of control.⁶⁶ The necessity of complying with both state and federal regulations raises the possibility that day care providers will be burdened by excessive or conflicting government controls. The cost implications of these controls, in turn, may defeat the basic objective of providing low cost day care for working families.

II. COST CONSEQUENCES OF DAY CARE REGULATION

California day care providers are faced with significant costs due to the burdens imposed by federal and state day care regulations. These costs are due in large part to the extensiveness of the regulations, and the vagueness and inflexibility of the FIDCR. The costs of complying with the regulations inhibit qualified day care providers from entering the day care market and from satisfying the interests of the parties involved in day care.

The interests of the groups involved in day care generally coincide. The federal government, the State of California, parents, and children are all interested in seeing that children are cared for in an environment that is safe and conducive to educational and personal development.⁶⁷ Both the government and parents

713 (1967) (current version at 42 U.S.C.A. § 2932 (West Cum. Supp. 1978)) directed the Secretary of the U.S. Dep't HEW and the Director of the Office of Economic Opportunity to "take all necessary steps to coordinate programs under their jurisdiction which provide day care, with a view to establishing, insofar as possible, a common set of standards and regulations, and mechanisms for coordination at the state and local levels."

⁶⁵ See text accompanying notes 91-93, 99-101, 117-122 *infra*.

⁶⁶ The FIDCR apply only to programs receiving federal funds. Consequently, a private day care center or home funded entirely from parental fees would not directly face these cost consequences. To the extent, however, that parents seek out programs which comply with the FIDCR, a private program will be forced to offer similar services to remain competitive. CHILD CARE AND DEVELOPMENT SERVICES REPORT, *supra* note 1, at 9.

⁶⁷ The FIDCR reflect the interest in quality day care by detailing a wide range of required services for programs receiving federal funds. See 45 C.F.R. §§ 71.13 to 71.18 (1978). The parallel provisions in the California regulations are found in CAL. EDUC. CODE § 8201 (West 1978).

are additionally interested in providing an adequate number of day care facilities, reducing the welfare dependency of parents,⁶⁸ and seeing that public funds are spent prudently.⁶⁹ Day care providers must address these interests in order to meet their goal of providing profitable, cost-effective, quality day care.

The poor draftsmanship of current federal day care regulations and their divergence from state standards prevents uniformity in day care regulation. One problem is that day care providers face a dilemma in interpreting the Federal Interagency Day Care Requirements. This is because many sections of the FIDCR are so vague that day care providers who strictly interpret them will incur significant costs. A looser interpretation of the same sections, on the other hand, may result in the provision of low quality services.⁷¹ A second problem arises from the substantial inconsistencies between the FIDCR and California's regulations.⁷² Both of these problems lead to increased day care costs and tend to discourage the establishment of publicly-subsidized day care programs, as evidenced by the substantial number of children who cannot be served by current publicly-subsidized day care programs.⁷³

A. *Vagueness of the FIDCR.*

Many of the FIDCR are vague as to the specific nature of the services required. The wide range of possible interpretations of the FIDCR can lead to high costs for day care providers who strictly interpret the federal regulations or to inadequate services

⁶⁸ Title XX of the Social Security Act authorizes States to spend federal funds directed at eliminating parental dependency on the federal government. See note 3 *supra*. By offering Title XX funds to day care providers, the federal government can improve the parents' ability to accept employment opportunities.

⁶⁹ The State is required to prepare an annual social services plan detailing planned expenditures of Title XX funds. This reflects the federal government's interest in how federal funds are spent. 45 C.F.R. § 228.5 (1978).

⁷⁰ This section deals primarily with the FIDCR's cost consequences because federal funds requiring compliance with the FIDCR are the major source of financial support to California day care programs.

⁷¹ See text accompanying notes 80-87 *infra*.

⁷² See text accompanying notes 91-93, 99-101, 117-122 *infra*.

⁷³ In 1978 one million children had working mothers and were not old enough to care for themselves. Approximately one-third of these children were eligible for full or partially-subsidized care. There are, however, only 129,000 publicly-subsidized day care spaces in California, leaving 237,000 children in need of subsidized care. CHILD CARE AND DEVELOPMENT SERVICES REPORT, *supra* note 1, at 5.

for parents and children if a day care provider minimally interprets the regulations.⁷⁴

Four examples illustrate the vague language of the FIDCR and the potential costs of that vagueness. The requirement that "adequate and nutritious meals" be served is one such example.⁷⁵ The difficulty arises in determining what constitutes an adequate and nutritious meal. The FIDCR do not define that phrase.⁷⁶ Compliance with the nutrition requirement might entail either meeting the recommended dietary allowances established by the National Academy of Sciences⁷⁷ or merely supplying foods with some minimal nutritional value.⁷⁸ The latter interpretation may not promote the nutritional well-being of children to the same extent as meeting the recommended dietary allowances. In addition, day care centers that provide marginally nutritious meals may be jeopardizing their government funding.⁷⁹ Yet, a strict interpretation entails great expense. HEW estimates that a comprehensive day care food service, which includes breakfast and lunch, would increase the costs of a day care program \$180 to \$240 per child per year.⁸⁰

⁷⁴ Parents cannot easily avoid this problem by sending their children to other centers because information about available day care services is often inadequate. UNCO., INC., AN EVALUATION OF DAY CARE IN REGION X, A DAY CARE ACTION PLAN FOR REGION X, at I-11 (1973) (NTIS PB-221 453). The state established limited referral services to deal with this problem. OFFICE OF CHILD DEVELOPMENT, CALIFORNIA STATE DEPARTMENT OF EDUCATION, ALTERNATIVE CHILD CARE PROGRAMS 1976-77, A REPORT TO THE CALIFORNIA LEGISLATURE AND THE GOVERNOR, at 4, 7 (1977). Further, transportation costs to other centers may also discourage parents from selecting other day care programs. The FIDCR recognizes that proximity to day care centers and transportation costs are important to parents. See 45 C.F.R. § 71.13 (a)(2)(i), (ii) (1978).

⁷⁵ The health and nutrition services requirement states in part that "the facility must provide adequate and nutritious meals and snacks prepared in a safe and sanitary manner. Consultation should be available from a qualified nutritionist or food service specialist." 45 C.F.R. § 71.16(g) (1978).

⁷⁶ In contrast, California defines nutritionally adequate meals, thus resolving the problem when only state funds are used. CAL. EDUC. CODE § 8211(j) (West 1978).

⁷⁷ NATIONAL ACADEMY OF SCIENCES, RECOMMENDED DIETARY ALLOWANCES (8th rev. ed. 1974).

⁷⁸ APPROPRIATENESS REPORT, *supra* note 7, at 72, 115.

⁷⁹ Title XX stipulates that noncompliance with the FIDCR will result in loss of federal funds. See note 17 *supra*. This penalty has never been imposed because the FIDCR's vague language has made it difficult to determine what constitutes compliance. APPROPRIATENESS REPORT, *supra* note 7, at 151.

⁸⁰ APPROPRIATENESS REPORT, *supra* note 7, at 115. See also Comment, *School Lunch and Breakfast Programs During the Seventies*, this issue.

Similarly, the nutrition regulation also requires that consultation services of a food specialist or nutritionist be available to day care providers.⁸¹ Federal regulations do not clearly state whether day care programs must hire a full-time nutritionist or if they may meet the requirement by consulting an outside nutritionist. As a result, day care providers may not be adequately seeking needed advice on nutritional planning.

Another example of the cost problems created by the FIDCR's language is found in the regulation requiring social services. Social services include supportive services, apart from actually caring for a child, that enhance the family as a unit as well as the child.⁸² The FIDCR state that social services must be provided but are unclear as to what kind of social services these should be.⁸³ Day care programs that attempt to comply with this requirement by offering a wide variety of services, such as assistance in obtaining community benefits, bear significant costs.⁸⁴ Conversely, programs that attempt to comply with the social services regulation by merely providing family counseling run the risk of losing fed-

⁸¹ See note 75 *supra*.

⁸² APPROPRIATENESS REPORT, *supra* note 7, at 82. The types of social services offered generally include counseling on child development and family problems, assistance in obtaining financial aid and food stamps, and assistance in obtaining community services. *Id.* at 83.

⁸³ The FIDCR's "Social Services" requirement states:

(a) Provision must be made for social services which are under the supervision of a staff member trained or experienced in the field. Services may be provided in the facility or by the administering or operating agency. . . .

(c) Counseling and guidance must be available to the family to help it determine the appropriateness of day care, the best facility for a particular child, and the possibility of alternative plans for care. The staff must also develop effective programs of referral to additional resources which meet family needs.

(d) Continuing assessment must be made with the parents of the child's adjustment in the day care program and of the family situation.

(3) There must be procedures for coordinating and cooperation with other organizations offering those resources which may be required by the child and his family.

45 C.F.R. §§ 71.15(a), (c), (d), (e) (1978).

⁸⁴ The U.S. Dep't of HEW concluded that when the FIDCR are interpreted to mean that all children and their families must be provided with a variety of social services, including family counseling, costs will be greater than if the requirement calls only for referral to food stamp or other public agencies. APPROPRIATENESS REPORT, *supra* note 7, at 113.

eral funds.⁸⁵ In either case, needed day care spaces may be eliminated through increased costs or by closing facilities.

A final example of the cost consequences of the FIDCR's vagueness is its regulation of day care staff training. The FIDCR require some form of staff training, but the nature and duration of such training is not specified.⁸⁶ The cost of training day care staff may vary greatly depending upon the type of training offered. For example, a three unit one-year course for each staff member could cost less than ten dollars per child, while a training program conducted during working hours could cost an additional fifty dollars annually per child.⁸⁷ A day care provider is burdened with excessive costs by complying with the FIDCR to a greater extent than presumably necessary, yet children and parents may receive insufficient services if the provider chooses the minimal interpretation.

The FIDCR's vague language leads to confusion and indecision of day care providers about the required level of day care services.⁸⁸ This confusion adversely affects the interests of all groups involved in day care. Where the FIDCR's language results in inadequate care, the interests of all parties in promoting quality day care is defeated, and the federal funds are poorly spent. In contrast, where the FIDCR are interpreted more strictly, parents and federal and state governments must pay for the high costs of that result, and fewer day care providers can afford to enter the publicly-subsidized day care market.

The FIDCR's vagueness inhibits the establishment of quality day care programs because it creates cost uncertainties for day care providers.⁸⁹ Day care providers cannot intelligently decide

⁸⁵ See note 17 *supra*.

⁸⁶ The FIDCR staff training requirement states in part: "(a) The operating agency must provide . . . orientation, continuous inservice training, and supervision for all staff involved in a day care program—professionals, nonprofessionals, and volunteers—in general program goals as well as specific program areas. . . ." 45 C.F.R. § 71.17(a) (1978).

⁸⁷ APPROPRIATENESS REPORT, *supra* note 7, at 110. This figure is based upon two hours of training per week for each staff person. Training costs also depend upon instructor salaries, materials used, and the time trainees spend in the program. *Id.*

⁸⁸ APPROPRIATENESS REPORT, *supra* note 7, at xxix.

⁸⁹ See APPROPRIATENESS REPORT, *supra* note 7, at 160, 163. In California, day care providers have been similarly deterred from establishing day care homes because of the regulations they must comply with. GOVERNOR'S ADVISORY COMMITTEE ON CHILD DEVELOPMENT PROGRAMS, CHILD CARE LICENSING AND REGULATION: A REPORT BY THE GOVERNOR'S COMMITTEE ON CHILD DEVELOPMENT PROGRAMS 10 (1978).

how to budget their operation including staff, facilities, and supplies, because any decision regarding the required level of services is subject to modification due to a later interpretation by a state or federal administrator.⁹⁰ Faced with this uncertainty, potential day care providers cannot accurately predict the costs of operating a day care facility and, thus, are discouraged from establishing day care programs.

B. Inflexibility of Federal Day Care Regulation

Inflexible federal day care regulations have led California to develop standards that differ significantly from federal regulations to mitigate the costs faced by day care providers. The FIDCR rigidly apply to all types of day care facilities regardless of the number of children served.⁹¹ The California regulations, however, distinguish between types of day care facilities.⁹² Moreover, California has dealt with high federal staffing ratios by developing state-funded programs with less stringent standards.⁹³

As with any conflict between state and federal laws, the question of whether federal day care regulations preempt the state regulations must be considered in attempting to resolve any differences between them. Where a direct conflict exists between federal and state regulations in an area of enumerated federal power, the supremacy clause of the United States Constitution⁹⁴ mandates that federal law preempt state regulation. Where no direct conflict exists, the Supreme Court will examine whether the state regulation facilitates or detracts from the federal statute's purpose.⁹⁵ Moreover, a state regulation which detracts from a federal statute's purpose will be invalidated.

⁹⁰ Because noncompliance is determined by the administering state agency, a day care provider's determination of the appropriate level of services is subject to later modification. See 45 C.F.R. § 71.6(a) (1978).

⁹¹ The FIDCR's "types of facilities" requirement describes the three major types of day care facilities which communities may use. The facilities are the family day care home, the group day care home, and day care centers. 45 C.F.R. § 71.10 (1978). See notes 19, 43 *supra*.

⁹² See notes 57-61 and accompanying text *supra*.

⁹³ See notes 118-119 and accompanying text *supra*.

⁹⁴ U.S. CONST. art. VI, cl. 2.

⁹⁵ See generally, J. NOWAK, R. ROTUNDA, AND J. YOUNG, CONSTITUTIONAL LAW 269 (1978); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 377-86 (1978).

⁹⁶ In *King v. Smith*, 392 U.S. 309 (1968), the United States Supreme Court invalidated a state regulation which disqualified a dependent child from receiving payments under the Aid to Families with Dependent Children Program (AFDC) if the child's mother lived with an able-bodied man. The payments

Where state day care regulations are preempted by federal regulation, California's ability to develop quality, innovative, and cost-effective programs is restricted. The United States Supreme Court has held that where a state receives payment as part of a federally-financed program, state regulation of that program may not conflict with federal law and policy.⁹⁶ Payments to the states for day care programs under Title XX are part of a federally-financed program.⁹⁷ In coordinating these programs, the FIDCR specify the conditions under which state agencies agree to contract for services under Title XX.⁹⁸ No state standards which conflict with the FIDCR may be imposed on programs receiving Title XX funds. Thus, California retains little opportunity to create flexible approaches to the regulation of day care.

Conflict between federal and state regulations arises in part because each takes a different approach to regulating small day care facilities. California day care regulations place fewer restrictions upon day care homes than upon larger day care centers.⁹⁹ The reason for this distinction is that California recognizes that day care *homes* accommodate fewer children than day care *centers* and that parents can more readily evaluate the provisions made for their children's health and safety in such smaller facili-

were part of a federally-financed program, which did not limit payments as the state did. The regulation, therefore, was held invalid as conflicting with federal law and policy.

King was followed by three Supreme Court decisions, which reaffirmed that a state program restricting eligibility for Social Security payments beyond what was intended by Congress is invalid because of its inconsistency with the Social Security Act; *Lewis v. Martin*, 397 U.S. 552 (1970) (Plaintiffs, AFDC beneficiaries, sought to invalidate a California statute and regulation which provided that a child's resources included the income of a nonadopting stepfather. The Court held the provisions inconsistent with a federal regulation requiring proof of actual contributions to dependent children); *Townsend v. Swank*, 404 U.S. 282 (1971) (Plaintiffs, two college students and their mothers, alleged that an Illinois statute prohibiting children attending a college or university from qualifying for AFDC benefits, was invalid on equal protection and supremacy grounds. The Court held that the Illinois statute conflicted with federal law, which did not restrict the AFDC eligibility of college age dependents. The Illinois statute was therefore invalid under the supremacy clause.); *Carleson v. Remillard*, 406 U.S. 598 (1972) (Plaintiffs, a mother and her child, sought injunctive relief from a California statute denying eligibility for AFDC benefits where a parent was absent from the home for military service. The Court held the statute invalid as conflicting with the Social Security Act.)

⁹⁷ See note 17 *supra*.

⁹⁸ APPROPRIATENESS REPORT, *supra* note 7, at 136.

⁹⁹ See note 6 *supra*.

ties.¹⁰⁰ The FIDCR, by comparison, apply to all types of day care facilities using federal funds regardless of the program's size.¹⁰¹ Thus, the uniform applicability of the FIDCR precludes California from treating federally-subsidized day care homes in a less-regulated manner.

State-subsidized day care homes are less extensively regulated than day care homes which must comply with the FIDCR. California regulations do not mandate that day care homes provide social services, staff training, or opportunities for parental involvement, all of which are required by the FIDCR.¹⁰² In addition, while the FIDCR require that a qualified physician supervise the health of the children in a day care home,¹⁰³ California merely requires that the head of a day care home attend to the health of children.¹⁰⁴ To the extent these services are unnecessary in a day care home,¹⁰⁵ the inflexibility of the FIDCR results in additional costs to day care providers.

In an attempt to alleviate the burdensome costs of both federal and state day care regulation, California has adopted an Alternative Child Care Program. The program has sought to encourage the development of economical means of meeting the demand for quality day care.¹⁰⁶ Economical day care programs have been created under this program because they have been entirely state-funded and, thus, the FIDCR have not been applicable to them. Moreover, the Alternative Child Care programs have been exempted from the services required under the Child Development Act.¹⁰⁷ The SDE has also been permitted to waive other Education Code requirements for these programs.¹⁰⁸ For example, the Children's Home Society of Orange County, California, has offered developmental activities, but has not provided the meal services required by the FIDCR or the California regulations.¹⁰⁹

¹⁰⁰ GOVERNOR'S ADVISORY COMMITTEE ON CHILD DEVELOPMENT PROGRAMS, CHILD CARE LICENSING AND REGULATION: A REPORT BY THE GOVERNOR'S COMMITTEE ON CHILD DEVELOPMENT PROGRAMS 10 (1978).

¹⁰¹ 45 C.F.R. § 71.3(d) (1978).

¹⁰² See 45 C.F.R. §§ 71.15, 71.17, 71.18 (1978).

¹⁰³ 45 C.F.R. § 71.16(a) (1978).

¹⁰⁴ CAL. ADMIN. CODE, tit. 22, § 31177.

¹⁰⁵ A person trained in first aid should be able to handle most situations that arise in a day care home. A child's personal physician or a physician "on call" could handle more serious problems.

¹⁰⁶ CAL. EDUC. CODE § 8400 (West 1978).

¹⁰⁷ *Id.* § 8411.

¹⁰⁸ *Id.*

¹⁰⁹ OFFICE OF CHILD DEVELOPMENT, CALIFORNIA STATE DEPARTMENT OF EDUCATION, ALTERNATIVE CHILD CARE PROGRAMS 1976-77, A REPORT TO THE CALIFORNIA

While day care providers have been able to offer fewer services, they are still held to certain standards of quality by applicable state regulations for the services they have provided. Thus, program flexibility has enabled day care providers to offer lower cost day care services while maintaining quality in the area of services offered.

The Alternative Child Care Programs have resulted in significant cost savings.¹¹⁰ The average hourly cost of providing child care under the Alternative Child Care Programs has been \$1.20 per hour, as compared with \$1.74 per hour for other publicly-subsidized programs for comparable quality day care services.¹¹¹ This thirty-two percent difference in cost is derived from preliminary data, but it suggests that the Alternative Child Care Programs could successfully serve thousands of additional children in quality day care programs at current expenditure levels.¹¹²

The Alternative Child Care Program has been of limited value because it was only a small part of California's day care efforts. In fiscal year 1977-78, this program served over eleven thousand children.¹¹³ This figure represented only seven percent of the total number of children in California's publicly-subsidized day care programs.¹¹⁴ Moreover, the program expired on June 30, 1979.¹¹⁵

LEGISLATURE AND THE GOVERNOR, at A-4 (1977) [hereinafter cited as ALTERNATIVE CHILD CARE PROGRAMS REPORT].

¹¹⁰ OFFICE OF CHILD DEVELOPMENT, CALIFORNIA STATE DEPARTMENT OF EDUCATION, ANNUAL REPORT ON PUBLICLY-SUBSIDIZED CHILD CARE SERVICES 1977-78, at 83 (1978) [hereinafter cited as REPORT ON PUBLICLY-SUBSIDIZED CHILD CARE SERVICES]. These figures represent a weighted average of the costs of infant care and care for children over two years of age. For infants, the Alternative Child Care cost was \$1.34 per hour, versus \$2.05 per hour of general child care. The cost differential in caring for children over two years of age is similar; the Alternative Child Care cost was \$1.12 per hour, versus \$1.65 per hour of general child care.

¹¹¹ *Id.*

¹¹² In April 1978 over 112,500 children were enrolled in some type of publicly-subsidized child care in California. CHILD CARE AND DEVELOPMENT SERVICES REPORT, *supra* note 1, at 6. In that same month over 62,000 children were on waiting lists for child care. REPORT ON PUBLICLY-SUBSIDIZED CHILD CARE SERVICES, *supra* note 110, at 19. If the thirty-two percent savings of the Alternative Child Care Programs could be duplicated statewide, an additional 19,840 children could be accommodated with current expenditures.

¹¹³ REPORT ON PUBLICLY-SUBSIDIZED CHILD CARE SERVICES, *supra* note 110, at 88.

¹¹⁴ CHILD CARE AND DEVELOPMENT SERVICES REPORT, *supra* note 1, at 6, 8.

¹¹⁵ CAL. EDUC. CODE § 8400 (West 1978). Two bills have been introduced which would extend the provisions of the Alternative Child Care Programs. Among its other provisions, S.B. 863, introduced by State Senator Alan Sieroty, sought to eliminate the June 30, 1979 termination date of the programs. See S.B. 863, Cal.

Because the Alternative Child Care Program was cost-effective and responsive to community needs, the California Legislature should reinstitute its provisions. This action would continue California's efforts to minimize the cost burdens imposed by federal and state day care regulations.¹¹⁶

Staffing ratios represent another major area where substantial differences between state and federal regulations may result in increased costs for day care providers. These ratios prescribe the number of qualified staff that must be present to supervise a given number of children.¹¹⁷ The federal staffing ratios are higher than the California standards,¹¹⁸ and federal programs generally require payment of higher wages to day care staff.¹¹⁹ A center

Leg. Reg. Sess. (1974). A.B. 460, by Assemblyman William Lockyer, would indefinitely extend the authorization for the Alternative Child Care Programs. See A.B. 460, Cal. Leg. Reg. Sess. (1979). Neither bill has yet become law.

¹¹⁶ The additional cost caused by the FIDCR and the California day care regulations is significant. The FIDCR require day care facilities to conform to local fire and building codes. 45 C.F.R. § 71.13 (1978). The federal government, however, does not subsidize the capital expenses of developing a day care program. ALTERNATIVE CHILD CARE PROGRAMS REPORT, *supra* note 109, at 6.

California has only recently made funds available under the Alternative Child Care Programs to meet minor capital costs. CAL. EDUC. CODE § 8435 (West 1978). The impact of this funding is limited because the funds available to meet capital costs amount to one-half of one percent of annual California child care expenditures. For fiscal years 1976-77 and 1977-78, a total of \$684,000 was allocated to minor capital expenses. By comparison, in 1977-78 nearly \$180,000,000 were spent in California on subsidized child care. The Alternative Child Care Programs funds are spent only on "minor" capital outlays, which are renovations bringing facilities into compliance with local and state health and safety standards. REPORT ON PUBLICLY-SUBSIDIZED CHILD CARE SERVICES, *supra* note 110, at 97.

¹¹⁷ APPROPRIATENESS REPORT, *supra* note 7, at 296-97.

¹¹⁸ This table illustrates the differences between the California and federal adult-child ratios that apply to day care centers:

Ages	Infants	3-4	4-6	6-14
California	1:4	1:7	1:8	1:15 or 1:20
Federal	N/A	1:5	1:7	1:10

45 C.F.R. § 71.11(c) (1978), CAL. ADMIN. CODE, tit. 5, § 18204. California specifies adult-child ratios for age groups that differ slightly from the groups used in the federal ratios. The age groups in the California day care regulations are: infants, preschool children, kindergarten children, and grade-school children. These terms are defined in CAL. ADMIN. CODE, tit. 5, § 18201.

¹¹⁹ Wages are higher in federally-funded day care programs than in only state subsidized or private programs because federal reimbursement policies make it

using federal funds, rather than parental fees and state funds exclusively, therefore, will face higher costs. The increase in the cost of complying with the FIDCR staffing ratios over the cost of private day care ranges from \$153 to \$290 per child annually.¹²⁰ California's ratios indicate that the State believes the additional costs imposed by the federal ratios are not justified by the benefits received from that expense. Moreover, federal funding is insufficient to cover all of these costs thus leaving the state and parents with a greater financial burden.¹²¹ The result of this burden imposed by the staffing ratios is that nearly thirty percent of California day care centers receiving federal funds are not in compliance with the FIDOR staffing ratios.¹²²

The California Legislature has attempted to alleviate the burdens imposed by the federal staffing ratios by adopting a "buy-out" plan.¹²³ The buy-out plan works by replacing federal Title XX funds with state funds in designated day care programs. By only using state funds, the day care programs are required to meet only the lower state staffing ratios. The SDE determines which day care programs receive buy-out funds¹²⁴ on the basis of

easier to pass through wage increases. Additionally, federally-subsidized programs generally have more full-time staff, thus adding to total program wage costs. APPROPRIATENESS REPORT, *supra* note 7; at 125.

¹²⁰ APPROPRIATENESS REPORT, *supra* note 7, at 107-8. Estimates of the cost of compliance with the FIDCR staffing ratios vary according to the assumptions made about wages.

¹²¹ The federal government recognizes the cost implications of the staffing ratios, and under certain circumstances, the ratios may be waived. To obtain a waiver, a day care center must comply with state staffing requirements, and must serve few Title XX children. "Few Title XX children" means either five or fewer children, or not more than twenty percent of the total number of children that the center serves. 45 C.F.R. § 228.42(c)(2)(i) (1978).

In *Stiner v. Califano*, 432 F.Supp. 796 (W.D. Okla. 1977), a group of parents and day care operators, in seeking to avoid the burden imposed by the federal staffing ratios, challenged the ratios' constitutionality. The Court held that the Title XX and FIDCR provisions for staffing ratios were an authorized and valid exercise of Congressional power. The plaintiffs argued that implementation of the staffing ratios, 42 U.S.C.A. § 1397a(9) (A) (West Cum. Supp. 1978), and 45 C.F.R. § 228.42 (1978), would violate the due process clauses of the fifth and fourteenth amendments. The court held that there is a rational basis for the staffing ratios, and therefore the ratios do not deny operators of day care centers and parents due process. *Id.* at 800, 802.

¹²² APPROPRIATENESS REPORT, *supra* note 7, at 155.

¹²³ REPORT ON PUBLICLY-SUBSIDIZED CHILD CARE SERVICES, *supra* note 110, at 109.

¹²⁴ Because the SDE is the single state agency that is responsible for the provision of day care and that, under interagency agreement, disburses and

the program's burden of complying with the FIDCR. The federal funds made available by the state buy-out plan are then spent on other programs designed to fulfill Title XX programs.¹²⁵ As a result of the buy-out plan, California provides more child care without an increase in costs by avoiding the burden of complying with the FIDCR staffing ratios.¹²⁶ This plan, however, accounts for less than ten percent of the amount spent on publicly-subsidized day care in California,¹²⁷ thus minimizing its potential impact on relieving the cost burdens imposed by the FIDCR staffing ratios. Despite the small size of the program, it is one method of resolving the costs imposed by the federal staffing ratios.

Although California is not entirely preempted from regulating day care, where programs utilize federal funds, California's ability to regulate day care and to minimize day care costs is restricted. The uniform and inflexible application of the FIDCR generally and the federal staffing ratios specifically increase the cost of day care to state and federal governments, day care providers, and parents. California has taken a different approach to these requirements in programs not receiving federal funds in an attempt to provide quality day care and to avoid the costs imposed by the FIDCR. Any meaningful attempt to reconcile differing day regulations, however, must take place at the federal level because the problems in day care regulation arise due to the preemptive conditions imposed upon programs receiving federal funds.

III. PROPOSAL FOR REFORM: ENHANCED PROGRAM FLEXIBILITY

In California, efforts to meet the need for quality day care at reasonable cost have been hampered by several problems. These problems arise from the nature, scope, and implementation of regulations governing publicly-subsidized day care programs. The FIDCR's vagueness and the differences between federal and state regulations result in significant cost consequences for day

accounts for federal funds under Title XX, it has the authority to make the determinations regarding which programs receive buy-out funds. See CAL. EDUC. CODE §§ 8204, 8206 (West 1978).

¹²⁵ REPORT ON PUBLICLY-SUBSIDIZED CHILD CARE SERVICES, *supra* note 110, at 109.

¹²⁶ From the savings of the buy-out plan an additional 1,171 children per year received subsidized care during fiscal years 1976-77 and 1977-78. *Id.*

¹²⁷ In fiscal year 1977-78, of the nearly \$181 million spent on subsidized child care services in California, only fifteen million dollars was spent in the buy-out program. *Id.* at 75.

care providers.¹²⁸ California has sought to deal with these problems in a limited way through the Alternative Child Care Programs¹²⁹ and the buy-out plan.¹³⁰ Greater flexibility in federal day care regulations is needed to alleviate these problems.

Congress should adopt a program changing the federal and state governments' role in day care regulation and administration. Enhanced Program Flexibility (EPF) is a program designed to deal with the differences between state and federal regulations and with the problems generated by the scope and vagueness of the FIDCR.¹³¹ The main features of the EPF model chosen by the state is that day care providers have the option of either choosing from among several day care services or the level at which the services are provided. With this flexibility, EPF enables a day care provider to achieve cost savings while maintaining the quality of day care.

The state¹³² can operate EPF under three different models.¹³³ The first model requires the provision of certain services such as education, health, or nutrition, but each day care provider could determine the level or quantity of those services. Therefore, if the state mandates educational services, then day care providers

¹²⁸ See text accompanying notes 74-127 *supra*.

¹²⁹ See text accompanying notes 102-116 *supra*.

¹³⁰ See text accompanying notes 123-127 *supra*.

¹³¹ The philosophy of EPF is partly seen in the waiver provisions of both the Alternative Child Care Programs legislation and in the FIDCR. The Alternative Child Care Programs legislation seeks to test potential cost reducing features. The Alternative Child Care Programs provide for the waiver of several sections of the Child Development Act. CAL. EDUC. CODE § 8411 (West 1978). To obtain a waiver from the FIDCR, a program must "advance innovation and experimentation, and extend services without loss of quality. . . ." 45 C.F.R. § 71.4 (1978). This provision is less specific than the California legislation, but it offers some opportunity to make changes in the services offered by a day care program. The practical effect of a waiver from the FIDCR is unknown because a waiver has rarely been extended. UNCO, INC., AN EVALUATION OF DAY CARE IN REGION X, A DAY CARE ACTION PLAN FOR REGION X, at I-5 (1973) (NTIS PB-221 453).

¹³² EPF should benefit any state which is experiencing day care problems similar to California's. States' day care problems are largely due to the vagueness and inflexibility of the FIDCR, which is applicable to all states receiving federal funds under Title XX.

¹³³ Elements Required Under EPF's Models:

Model	Services	Level
I	Required	Optional
II	Optional	Required
III	Optional	Optional

could determine the scope of services they wish to provide depending upon identified community needs. For example, a day care provider might offer a complete pre-school program or a simpler program emphasizing the development of cognitive skills.

The second model regulates the level of the services which the day care program offered, while allowing day care providers to choose the services they would provide. For example, if a day care provider chose to offer nutritional services, federal guidelines would establish the number of meals and snacks to be served as well as the specific amounts and types of food offered. The difference in day care providers' discretion between this model and the first model is qualitative only; the first permits discretion as to levels of services while the second permits discretion as to the kinds of services offered. It is the state's responsibility to decide which model to implement. It is likely that more states will choose the second model than the first because presumably day care providers can more easily assess the need for specific services than for particular levels of those services.

The third, and least-regulated, model allows the day care provider to choose both the services and the levels which the day care program would offer.¹³⁴ Under this model the federal government would continue to provide funds for day care programs serving low-income families while state licensing standards and economic (i.e. marketplace) considerations would govern the quality of day care. While this approach offers day care providers more flexibil-

¹³⁴ A complete or partial federal withdrawal from day care regulation is one way of dealing with the problems of comprehensive regulations. The federal government has examined the implications of a diminished or abolished federal role in day care. Several advantages might accrue from such a strategy. One advantage would be a reduction in federal expenditures to administer the FIDCR. Second, the supply of day care might increase because lower standards would reduce the barriers to entry by day care providers. Finally, the self-regulation of a free market for day care would allow maximum freedom of choice by parents in selecting and using day care services. Such a market would also be likely to result in a wide range of new types of day care settings, and promote efficiency.

The potential disadvantages of abolishing or cutting back federal day care regulations are numerous. One problem would be that as federal emphasis on day care decreases, quality day care could become a lower priority item at the federal, state, and local levels. Low standards may encourage the entry of day care providers who have limited abilities to meet the needs of children. Day care consumers who lack adequate knowledge would be unable to select a day care provider. Thus the FIDCR gives consumers some assurance of quality services. UNCO, INC., AN EVALUATION OF DAY CARE IN REGION X, A DAY CARE ACTION PLAN FOR REGION X, at I-11, 2-78 (1973).

ity than the other models, it also presents the risk to both government and parents that children's needs for quality day care will not be met.

In order to meet these needs, the federal and state governments and day care providers all have distinct roles under EPF and, thus, can apply their expertise in providing quality day care. The federal government is responsible for establishing specific guidelines for particular day care services thus replacing the current comprehensive FIDCR.¹³⁵ With these guidelines determined, the States may then determine the EPF model to be used in state day care programs based on its assessment of day care needs.¹³⁶ Day care providers then have some flexibility in choosing either the services to be provided or their levels depending upon the state EPF model.

The advantages of EPF are the reduction of day care costs, the assurance of an acceptable level of quality day care, and greater responsiveness to day care consumers' needs. Costs are reduced by providing only those types of services that the day care provider identifies as necessary to meet community needs.¹³⁷ To assure

¹³⁵ While uniform national standards can be said to exist in the FIDCR, EPF incorporates a minimum level of day care services, as opposed to the wide variety presently mandated under the federal regulations.

¹³⁶ The authority to make this determination could be vested in a California Office of Child Care which would consolidate the current responsibilities of two separate state agencies. The SDE is the sole state agency responsible for the promotion, development, and provision of child care in California. CAL. EDUC. CODE § 8204 (West 1978). The State Department of Social Services, on the other hand, is responsible for services and funds provided under Title XX. CHILD CARE AND DEVELOPMENT SERVICES REPORT, *supra* note 1, at 8. This division of responsibility between state departments leads to inefficient channeling of funds, duplication of effort, and additional regulations and administrative costs. CHILD CARE: THE FINAL REPORT, *supra* note 12, at 120-122.

The creation of the California Office of Child Care has been suggested by other sources as an attempt to reduce duplication and inefficiency. *Id.* This office would consolidate the responsibility for both the financial and administrative management of day care programs. A legislative reorganization using the funds and personnel currently allocated to the administration of California day care programs would create the Office. This new government body could be a line agency within the SDE, thus enhancing coordination with other child care programs. This would require a waiver of the federal "single state agency" requirement (45 C.F.R. § 228.6(a)(1)(1978)) which has been unsuccessfully sought in the past. See CAL. EDUC. CODE § 8205 (West 1978). Through consolidation, current duplication of effort should be eliminated, thus improving the efficiency of California's administration of day care.

¹³⁷ Day care needs can be identified by a consumer or neighborhood survey. The survey should be designed and conducted by the proposed California Office of Child Care. The survey should be taken periodically to ensure that day care

that day care providers fulfill those needs, EPF should require providers to certify to the state that the day care program is designed to respond to those community needs.¹³⁸ The state's monitoring of day care programs to assure their responsiveness coupled with the federal minimum guidelines¹³⁹ will help ensure an acceptable level of quality in the day care programs.

To further ensure that quality day care is being provided, EPF can be implemented in stages. Each EPF model gives day care providers flexibility which does not exist under the FIDCR. A state's choice of an EPF model should be based upon a monitoring¹⁴⁰ of day care quality and cost-effectiveness under the EPF model then in effect. To the extent day care programs are not in compliance with the applicable federal regulations,¹⁴¹ federal financial support will be withdrawn.¹⁴²

EPF's flexibility is distinguishable from the vagueness of the FIDCR by the amount of certainty under which day care providers can operate. Under the FIDCR, the day care provider's decisions regarding the level of services which must be provided are subject to reversal by an administrator with a different interpretation.¹⁴³ In contrast, EPF should avoid this problem since its clearly defined minimum standards for the levels of day care services, combined with the flexibility allowed the state and day care providers, should yield consistent results in interpretations.

The FIDCR's staffing ratios deserve special attention under EPF because of their significant cost consequences. In order to develop cost-effective and high quality day care, the state should be given an increased role in determining staffing ratios. This is similar to the present FIDCR which delegates licensing responsibility to the states.¹⁴⁴ To prevent abuse of this increased state

providers respond to changing community needs. In the survey, parents would indicate their desire for various day care services. This type of survey should enable day care providers to tailor their programs to community needs, and therefore to reduce the total cost of day care services.

¹³⁸ Under EPF, day care providers must file a copy of their community survey along with a description of their day care program detailing how community needs are addressed.

¹³⁹ See note 135 *supra*.

¹⁴⁰ Additional funds for monitoring will be required. A percentage of any savings realized under EPF could be designated for monitoring.

¹⁴¹ See note 79 *supra*.

¹⁴² 45 C.F.R. § 71.6(a) (1978). While the loss of federal funds has not occurred in the past, increased monitoring will make the potential loss of federal funds a more effective enforcement tool. APPROPRIATENESS REPORT, *supra* note 7, at 151.

¹⁴³ See note 88 *supra*.

¹⁴⁴ See 45 C.F.R. § 71.12 (1978).

responsibility, the federal government should adopt minimum ratios and require the states to substantiate the validity of any lower ratios they adopt.¹⁴⁵ Because of the importance of staffing ratios, day care providers would not have the option of varying the state-established ratios. This approach resolves the current differences between federal and state staffing ratios and gives the state a greater role in this critical area while maintaining an acceptable level of quality in the day care program.

Thus, EPF allows day care providers to offer quality day care at reduced costs. This program recognizes that within structured regulations, flexibility is required to promote cost-effective and quality day care which is responsive to community needs. By allowing a day care provider to offer only those services that the community needs assessment has determined to be necessary, EPF lowers the cost barriers to providing day care services. This will encourage the development of new day care spaces to meet the demand for day care services. Moreover, EPF brings certainty to the levels of day care services required and clearly establishes the areas in which day care providers have flexibility. The difference between state and federal staffing requirements is mitigated by delegating greater responsibility to the states in establishing staffing ratios. As a result, EPF will help to minimize the current problems which day care providers face under the FIDCR.

CONCLUSION

Day care is a vital service in our nation. It enables parents to work and be assured that their children are being adequately cared for and supervised. The scope of day care regulation and its resulting costs, however, make day care expensive for all interested parties. The vagueness and the inflexibility of the FIDCR further discourage day care providers from establishing low-cost day care programs. Additionally, the division of responsibility for day care administration wastes scarce financial resources. Thus, there is an inadequate number of day care facilities.

Major federal legislative action can resolve these problems. Congress should enact Enhanced Program Flexibility to give the states and day care providers greater flexibility in establishing and operating day care programs. By taking this step, California

¹⁴⁵ The current FIDCR represent maximum ratios as evidenced by the fact that only two states have more stringent ratios. APPROPRIATENESS REPORT, *supra* note 7 at 144. The staffing ratios established by the federal government under EPF should be set at minimal level.

and the federal government will significantly encourage the development of additional low-cost day care spaces. This action will also assure that available day care programs best meet the needs of children and parents.*

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* On June 28, 1979, after this comment was submitted, the California State Legislature passed A.B. 460. This bill, originally introduced by Assemblyman Lockyear, extends the life of the Alternative Child Care Program, mentioned in note 80 and accompanying text *supra*. This measure thus continues the program's cost-effectiveness and responsiveness to community needs while minimizing the cost burdens imposed by federal and state day care regulations.