ARTICLES

CHILD CARE AND THE LAW

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Child care as an issue has a common border with just about every major domestic goal, from full employment to economic growth, from improving education to reducing child abuse, from improving early developmental opportunities for the handicapped, and respite for their parents, to helping teenage parents stay in school.¹

I. INTRODUCTION

Child care² is a critical and complex social issue which has

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2. Child care—as a phrase and a practice—has suffered from ill-definition in the minds of the public and people working in the human services field. As used in this article, "child care" refers to less than 24-hour care of children for the purpose of providing positive supervision while their parents work. It does not refer to foster care, residential treatment programs, adoptive or abused child services. The term "child day care," recently urged as clarifying terminology, is not adopted here because its usage is not yet widely accepted.

The term "child care" encompasses a wide variety of forms of care: care by the child’s parents themselves; parent-created care, such as playgroups or babysitters; and provider care, including family day-care homes and group-care centers. See infra § IV, The Child Care Delivery System, for a more extensive description of the forms of child care.

Children who use child care are defined, regulated and referred to by age. Precise definitions differ throughout the country. In an effort to develop a common nomenclature, the National Academy of Early Childhood Programs of the National Association for the Education of Young Children has promulgated the following definitions:

Infants: Children between the ages of birth and 12 months.
Toddlers: Children between the ages of 13 months and 36 months.
Preschoolers: Children from three through five years-old including Kindergarten children.
School-age: Children attending first grade or beyond who are participating in a before- and/or after-school program.

Early childhood: Children from birth through eight years-old.
failed to elicit public concern. Recently, however, child care has begun to attract the attention of various groups as an essential community service.

For example, in 1984, the Select Committee on Children, Youth and Families of the United States House of Representatives commenced a series of national hearings on the need for child-care services. The Committee published several reports and unanimously approved a set of recommendations.

In addition, a group of advocates, media representatives and child-care professionals formed the Child Care Action Campaign "to inform the public about this country's urgent child care crisis and about possible solutions and services attainable through expanded efforts at all levels — ranging from government to corporations to individuals." The Campaign's activities have resulted in significant coverage of child-care issues in national magazines and on television.

In 1983, the House of Delegates of the American Bar Association adopted a formal resolution in support of increased child-care services for families at all income levels. The resolution "encourages attorneys as well as state and local bar groups, to direct their attention to the issue of the enhancement of community child-care resources, including assistance to individual child-care centers in business and tax planning, licensing, zoning, and other legal matters and to advocate for innovative legislative approaches designed to enhance


4. Staff of Select H.R. Comm. on Children, Youth and Families, 98th Cong., 2d Sess., Families and Child Care: Improving the Options (Comm. Print 1984) [hereinafter cited as Families and Child Care].


the availability of child-care services to American families."

Lawyers can play a significant role in building a rational and equitable child-care delivery system. Lawyers are needed to clarify issues, develop legal strategies, and to provide technical advice and representation. Most important, lawyers are needed to advocate statutory reform by drafting legislation and testifying at public hearings. Clients will include child-care centers and family day-care providers, professional organizations, child development educators, resource and referral agencies, regulatory agencies, parent associations, policy makers, and child advocacy groups. Unfortunately, few child-care programs or organizations (with the exception of the major proprietary child-care centers, some publicly-subsidized programs and a few large advocacy organizations) are in a position to pay for legal services. While this may change as the field matures, lawyers beginning child-care work probably will be engaged on a pro bono basis. Many lawyers are already involved as advisors or members of boards of directors of community child-care programs. While volunteer activities will undoubtedly form the basis of attorney involvement in child care, some level of financial support will be required to sustain the efforts.

Efforts to provide organizational leadership and technical support to lawyers interested in child-care law are underway at the Child Care Law Center in San Francisco and the American Bar Association's National Center for Child Advocacy and Protection in Washington, D.C. To date, published materials on legal issues in child care have been directed toward a lay audience of child-care providers. As the field develops, the need for professional support to attorneys will increase, as will the importance of improving com-

7. Id.
8. The Child Care Law Center, a public interest law organization, provides technical support and publications on legal issues in child care. The Child Care Law Center, 625 Market Street, Suite 815, San Francisco, CA 94105.
9. The National Center for Child Advocacy and Protection, a project of the Young Lawyers' Division of the American Bar Association, focuses on a variety of legal issues affecting children and has an extensive publication list. National Center for Child Advocacy and Protection, 1800 M Street, NW, Washington, DC 20003.
munication between the child care and legal professionals. 11

This symposium issue of the Santa Clara Law Review marks the first academic treatment of child-care legal issues. It is designed both to inform and to spur further work. To help inform lawyers of the broader context in which legal issues arise, this article recites data concerning demographic trends, analyzes key issues in the "child-care debate" and describes the current child care delivery system. The following section will discuss the impact of these changes on child-care services. The next section will explore various facets of the child care debate to illuminate its complexity and to isolate some of the main impediments to creative solutions.

II. DEMOGRAPHIC TRENDS

Phenomenal social changes have swept across this nation in the past decade which have had a profound impact on child-rearing practices, attitudes and values. The majority of American children have working mothers. 12 Record numbers of children are — or will — live at least some part of their lives in a single-parent home. 13 More children than ever before are identified as victims of child abuse or neglect. 14 The number of children living in poverty is high and is expected to increase. 15 A high birth rate among the baby boom generation intensifies each of these trends. 16 Unfortunately, the policy response to these deep and abiding changes has been slow and limited, particularly with respect to child-care services.

The most significant of these demographic changes is the recent and rapid increase in maternal employment. Women from every eco-

12. In 1982, 55% of all children under the age of 18 had mothers in the labor force as compared with 39% in 1970. U.S. CHILDREN, supra note 3, at 12.
13. The percentage of children under age 18 who live with one parent will increase from 11.9% in 1970 to 25% by 1990. CBO REPORT, supra note 3, at 74.
14. A 1979-80 National Incidence Study documented 652,000 cases of child abuse and neglect, but the authors believe that to be a drastic undercount, estimating the actual incidence to be at least 1,000,000 children abused and neglected annually in the United States. NATIONAL CENTER ON CHILD ABUSE AND NEGLECT, CHILDREN'S BUREAU, ADMIN. FOR CHILDREN, YOUTH AND FAMILIES, OFFICE OF HUMAN DEV. SERV., U.S. DEPT. OF HEALTH AND HUMAN SERV., EXECUTIVE SUMMARY: NATIONAL STUDY OF THE INCIDENCE AND SEVERITY OF CHILD ABUSE AND NEGLECT Pub. No. (OHDS) 81-30329 (1982) [hereinafter cited as NATIONAL INCIDENCE STUDY].
15. Projections indicate that by 1990 a sobering 21% of children under age six will live in poverty. CBO REPORT, supra note 3, at 7.
16. In 1983, the Congressional Budget Office predicted a 14% increase in children under age 10 between 1980-1990, compared with an 11% decline in this age group in the 1970's. Id. at 19.
nomic and cultural group have entered the labor force and are remaining there after they have children. In 1983, fifty-eight percent of mothers of children aged three to five and forty-six percent of mothers of children under three were in the labor force. Nearly forty-five percent of mothers with infants under the age of one year were also working, an increase of almost thirty percent in only four years since 1979. This dramatic increase in working patterns of mothers of infants places significant strain on limited infant-care resources and raises concerns about the quality of an infant's first year of life.

In order to work, parents must make arrangements for the care of their children. Their choice of arrangements, which are as diverse as the families themselves, tends to be dictated by financial considerations, convenience, personal values and beliefs about child rearing and available child-care options. Increasingly, families who can afford to do so choose out-of-home organized group care. The demand for all forms of child care has increased, however, particularly for infant and school-age programs.

The new baby boom is producing children at record rates. By 1990 there will be a total of twenty-three million children under the age of six, up seventeen percent from 1980, and nearly fifteen million children aged six to nine, up ten percent from 1980. If maternal labor force participation rates hold firm, by 1990 at least half of

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17. Beginning a National Initiative, supra note 1, at 10. (testimony of Dr. Sheila B. Kamerman).
18. Id.
19. Id. at 11. Child development experts expressed concern about possible long-range negative effects of non-parental care in the first year of life. Families and Child Care, supra note 4, at 28 (testimony of Edward Zigler). As a result, the Committee "urges caution" concerning the use of out-of-home care for infants, particularly where the quality is questionable. The Committee recommends improvement of leave and personnel policies to allow parents the option of caring for their own infants. Id. at 9.
22. Beginning a National Initiative, supra note 1, at 12 (testimony of Dr. Sheila B. Kamerman).
23. CBO Report, supra note 3, at 17.
these thirty-eight million children, approximately nineteen million children, will need some form of alternative care during all or part of each day.

Increasing divorce rates and out-of-wedlock births, particularly among teenage parents, have led to dramatic increases in single-parent families. Demographers predict that by 1990 nearly one in four American children will live in a single-parent home. The vast majority of single parents are women whose families experience significantly higher poverty rates than two-parent families. For example, the economic status of female, unlike that of male heads of households, is not improved by upswings in the general economy. In fact, experts predict that by 1990, over one-half of children under six in single-parent homes will live in poverty. These statistics suggest strong links between the following: female-parent poverty and the continuing wage gap between male and female workers; divorce and attendant low child support payments; and the difficulties females encounter in working and raising children alone.

By 1990, one in every five or nearly five million children under the age of six will live in poverty. While child maltreatment occurs throughout society, the children of poverty are also at the greatest risk of child abuse and neglect, possibly as a result of the greater stresses which attend poverty. Nationwide, over one million chil-

24. Between 1970 and 1982 the number of children living with a divorced mother increased by 122%, from 2.3 million to 5.1 million. U.S. CHILDREN, supra note 3, at 10. Between 1970 and 1982 the number of children living with an unmarried mother increased by 431%. This increase is significant even if one considers that some of the increase reflects more efficient data collection. In black families, over half of all births occur to unmarried women. Id.

25. The percentage of children under age nine living in a mother-headed home will increase from 10% in 1970 to 22% in 1990. CBO REPORT, supra note 3, at 23.

26. Id. at 6.

27. Id. at 30-31.

28. In January 1985, the office of the Lieutenant Governor of California issued a report describing the factors which increase poverty among women and children and urging greater corporate support of child-care services. The report cited six factors which push increasing numbers of women into poverty: 1) Quality child care is expensive and hard to find; 2) A vast majority of absent fathers do not pay child support; 3) Aid to Families with Dependent Children does not provide adequate support for households headed by women, nor does it raise them from poverty; 4) It is extremely difficult for women to get better paying jobs; 5) Wage discrimination leaves women with only 59% of the male wage; 6) Older women and displaced homemakers suffer particular disadvantages after their husband's death or divorce and are often ineligible for welfare, medical insurance and unemployment or disability benefits. TASK FORCE ON THE FEMINIZATION OF POVERTY, OFFICE OF LT. GOV. LEO McCARTHY, THE FEMINIZATION OF POVERTY 3-4 (1985).

29. CBO REPORT, supra note 3, at 32.

30. "Children from low-income families are much more likely to suffer maltreatment
Children are maltreated annually, and of those over 1,000 die as a result of injuries or severe neglect. Experts now emphasize primary prevention and early intervention strategies, particularly local community-wide services which are available to all families, as the proper method to solve the problem of child abuse. Child-care services can serve as an extremely important component of a primary prevention system. In addition, therapeutic child care, though expensive, may prove a cost-effective treatment mechanism.

Economic and labor force changes parallel these demographic trends. The United States is moving from a production to an information economy. Consequently, the demand for unskilled and manual labor is decreasing rapidly. In this age of technology, the need for people with strong verbal and communication skills will become paramount. These trends underscore the need for policy makers to address the long-term labor force needs of this nation's economy, including how negative early childhood experiences may affect later adult productivity.

III. Child-Care Debate

The child-care debate in this country encompasses a number of concerns, including the effects of child care on children, the purposes of child care, and how a child care system might best be sponsored, regulated and funded.

A lack of accurate information about the threshold issue, the widespread use of alternatives to maternal child care, has impeded effective decision-making and implementation measures. This section will explore psychological, political and informational impediments to the development of a national child-care delivery system, place them in their current context and suggest some possible routes to resolution.

than are children from high income families. This finding would tend to corroborate the hypothesis that various environmental and family stresses associated with low-income children contribute to the maltreatment of children. Maltreated children are found in all geographic areas, urban, suburban and rural. However, the incidence rates differ. For example, sexual abuse is higher in rural counties, educational neglect is higher in urban counties and emotional neglect is higher in suburban counties. NATIONAL INCIDENCE STUDY, supra note 14, at 9. The study also reports incidence rates by economic level, race, and numerous other criteria.

31. Id. at 3, 5.
32. BERKELEY PLANNING ASSOCIATES, THERAPEUTIC CHILD CARE: APPROACHES TO REMEDIATING THE EFFECTS OF CHILD ABUSE AND NEGLECT (1982).
34. Id. at 21-23.
35. Id. at 27.
A. Effect of Non-Maternal Child Care

Questions about the effect of non-maternal child care must be viewed in the larger context of the increasingly public nature of child rearing in general. Traditionally, child rearing has been a matter of private family concern; outsiders infrequently scrutinized how the mother performed her delegated parenting tasks. Today child rearing responsibility is often shared by more adults (fathers or other relatives) and is reviewed by non-family members (teachers or child care providers). The increased number of working families using alternative care arrangements is probably the primary reason for this change, but other factors include the high rate of divorce and remarriage. All of these factors expose the nuclear family to new influences including: increased acceptance of the need for state intervention to prevent maltreatment of children, heightened knowledge of the factors which influence child and human development, and an increasingly studied approach to parenting.

The large numbers of children in out-of-home child care and the greater public acceptance of extra-familial child-rearing arrangements have made formalized out-of-home care services more acceptable. This factor has influenced the way the research questions are framed. Research in child care has now shifted from a focus on the differences between "home raised" and "child care" children to an emphasis on the factors which create positive experiences for children no matter what the form of the care. In part this may be due to the fact that few children are exclusively "home raised" anymore. Most preschoolers have participated in some type of non-maternal child care before entering school.

Any consideration of the effects of child care on children must recognize that neither families nor child-care programs are homoge-


37. *Beginning a National Initiative* supra, note 1, at 11 (testimony of Dr. Shiela B. Kamerman). Dr. Kamerman warns, however, that a dual-system of child care may be developing:

Children of affluent and well-educated parents attend preschool programs—whether or not their mothers work—and children of low income families use more informal care. As illustration: 53% of 3-4 year olds in families with median or higher incomes attended preschool programs in 1982 as contrasted with 29% of those in families with lower incomes. Similarly, 72% of two year olds whose mothers are college graduates were in a preschool program.

*Id.*
neous. Some families offer children a safe and secure environment; others may offer an abusive or neglectful environment. Similarly, child-care programs provide a wide range of experiences. Consequently, a child from a family with limited verbal and social skills might benefit from attending an educationally-oriented child development center, while a child from an advantaged background may not be demonstrably benefitted.

It is beyond the scope of this article to present a comprehensive review of the research on the effects of child care on child development. However, a few summary comments can be made. No study has suggested that significant negative effects inevitably result from the child-care experience. In contrast, there are several studies which indicate that educationally-oriented early childhood experiences can have extremely positive long-range effects, particularly for children from disadvantaged backgrounds.38

For example, researchers have looked at the long-range effects of positive early learning on later development, school performance, anti-social behavior and job success.39 Irving Lazar of Cornell University conducted a research project coordinating a set of twelve research groups which studied over 2,400 children in a variety of preschool settings.40 The Lazar project included 123 children studied in the Perry Preschool Project under the auspices of High Scope Educational Research Foundation in Ypsilanti, Michigan.41 Both studies were begun in the 1960's and measured the effects of preschool into the teenage years. The studies reviewed the effects of curriculum-based group preschool programs. (No similar long-range study of the effects of less formal care arrangements, such as family day care, has been attempted.) The findings are consistent that children who attended a quality preschool have higher academic achievement, less frequent placement in special education classes, and reduced juvenile delinquency rates when compared with children who did not attend such a program.42

39. See authorities cited supra note 38.
40. See Lasting Effects and Preschool Effects, supra note 38.
41. See Changed Lives, supra note 38.
42. See authorities cited supra note 38.
The Perry Preschool Project continued to follow its children into early adulthood and attempted to quantify the costs and benefits of preschool education upon children from disadvantaged backgrounds. The study concluded that by the time a child reaches nineteen, the net benefit of one year of preschool to taxpayers and potential crime victims is $23,852. This figure includes savings due to less welfare usage, reduced legal costs associated with criminal behavior, and reduced placement in special education classes.

Research has also been conducted concerning the factors which tend to promote a better quality child-care program. The studies reviewed children's test scores and observed classroom behavior. The studies have consistently shown that the two most important factors in quality child care are the caregiver's education or experience in early childhood education, and limitations on the size of the group.

Commenting on research concerning quality child care programs in conjunction with the studies of child development, one reviewer concludes:

What is so intriguing about these results of investigations aimed at chronicling the conditions of quality day care is how consistent they are with research on family influences on child development. Whether we look at the research on infancy or on early childhood, there is consistent evidence that certain qualities of in-home parental care promote optimal psychological development, and they are the same as those emerging from the research on variation in day care quality. This analysis suggests that it is not where the child is reared that is of principal importance, but how he or she is cared for. One's social address does not determine development, be it home or day care center, lower class or middle class surroundings; rather it is one's day to day experiences that shape psychological growth.

Social structure is influential because it probably determines the kinds of day to day experiences children will have. When group size is large and caregiver/child ratios are high, individual attention to children falls victim to the exigencies of coping with an overextended set of resources. Either restrictions and controlling behaviors increase, or disregard and aimless behavior on the part of the child increase. Neither is in the child's best inter-

43. See Changed Lives, supra note 38.
44. Changed Lives, supra note 38, at 91.
But when the necessary human resources are available, daily experiences tend to be stimulating and rewarding, and child development is facilitated. This is as true in a day care milieu as it is in a family environment. (footnotes omitted)46

The studies suggest, that, like many other human endeavors, the key question is not what is done—here use of non-maternal care—but how it is done. This perspective should help support child-care services and create the psychological and political freedom to explore ways to improve their quality.

B. Purposes of Child Care

The debate concerning the purposes of child care operates on at least two levels which are often interwoven but are separated here for purposes of analysis. First, one level of the debate asks whether child care should serve primarily as a support to parental employment or if it should be a means to promote the education and development of children. On a second, related level the debate queries whether child care is a service needed by—and appropriate for—lower income families or whether it is a service important to families at all economic levels.

Turning first to the tension between the employment support and educational functions of child care, a distinction has arisen between “early childhood education programs” and “custodial day care.” This distinction is of decreasing significance to parents who create child-care packages using every form of care, but is still reflected in regulatory and tax policies.

An “early childhood education program” generally refers to a program which employs trained professionals, establishes a curriculum and provides an environment which is designed to promote optimal child development. Part-day nursery schools for preschool children are the traditional example of an early childhood education program. To many, a “day-care center” refers to a custodial program which provides supervision and care for children while their parents are away at work, in training or engaged in other activities. While the primary purpose of a day care center is perceived as a service to the parent, the purpose of an early childhood program is seen as an enhancement of the child’s development.

However, these are not inconsistent purposes. Indeed, this artificial distinction represents a misapprehension of the nature of early

learning. *All* child care is educational in the sense that children are learning something. The question is, what is the quality of this experience? Perhaps the best illustrations of efforts to come to terms with this erroneous dichotomy occur in two tax court opinions. In *San Francisco Infant School v. Commissioner*, the tax court reviewed the denial of an application for tax-exempt status for a child-care program for children under the age of three. The denial was based on the Service's determination that infant care could not qualify as an "educational" program under Internal Revenue Code Section 501(c)(3) because infants, in a sense, were not "educable." Rejecting this argument, the tax court reviewed the program content and recognized that education was inherent in caretaking tasks.

In *Zoltan v. Commissioner*, the tax court attacked the distinction from the other direction as it tried to determine whether an activity-filled overnight summer camp program qualified as an expense for purposes of the child and dependent care tax credit. The dependent care tax credit is generally limited to programs providing care and does not include education programs. The *Zoltan* court approved use of the credit for the overnight camp on the basis that the expenses facilitated employment and that the recreational camp program was not educational.

The second level of the debate concerning the need for child care based on economic status is historical. In the mid-1960's with the advent of federal funding of child care for low-income families, child care was viewed in a social welfare context as a service to facilitate the employment of low-income mothers. Today some people continue to perceive child care as a welfare-related service for low-income families, and do not recognize that child care is a legitimate

47. In *United States Dep't of Labor v. Elledge*, 614 F.2d 247 (10th Cir. 1980), the court held that an Oklahoma program serving working parents' children ranging in age from infants to 12 years is a "preschool" subject to provisions of the Fair Labor Standards Act, 29 U.S.C. § 203(c)(5) (1982). Basing its decision in part on the expert testimony of a child development professional, the court determined that the center provided both custody and education and that "application of FLSA may not be avoided by the assertion of primary emphasis on custody and the rejection of the undenied learning opportunities afforded to the children." 614 F.2d at 247. The Ninth Circuit reached the opposite conclusion in *Marshall v. Rosemont, Inc.*, 584 F.2d 319 (9th Cir. 1978) (upholding a lower court determination that an Arizona day care center was not a preschool under FLSA).


49. *Id.* The Tax Reform Act of 1984 amends the definition of "educational" to include dependent-care centers in which substantially all of the care is provided in order to allow individuals to be gainfully employed and if the care is available to the general public. 26 U.S.C.A. §§301(k) (West Supp. 1985). This represents a significant shift from criteria based on program content to criteria based on the adult's purposes in using child-care services.

50. 79 T.C. 490 (1982).
need shared by all members of the community. As the numbers of working mothers increases, the notion of child care as an essential community service gains credence. The challenge now is to create an integrated system that can insure equitable access to child care by parents from all income levels.

The remainder of this section will explore the interface of child care services with several contemporary social policy issues.

1. Employment-Related Child Care Issues

a. Productivity

The link between child care and employment is tangible and immediate: parents cannot work if they have young children and no one to care for them. Furthermore, studies have shown that the use of reliable child-care facilities by parent employees creates lower turnover and absenteeism, and higher productivity. This has encouraged some employers to assist employees with their child-care needs by providing child-care benefits, improving child-care resource and referral services, building on-site child-care centers, and providing other supports.

b. Equal Education Opportunities

The availability of child care affects a women's educational and employment opportunities. The link between child care and educational opportunities for women was explored in De La Cruz v. Tormey. In De La Cruz, plaintiffs, a group of San Mateo County, California, low-income women urged that a community college's refusal to cooperate to establish a child-care center had an adverse impact upon women. The lack of child care, plaintiffs asserted, constituted both sex discrimination under Title IX of the Education Amendments Act of 1972 and a denial of equal protection under the 14th Amendment of the United States Constitution. The Ninth Circuit agreed that the plaintiffs had stated a viable cause of action. The

51. Parents caught between the pressures of meeting employment and parental responsibilities may leave their children alone despite possible jeopardy to the children. Children left alone are also subject to risk of long-range emotional deprivation. L. Long & T. Long, The Handbook for Latch Key Children and Their Parents 147-81 (1984).


54. 582 F.2d 45 (9th Cir. 1978), cert. denied, 441 U.S. 965 (1979).
case settled prior to trial. This basic theory has not been successful in other contexts.\

\section{Welfare Reduction}

Child care has long been recognized as an important component of any program to encourage and support the economic independence of low-income families, particularly female-headed single parent families. The federal Aid to Families with Dependent Children (AFDC) program assists recipients with child-care costs through the AFDC child-care expense disregard. Federal funds are also provided through Title XX of the Social Security Act. Governmental commitment to Title XX has been weak, however, and in 1981 it was cut by over twenty-one percent, leaving many low-income families without child care.\

d. Disabled Children

Of special concern are the child care needs of the working parents of disabled children. These parents, like other employees, need child care to allow them to meet their economic responsibilities to their families. Unfortunately, services are generally unavailable and, if provided, would probably cost more than most parents can afford.\

\section{Teenage Pregnancy and Parenting}

Teenage pregnancies are on the rise and much effort is directed toward prevention programs. These programs, including child care, allow teen parents to stay in school, develop an image of the future, and, hopefully, forestall future out-of-wedlock births. Taking the longer view, earlier intervention at the preschool level which focuses on self-esteem and social skills may be a useful primary prevention

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55. See, e.g., Giocoechea v. Mountain States Telephone and Telegraph Co., 700 F.2d 559 (9th Cir. 1983), in which the court rejected plaintiff's theory that the employer's requirements for travel had an adverse impact upon women with child rearing responsibilities. See also Maloney, Title IX, Disparate Impact and Child Care: Can a Refusal to Cooperate in the Provision of Child Care Constitute Sex Discrimination under Title IX? 25 U. COLO. L. REV. 271 (1981).
57. Id. § 1397 (1982).
mechanism. Evidence shows low self-esteem plays a significant role in teenage pregnancies.60

3. Child Abuse Prevention

Reports of child sexual abuse in child-care programs have focused attention on the need to improve child-care services and regulation.61 Unfortunately this media attention has distracted policymakers and the public from realizing the potential of a quality child-care delivery system to operate as a truly effective program to prevent and treat child abuse. As experts increasingly turn to community-based child abuse primary prevention programs, child care is an obvious and workable mechanism to provide education and support to all parents, including potentially abusive ones. Child care can provide a welcome respite to parents from the demands of child rearing, help children to learn skills lacking in their home environments, and provide opportunities for observation and reporting of actual abuse.62

The needs of school-age children who are unsupervised before and after school are a particular cause for concern. The increasing number of these “latch key children” is alarming. Estimates vary considerably, but most experts suggest the number of latch key children is somewhere between two and seven million children.63 While most parents would not consider themselves “neglectful” for failing


- Family members are better able to cope with their roles within the family and with the demands of life within the larger society if: a) They have some knowledge of child development and realistic expectations about the demands of parenting; b) They have opportunities that encourage successful parent-child bonding and facilitate communication among family members; c) They have an ability to cope with the stresses of infant and child care; d) They have some knowledge about home and child management; e) They have opportunities to share the burdens of child care; f) They have access to peer and family support systems to reduce isolation; g) They have access to social and health services for all family members.

63. M. SELIGSON, A. GENGER, E. GANNETT, & W. GRAY, SCHOOL AGE CHILD CARE: A POLICY REPORT, 7-8 (1983) [hereinafter cited as M. SELIGSON]. This report summarizes the various estimates of the number of school-age children engaged in self-care and notes the wide discrepancy in figures and the difficulty of projecting a realistic estimate.
to provide supervision for their children for a few hours at either end of the school day, these children are at a higher risk of both physical and emotional harm. Child neglect, which has received considerably less media attention than either physical or sexual abuse, is substantiated twice as frequently as all other types of child abuse combined, results in more fatalities than physical abuse, and creates children whose self-esteem and coping skills are low even when compared with other maltreated children. Despite these sobering facts, the legal parameters defining child neglect are not yet well-established in most states.

4. Community Development

Child care as a growing community institution provides employment, purchases goods and services, and contributes to the economic viability of the community in general. It also serves as a psychological sanctuary for many children and families who might otherwise be isolated from their peers. In many communities, child care programs are sponsored by churches and become a vital component of their community outreach efforts. A recent study concluded that approximately one-third of all group care programs in the nation are operated by or housed in churches. After-school child-care programs which are springing up in public schools across the country serve as community resources for the neighborhood.

5. Child Development

Appropriate educational experiences in the early childhood years can have positive effects on intellectual, emotional and social development. Child-care programs, along with nursery schools,

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69. See authorities cited *supra* note 38.
preschools, and parents can all enhance child development if they follow appropriate standards and techniques.

In 1984, the National Association for the Education of Young Children used program criteria recently found to enhance child development to create a voluntary accreditation system operated by its National Academy of Early Childhood Programs. The Academy will accredit early childhood programs based upon the following criteria: they must operate a part or full day and include a minimum of ten children up to age eight, have been in operation for at least one year, and comply with state and local regulatory requirements. The Academy's criteria cover interactions among staff and children, curriculum, interaction between staff and parents, staff qualifications and development, administration, staffing, physical environment, health and safety, nutrition and food service, and evaluation. These standards are significantly more complete and stringent than the minimum health and safety standards required by most state licensing laws. They are intended to complement the legal requirements in order to provide achievement goals that will improve in the quality of programs serving young children.

C. Sponsorship

The multiple purposes of child care have generated ongoing debate over who should regulate or sponsor these services.

Over the years, the perceived split between the employment-related function of child care and its child development aspect has resulted in dual regulatory systems. Nursery schools and other preschools have historically offered a child development focus in a usually less than full-day program and have been regulated by the educational authorities.

In contrast, all-day child-care programs, which may or may not contain an explicit educational component, are often funded and regulated by social services agencies. Because funded programs must often meet higher standards than non-funded programs, the anomaly sometimes arises in which the "educational" programs are subject to less rigorous regulatory scrutiny than the employment-related pro-

71. Id. at 1.
72. Id. at 7-50.
73. Id. at 1.
grams.\textsuperscript{74} This leads to confusion over categorization of programs, nomenclature and standards among relevant agencies, providers and the public, which tends to fragment rather than unify the field.

Sponsorship of children is currently diffuse and highly localized. The absence of strong and centralized leadership has promoted the growth of diversity at the expense of institutional strength and coherency. Analysts have suggested that unless a major institution such as the public schools "takes over" child care, it can never develop the strength or legitimacy it requires. Yet these analysts simultaneously note that something valuable, exciting, and very human would be lost in that particular transition.\textsuperscript{76} Certainly the public schools have entered this debate with greater force as a result of the growth of after-school programs in public schools. One can anticipate that increased public school involvement may be opposed by organizations administering commercial and nonprofit programs which have an investment in the status quo.\textsuperscript{76}

D. \textit{Funding}

Providing funding to child-care services is a dilemma which has plagued parents and policy makers for a number of years. The current child-care delivery system is financed primarily by parent fees, low caregiver wages, hidden subsidies in the form of unreported income by some child-care providers and direct and indirect federal and state subsidy programs.

As a labor-intensive service, child care is more expensive than many parents can afford to pay. Most parents find it difficult to pay the going rate of child-care services. Fees differ depending on locale. For example, the range of fees for group infant care in New York City is $60-$150 per week and $35-$70 in Atlanta, Georgia. For children ages two to five, the New York range is $50-$120 per week compared to $30-$70 in Atlanta. After-school care ranges in price

\textsuperscript{74} For example, in Alaska, all child care facilities must meet licensing standards administered by the Department of Health and Social Services, unless the facility's primary purpose is educational. ALA. STATS. §§ 44.47.310 (z)-(4), 47.35.030, 47.35.900 (1984). "Educational" facilities for children ages three-five may obtain exemptions from licensing as private schools. They are then subject to different standards administered by the Department of Education, but intriguingly, they are not subject to law and regulations relating to education. ALA. STATS. §§ 14.45.100, 14.07.020 (1984).

\textsuperscript{75} W.N. Grubb & M. Lazerson, \textit{Broken Promises: How Americans Fail Their Children} 221-22 (1982).

\textsuperscript{76} For a discussion of numerous unsuccessful legal challenges to provision of child care in public schools, see A. Cohen, \textit{School Age Child Care: A Legal Manual for Public School Administrators} 54-58 (1984).
from $20-$60 per week in New York and from $20-$35 in Atlanta.\textsuperscript{77} Payment is difficult because the gross median income of two-parent households averages $450 per week and that of female headed households averages only $180.\textsuperscript{78} The relationship of child-care costs to overall family income suggests that many parents who might use child-care services and whose children would benefit from the supervision are not doing so because they simply cannot afford it.

Parental hardship is balanced by that of caregivers whose wages are uniformly low and often hovering at minimum wage. A serious shortage of even minimally-qualified caregivers is occurring nationwide.\textsuperscript{79}

The immediate costs of these fiscal tensions include low caregiver morale and program-instability which in turn reduces productivity among employed parents.\textsuperscript{80} The long-term human costs of poor quality programs are likely to be tremendous and the actual cost many not be known for years in the future.

E. Information Gap

There is a tremendous lack of information about child care in general. Data are necessary concerning child-care supply and demand, parental needs and preferences (besides those executed for lack of economic means or knowledge of alternatives), the status, wages and working conditions of people who provide child care, and the effectiveness of regulatory systems. Every effort must be made to develop, organize and disseminate information, including legal information surrounding these and other issues. It is extremely difficult to make wise policy decisions with limited information.

The remaining portion of this article describes the current child-care delivery system.

IV. THE CHILD CARE DELIVERY SYSTEM

A. Introduction

The range of child care services used by working parents is rap-

\textsuperscript{77} Comparative Weekly Costs for Child Care in Seven Major Cities as of January, 1985, Making Child Care Work: Managing for Quality 13 (1985).

\textsuperscript{78} These figures are adapted from income levels based on 1981 data. U.S. Children, \textit{supra} note 3, at 15.

\textsuperscript{79} For a discussion on the status of child-care workers, see Whitebook, Caring for Children as Work, reprinted in Making Day Care Better 66-83 (J. Greenman & R. Fuqua eds. 1984).

\textsuperscript{80} See U.S. Children, \textit{supra} note 3, at 15.
idly emerging and diverse. Consequently, any description of the current child-care delivery system is apt to be quickly superseded. However, the rudiments of a system are in place. There are identifiable forms of care, a multiplicity of funding sources, regulatory systems and an emerging network of locally-based child-care information and referral agencies. This system is not the result of any master plan. Rather, it has emerged piecemeal in the years since the early 1970's in response to the dramatic increase in the demand for child-care services. Its heterogeneity reflects the continuing experimental nature of a field which has yet to resolve significant issues, including the economic viability of many forms of care and the quality of all forms of care.

The next section of this article outlines the forms of child care, including their common legal structures and regulatory status, and describes the sources of private and public funding for child care.

B. Forms of Care

New forms of child care emerge almost daily as parents and providers try to meet the need for care in the face of a generally hostile regulatory and fiscal environment. Some forms take root and gain credence and definition. Others fail. For example, care of preschool children aged three to five in group child-care centers is recognized as a stable form of care and is gaining self-definition and public acceptance. On the other hand, there are currently no generally accepted, affordable and readily replicable forms of care for infants, sick or disabled children, or for the nighttime care of children.

However, it is possible to describe the basic forms of care which, for organizational purposes, are categorized here as "parent care," "parent-created care," and "provider care." The average family will probably make use of all of these forms of care for their children in various configurations as their children grow and family needs change.

1. Parent Care

Parent care refers to personal care by one or both parents. Care provided by people other than parents is described in the following sections. Parents first confront the need for child care when their children are born or adopted. Some employers offer maternity, paternity or parental leave to allow the parent of a newborn to care for the child for at least a few weeks after birth. In most cases this leave is unpaid and of short duration, and generally does not exceed six
Most working mothers prefer to spend time with their infants during these early months; however, they cannot afford the time off without pay. While men express increasing interest in their fathering role, the availability of parental leave policies is currently more important for female employees than male employees.

The pregnancy and parental leave policies in the United States are in the early stages of development. The effort is hampered less by any intrinsic impossibility than by changing attitudes and sex roles. In an effort to define the practical and legal issues involved in parental leaves, groups in New Haven, New York, and San Francisco have begun work in this area.

Other personnel policies which affect the ability of parents to care for their own children are opportunities for part-time work, job sharing, flexible schedules and paid leave to care for their sick children. Implementation of flexible corporate policies to help parents

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81. Clinton, The First Six Months, Oct. 1983 Working Mother 83. Maternity leave received by mothers responding to Working Mother's Survey: 21% received seven weeks to three months leave with pay; 21% received six weeks leave with pay; and 39% received no paid maternity leave. Id.

82. Id. at 134. Reasons mothers reported for returning to work: 59% needed the money; 17% returned to keep their jobs; 9% felt that staying out longer would have affected their career; 15% were ready to go back when they did.

83. Project, Law Firms and Lawyers with Children: An Empirical Analysis of Family/Work Conflict, 34 Stan. L. Rev., 1263, 1293 Fig. 4 (1982). See also General Mills, Families at Work: The General Mills American Family Report 1980-1981, 48-49 (1981). In response to whether parental benefits would help balance work and family life, 30% felt pregnancy disability and personal leave for mothers would help a great deal. However, only 18% felt paid paternity leave would help. The discrepancy was even greater among human resource officers, of which 46% felt maternity leave would help a “great deal,” while only 9% felt paternity leaves would do so. Id.

84. These questions are reflected in a debate within the feminist legal community concerning the proper theoretical treatment of pregnancy-related disabilities. In summary, the question is whether statutes and policies should embrace an “equal treatment” or a “special treatment” approach. Under an equal treatment theory, pregnancy-related disability would be treated like all other disabilities—as is currently required by the Federal Pregnancy Discrimination Act. 42 U.S.C. § 2000e(k) (1982). A “special treatment” approach would acknowledge pregnancy’s unique applicability to women and seek to establish policies which treat women differently as a consequence. California Fed. Sav. and Loan v. Guerra, 758 F.2d 390 (9th Cir. 1985) (upheld California statute requiring employers to grant pregnancy disability leave of up to four months finding it was not preempted by the Federal Pregnancy Disability Act). See Williams, Equality’s Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate (to be published in N.Y.U. Rev. L. & Soc. Change (Spring 1985) (a historical and analytical review of the debate). See also Kreiger & Cooney, The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women’s Equality, 13 Golden Gate 513 (1983).

85. Bush Center, Yale University, New Haven (Edward Zigler); Catalyst, New York (Phyllis Silverman); Employment Law Center, San Francisco (Joan Graf).
meet their dual responsibilities in the home and at work have been identified as a top priority by working parents. In addition, state policies which limit a parent's ability to meet family responsibilities may require reform. For example, state laws which limit parents' right to unemployment compensation when child-care responsibilities conflict with employment have been invalidated in several jurisdictions.

2. Parent-Created Care

Parents have long made private arrangements to provide care for their children when they have been unable to do so themselves. Today, these parent-created options proliferate as parents struggle with their changing needs, the necessity to cut costs, and the evolving needs of their children. Parent-created care includes care by other relatives and by non-relatives.

Parent-created care arrangements share a number of characteristics. From a legal perspective, they tend to operate in the underground economy where their legal status and legitimacy is ambiguous. In most cases, parent-created care is explicitly or de facto exempt from regulatory requirements, presumably on the theory parents have direct and continuing control over the caretaker. These arrangements also often operate in violation of the laws. This represents a hidden, yet significant, public subsidy of child care by virtue of foregone tax revenues. Federal law acknowledges the widespread existence of underground child care by exempting programs for six or fewer children from state and local laws for purposes of the federal dependent care credit and by permitting Aid to Families with Dependent Children (AFDC) child-care expense disregard payments.

86. The top recommendation of the 1980 White House Conference on Families was "a call for family-oriented personnel policies—flextime policies, shared and part-time jobs, transfer policies." WHITE HOUSE CONFERENCE ON FAMILIES, LISTENING TO AMERICA'S FAMILIES 16 (1980).


88. The reference to "parent-created care" has been used by Bananas, Inc., an Oakland, California child care information and referral agency, to describe several forms of care developed by parents to meet their special needs.

to be made to non-licensed programs. Indeed, strict enforcement of regulatory and tax requirements might have a deleterious effect on the delivery of services, particularly to lower income families who rely most heavily on underground care.

The following is a summary of the major categories of parent created care:

a. **In-home Babysitter**

Perhaps the most common form of parent created care, the in-home babysitter, covers a wide range of caregivers from the teenager who helps out with youngsters after school to the full-time "nanny." Babysitters are not regulated. No governmental agency screens candidates or undertakes a fingerprint clearance of potential job seekers. Parents rely on word of mouth, advertisements, and, in a few localities, information and referral agencies to help them locate babysitters.

Despite the apparent informality, this relationship involves a number of legal issues. First, the parent-employer is required to meet federal and state laws regarding withholding of social security, unemployment, and other payroll taxes. For example, if the babysitter is paid wages in excess of $50 in a calendar quarter, contributions must be made by both employer and employee to federal social security. An employer who pays wages of at least $1,000 in a calendar quarter, or approximately $77 per week, in the current or preceding year must also pay federal unemployment tax. While most babysitting arrangements do not involve substantial legal protection for the babysitter or the parent-employer, babysitters in some areas are beginning to demand a living wage and protections such as social security, unemployment, and disability.

Liability issues include compensation for a babysitter who is injured while working, injury of the child by the babysitter, and damage caused by the sitter to the premises. Insurance solutions may include coverage under the homeowner's policy or purchase of special workers' compensation insurance. However, although coverage may be required and available, in most cases it is not obtained, and injuries to caretakers and children frequently remain

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91. As family income increases, parents are more likely to choose group care, perhaps in an effort to seek stability and a more coherent program. U.S. BUREAU OF THE CENSUS, TRENDS IN CHILD CARE ARRANGEMENTS OF WORKING MOTHERS 12 (1982).
uncompensated.

b. **Share-Care**

Share-care arrangements occur when two or more families hire a caregiver to take care of their children, usually in the home of one of the families, or sometimes on a rotating basis. The caregiver is paid by each family separately. Tax withholding requirements and liability considerations are similar to those described for in-home babysitters, except that here the concern is for damage by the child to another's home rather than for damage by another to the child's home. Share-care arrangements are typically unregulated on the theory parents have close and continuing contact with the provider.

c. **Playgroups, Exchanges and Babysitting Co-ops**

These three forms of parent-created care are generally feasible only for part-time working parents because parents themselves provide some of the actual care. These arrangements raise legal issues similar to those noted for babysitters and share-care arrangements concerning liability, insurance, and, in the case of paid playgroups, wage and tax responsibilities of the employer.

### 3. Provider Care

Care by child-care providers is offered to parents for a fee or through a public subsidy. Providers establish the services to be offered, set the fees and typically operate as a service business. The more complex their business enterprise, the more comprehensive the legal issues which attend their operations.

The following is a description of the forms of provider child care:

a. **Family Day Care**

In general, family day care is care in a provider's own home. Providers often enter the field casually by caring for relatives or for neighbor children on an informal basis. Frequently, providers are unaware of the regulatory and tax reporting requirements to which

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they may be subject as sole proprietors of a small business.  

Family day care is the most widely used form of out-of-home child care in the United States, for all ages of children. An estimated 1.3 million family day-care homes in the United States serve approximately twenty-two million children on a full-time, part-time, or occasional basis.

Family day care is generally subject to some regulation, but estimates suggest that the majority of providers operate in an informal, unregulated manner. Thirty-one states require family day-care homes to be licensed, fourteen require or offer the option of registering the home and five have no regulation except for publicly subsidized care. In many states which require homes to be regulated, the regulatory standards are higher for publicly subsidized care. Family day care appears in the following configurations:

i. Small Family Day-Care Providers

These providers are those who operate small family day-care homes that care for a few children in addition to their own, generally

98. Id. at 2. By category, the numbers are: full-time, 3.4 million children; part-time, 2.8 million children; occasional, 16.7 million children.
99. Id.
101. Id. at 4.
a maximum of six to eight. The vast majority of these providers operate as sole proprietors although some share their business with a partner and a few incorporate as a non-profit or profit-making corporation.

ii. **Group Day-Care Homes**

Sometimes referred to as large family day-care homes, or mini-centers, these facilities care for more children, generally a maximum of twelve to fifteen. Group homes may be subject to more stringent regulations than small homes. These arrangements are a growing proportion of available care as providers seek to increase their income by enrolling additional children.

iii. **Family Day-Care Home Systems**

A family day-care home system consists of a group of family day-care homes which join together under a single sponsor for purposes of receiving funds, training and/or providing mutual support. Not infrequently, the motivation is to establish an eligible tax-exempt recipient of public or private funding which is then distributed to the individual providers.

In recent years, systems have been organized by food program sponsors, community agencies, child-care centers, and in a few instances, employers. Systems create better quality child care by "maintaining desirable enrollment levels, monitoring regulatory compliance, training caregivers, providing technical assistance to the caregiver and providing a vehicle for parent involvement."\(^{102}\)

While numerous business law issues are raised for both the homes and the sponsoring agency in a family day-care system, one of the most difficult is the nature of their legal relationship. Are the providers employees or independent contractors? An independent contractor is a self-employed person who bears responsibility for payment of estimated federal and state withholding taxes, federal social security payments and other payroll taxes. In contrast, an employer is responsible for the prepayment of these and other taxes on behalf of its employees. An employer who treats a person as an independent contractor may be required to pay back taxes and possibly penalties if that person is subsequently found to be an employee. Sponsoring agencies will require legal assistance, preferably prior to an assessment for back taxes, to analyze their relationship to the

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102. **Nat'l Day Care Home Study, supra** note 96, at 52.
providers under relevant statutes and case law. Because determination of employment status will turn on the specific facts of each relationship, no standardized answer is available. Relevant factors include: the rights to supervise, train, discharge, or quit; the degree to which services must be personally rendered; the hiring of assistants; the continuity of the relationship; the hours of work, and where the work is performed.\(^\text{103}\)

b. Child-Care Centers

Most other forms of provider child care for infants and preschoolers can be categorized as "child-care centers." These programs share common characteristics: they provide care for groups of young children during all or part of a day; they are the most stringently regulated form of care, and they have the most public legitimacy. Included in this broad category are nursery schools, preschools, Head Start programs, and other child-care centers.

While the distinctions between these programs have been quite evident to early childhood professionals, they tend to blur in the eyes of the parent-consumer. Today, all of these programs are likely to be used by parents as part of a child-care package created out of the necessity to match child-care needs to financial resources, convenience, and the child's developmental needs and interests. Indeed, the distinctions among these programs blur as increasing numbers of nursery schools add afternoon sessions or extend the day to accommodate the needs of working parents.

State licensing standards have been established for these programs to address physical space and programmatic considerations. Studies confirm that the quality of the care in a child-care center is affected by characteristics which lend themselves to regulation. For example, limited group size, classes with fewer children per caregiver, and teaching by caregivers with child-related education and training have all been correlated with positive child behavior and improved test scores.\(^\text{104}\)

The following is a thumbnail sketch of the various categories of center-based care:

103. See R. Heimbichner, Memorandum Re: Legal Criteria to Determine the Existence of Employer-Employee Relationship and to Relate those Criteria to the General Context of Subsidized Child Care Providers in Family Day Care Homes (unpublished memorandum available from Child Care Law Center, 625 Market Street, Suite 815, San Francisco, CA 94105).

104. U.S. CHILDREN, supra note 3.
i. Nursery Schools and Preschools

Typically offering a part-day program for children ages three to five, these entities are perceived as educational and developmental opportunities for children. The programs are generally administered and staffed by people with training in early childhood development. The staff members sometimes resist an explicit child care role, fearing that such a characterization may demean their professional status as educators.

ii. Public and Private Kindergarten

In most states public school attendance is not compulsory until age six, yet states provide and most parents make use of half-day kindergarten programs. Private schools and child-care centers may also offer kindergarten programs.

iii. Head Start

Essentially a more comprehensive, federally-funded nursery school experience for low-income preschool children, Head Start provides half-day care and enrichment experiences to children. Today, Head Start is often used in combination with relative or family day care to create a full day of child care for working parents. Some states offer state funded preschool programs for the children of eligible families. These programs resemble the federally-funded Head Start programs, although financial eligibility standards and program content may differ.

iv. Child Care Programs

Since the late 1960's, full-day, group care programs specifically designed to meet the needs of working parents have proliferated. These programs care for all ages of children: infants, preschool children, and school-age children. Programs operate under a wide range of legal entities, including independent non-profit, tax-exempt centers; centers operated as a part of larger private and public institutions, such as churches, the YMCA, a school district, or local park and recreation departments; and proprietary centers, including "mom and pop" single-site operations, as well as small and large chains of centers.

c. School-Age Child Care Programs

While many school-age children are cared for in family day-
care homes and centers, there is a rapidly-growing category of care
designed specifically for the school-age child between the ages of six
to thirteen. Many of these programs are operated by public schools
on or near school property. Other programs are developing under a
wide variety of public and private sponsorship.\textsuperscript{106}

The legal issues faced by group child-care programs are similar
to those faced by any service business. They include entity choice
and formation, contracts, leases, labor law requirements, tax consid-
erations, liability and regulatory concerns. \textit{The Legal Handbook for
Day Care Centers} describes the applicable federal statutes and gen-
eral legal rules pertaining to these topics.\textsuperscript{106} However, because child
care programs are primarily subject to state and local laws and regu-
lations, programs would benefit from legal information based on lo-
cal statutes, case law, and practices. As the field develops, the need
for local and program-specific legal information is likely to emerge.
One response to this emerging need is a legal manual for public
school administrators interested in establishing school-age
programs.\textsuperscript{107}

C. Child Care Information and Referral Agencies

There are an estimated 300 child-care information and referral
agencies nationwide.\textsuperscript{108} These community agencies maintain a cur-
crent list of available child-care services, help parents locate and
choose care, offer technical assistance to providers, and advocate im-
proved child-care policies. While still few in number, their potential
for building a coordinated child-care delivery system has been recog-
nized by commentators\textsuperscript{109} in proposed federal legislation,\textsuperscript{110} and by a
major corporation which supports nationwide information and refer-
ral services for its employees.\textsuperscript{111}

\textsuperscript{105} See R. Baden, supra note 68.
\textsuperscript{106} U.S. DEP'T OF HEALTH AND HUMAN SERVS. PUB. NO. (OHDS) 83-30335, LE-
GAL HANDBOOK FOR DAY CARE CENTERS (1983).
\textsuperscript{107} A. Cohen, SCHOOL AGE CHILD CARE: A LEGAL MANUAL FOR PUBLIC SCHOOL
\textsuperscript{108} Telephone conversation with Gwen Morgan, Director, Work Family Directions,
Wheelock College, Boston, Mass. (Aug. 3, 1984). A national directory of local agencies is
available for $10.00 from California Child Care Resource and Referral Network, 809 Lincoln
Way, S.F., CA 94122.
\textsuperscript{109} Levine, "The Prospects and Dilemmas of Child Care Information and Referral,"
\textit{reprinted in Families and Child Care, supra}, note 4, at 378-401.
\textsuperscript{110} Significant funding for child-care information and referral services was included in
\textsuperscript{111} IBM, Inc. has contracted with Work/Family Directions at Wheelock College, Bos-
ton, Mass. to provide its employees with child-care information and referral services at 150
D. Funding Mechanisms

Funding mechanisms for child care are as diverse and complex as the programs themselves. They include parent fees and public subsidies to consumers, programs, and employers.

1. Parent Fees

The vast majority of families pay for child care out of personal income and receive no public or private assistance. Many of these transactions occur in the underground economy and represent hidden subsidies in the form of lost tax revenues and labor by caretakers at below the minimum wage.

2. Public Subsidies

Present governmental policies provide subsidies to child care in three primary ways: subsidies to consumers, to providers, and to employers. Consumer subsidies are funds allocated to families to help them meet the cost of child care. Typically, these subsidies allow the family to choose the care from a wide variety of caregivers. The subsidy follows the parent when a new caregiver is selected. The subsidies are usually delivered as indirect and after-the-fact payments, such as the dependent care credit,112 the dependent care assistance program,113 and the AFDC income disregard.114 Program subsidies are also delivered through contracts with child-care providers to allow them to serve income-eligible children. Examples include Head Start,115 Title XX116 and the Child Care Food Program.117 Finally, employer subsidies, such as indirect tax incentives, are designed to stimulate the employer's involvement in child care through special credits. Each of these subsidies is discussed below.

a. Consumer Subsidies

i. Child and Dependent Care Tax Credit

The single largest public subsidy for child care is the federal


dependent care credit which is estimated as a $1.9 billion program for the fiscal year 1985.\textsuperscript{118} Also available for the day-care costs of physically or mentally disabled dependents, the credit offsets the cost of designated work-related child-care expenses based on the family’s adjusted gross income. To qualify for the child-care tax credit, the taxpayer must meet several basic criteria. The taxpayer must be working or looking for work during the tax year.\textsuperscript{119} Child-care expenses eligible for the credit are limited to the amount of earned income of the taxpayer or the taxpayer’s spouse, whichever is lower.\textsuperscript{120} The child-care expenses must be employment-related and paid on behalf of a child younger than the age of 15 (or a disabled dependent).\textsuperscript{121} The taxpayer must maintain a household for the child.\textsuperscript{122} The payments for care must be made to a qualified child-care provider.\textsuperscript{123} The taxpayers must file a joint tax return if married.\textsuperscript{124}

The credit is based on the family’s adjusted gross income; those with lower incomes receive a larger credit.\textsuperscript{125} Families with adjusted gross incomes up to $10,000 receive a thirty percent credit; those with incomes over $28,001 receive a twenty percent credit; families with an income between $10,001 and $28,000 receive a credit which decreases by one percent for each $2,000 increase in adjusted gross income. The credit may be taken against maximum qualified expenses of $2,400 for one child or $4,800 for two or more children.\textsuperscript{126} Qualified expenses include: the costs of child care, nursery school, private kindergartens, and summer camp.\textsuperscript{127} Non-qualifying expenses include: the cost of private school education for a child in first grade or beyond; transportation costs from the child’s home to child care;\textsuperscript{128} fees paid to a person for whom the taxpayer may claim a personal exemption; fees paid to a child of the taxpayer under age


\textsuperscript{120} 26 U.S.C. § 44A(e) (1982).

\textsuperscript{121} 26 U.S.C. § 44A(b)(1) (1982).


\textsuperscript{125} 26 U.S.C. § 44A(a) (1982).

\textsuperscript{126} 26 U.S.C. § 44A(d) (1982).


\textsuperscript{128} Treas. Reg. § 1.44A—1(c)(3) (1984).
and fees paid to a dependent-care center caring for seven
or more children which fails to meet state and local laws and
regulations.\textsuperscript{129}

Beginning with the 1983 tax year, taxpayers may use either the
short form (1040A) or the long form (1040) to claim the credit.

The child-care tax credit is not refundable, and therefore denies
the benefits of the credit to low-income families who pay no taxes.
However, by taking the child-care credit in conjunction with the
Earned Income Credit (EIC),\textsuperscript{131} which is refundable, families with
children and incomes under $10,000 may be eligible for a tax
refund.\textsuperscript{132}

Twenty-nine states and the District of Columbia offer some sort
of dependent-care tax subsidy,\textsuperscript{133} but the total amount of assistance
provided by these state policies has not been tabulated.\textsuperscript{134}

\section*{ii. Dependent Care Assistance Programs}

Dependent care assistance may be provided by an employer to
employees through federal dependent care assistance programs
(DCAP).\textsuperscript{135} DCAPs, which may include both child and other depen-
dent care, are one of a number of statutory non-taxable benefits
which are excluded from inclusion in an employee’s gross income for
purposes of withholding social security and federal unemployment
tax.\textsuperscript{136} While this is currently a relatively small federal program
with estimates of revenue loss in the range of $71 million for fiscal
year 1985, many experts believe DCAPs could become a significant
source of funding for child care as more employers recognize the
availability of the program and work out administrative
procedures.\textsuperscript{137}

\begin{footnotesize}
\begin{itemize}
\item[130.] 26 U.S.C. § 44A(c)(2) (1982).
discussion explaining the combined use of the child care and EIC credits).
\item[133.] H. Blank & J. Simons, State Dependent Care Tax Policies for Child Care, Wash-
ington, D.C., Children’s Defense Fund, 1982 (unpublished summary of state-dependent care
policies).
\item[134.] Telephone conversation with Helen Blank, Children’s Defense Fund, Washington,
D.C. (July 26, 1984).
\item[136.] 26 U.S.C. §§ 125(f), 129(a) (1982).
\item[137.] Telephone conversation with Sonia Connelly, Office of Tax Analysis, Internal
pendent Care Assistance Programs, see D. Friedman, Corporate Financial Assistance
for Child Care (1985).
\end{itemize}
\end{footnotesize}
In order to receive these tax benefits, the employer must follow the implementation requirements set forth in the statute. The DCAP must be a separate written plan for the benefit of employees and must be communicated to the employees. The plan may not discriminate in favor of highly compensated employees, officers or owners of the company, or their dependents. However, members of a collective bargaining unit may be excluded when dependent care was the subject of good faith bargaining in previous negotiations. Not more than twenty percent of the amounts paid for child care by the employer during the year may be provided to shareholders or persons who own more than a five percent interest in the employer. The five percent rule tends to eliminate many small employers from participation in the program because they are likely to hold more than a five percent share and are thus limited to a total of twenty-five percent of the benefits.

Dependent care assistance is defined as a service and as such could be counted as employment related expenses under the provisions of the child-care tax credit. Like the tax credit, an employee’s DCAP assistance is limited by the amount of earned income received by the employee or the employee’s spouse. Amounts received in excess of earned income are subject to taxation. Assistance received from the employer is not eligible for the child-care tax credit. However, additional funds paid out of pocket by the employee which are not reimbursed by the employer are eligible for the credit.

A dependent care assistance program may be offered as a separate benefit or as one of a choice between two or more benefits under a cafeteria plan. Other statutory non-taxable benefits include health insurance, group term life insurance, and group legal services programs. A cafeteria plan must meet Section 125 implementation requirements as well as the requirements for each individual benefit offered under the overall plan.

To implement a cafeteria plan, an employer must develop a

written plan under which all participants are employees.\textsuperscript{147} The plan may not discriminate in favor of highly compensated employees or key employees.\textsuperscript{148} Employers which maintain cafeteria plans beginning after December 31, 1984 must report to the Secretary of Labor the number of their employees participating under the plan, the total cost of the plan during the tax year, the name, address, and taxpayer identification number of the employer and the type of business the employer engages in.\textsuperscript{149}

Employers may offer cafeteria plan benefits on a salary reduction basis.\textsuperscript{150} In a salary reduction plan, the employer and the employee agree to reduce the employee's salary or to forego increases, thereby creating a fund or a flexible spending account against which various benefits may be reimbursed.\textsuperscript{151} The advantage to the employee is that the plan converts the reduced amount from taxable income to non-taxable benefits (unless taxable benefits are selected under the plan). Currently there is no cap on the amount of salary which may be designated for a salary reduction plan as long as earned income requirements are met. Unlike the child care tax credit in which the sliding scale provides greater benefits to lower income families, DCAP salary reduction programs are tied to the individual's tax rate, and therefore generate a larger benefit to the higher bracket taxpayer.\textsuperscript{152}

The salary reduction approach offers advantages to the employer. The employer can both offer a range of benefits to employees at no additional cost (except the implementation and administrative costs) and be relieved of the employer's share of social security and federal unemployment tax.

In 1984, cafeteria plan amendments and proposed IRS regulations established restrictions on salary reduction plans. For example, monies set aside for a flexible spending account must be designated at the beginning of the tax year and may be revised only under certain circumstances, such as marriage, divorce, death of a spouse or

\begin{thebibliography}{99}
\bibitem{148} 26 U.S.C. § 125(b)(1), (2) (1982).
\bibitem{149} 26 U.S.C. § 125(h) (1982).
\bibitem{151} \textit{Id.}
\bibitem{152} R. Soloway, The Inequities of Salary Reduction as National Child Care Policy: Where Do We Go From Here? (1983).
\end{thebibliography}
child, birth or adoption of a child, and termination of the employment of a spouse. If the employee’s expenses are less than the amount elected at the beginning of the year resulting in a balance in the account at the end of the year, the employee loses that money. The funds cannot be returned to the employee as taxable income nor can they be rolled over to the following tax year. The implementation of cafeteria plans which meet the various legal requirements is a complex undertaking and most companies which have done so have sought the advice of tax experts.

iii. AFDC Child Care Expense Disregard

Child care is an allowable work expense under the AFDC program. The child-care expense disregard is the amount of actual child care expenses, up to a maximum of $160 per month per child, which are deducted from the recipient’s income to compute the monthly AFDC award. Beneficiaries must purchase the care with their own funds and are then reimbursed through their monthly AFDC award. Data concerning the numbers of families receiving the benefit and the amount expended on the child-care disregard are not readily accessible. Recipients using the disregard may select any form of care; there is no requirement that the care be licensed. Child care advocates believe the child-care disregard may be underutilized because it requires a pre-purchase of care which is impractical for low-income families, and because its availability may not be known to potential recipients. In many ways, the operational theory of the disregard is the same as the dependent-care credit. Parents may select from a wide range of care available; they must pay for the care out of their own income; and they face the same constraints as purely private purchasers: affordability, availability and quality of care.

153. Tax Treatment of Cafeteria Plans, supra note 150, at 19,324 (Answer to Question 8).
154. Id. at 19,325 (Answer to Question 15).
155. Id. at 19,234 (Answer to Question 7).
156. For a sample DCAP, see S. Burud, supra note 51, at 68-71. See also D. Friedman supra note 137.
159. Id.
160. See Zeitlin & Campbell, supra note 20, at 302-05, for a thorough discussion of the disregard, including strategies to maximize its use and extend the benefit to part-time workers.
b. Program Subsidies

Program subsidies are federal and state supports to child-care providers which serve low-income families. In general, both the federal and state funds are allocated to local providers under a contract bid process. Typically the subsidies remain with the program to support care of an eligible child and do not follow the child upon the child's departure. In some states, program subsidies have been converted to consumer subsidies by certifying the eligible parents to seek the child care of their choice. In these "voucher" programs the subsidy follows the parent. Alternatively, the subsidy may be paid directly to the provider on behalf of the child, creating a "vendor" program.

The following is a discussion of the primary federal program subsidies for child care.

i. Head Start

Head Start delivers comprehensive health, educational, nutritional, social and other services to economically disadvantaged children pursuant to stringent federal program standards. Although it is not designed as a child-care program, Head Start currently represents the largest federal program expenditure for preschool care. Over 400,000 children are enrolled in Head Start and the program had a fiscal year 1984 expenditure of $998 million. Only fifteen percent of Head Start programs operate for a full work day. Working parents supplement Head Start with other child care options such as family day care, babysitters, care by older siblings and other forms of care.

ii. Title XX

Title XX of the Social Security Act provides federal funding
to states for a wide range of social services. As an optional service, child care is provided by most, but not all states under Title XX. The limited funding of Title XX is available on a first come, first serve basis to eligible individuals. It is administered by the Department of Health and Human Services, with an allocation for fiscal year 1985 of $2.7 billion. Of this, about $540 million is expended for child care services. In 1981, Title XX served over 472,000 children in an estimated 11,342 centers and 29,329 family day-care homes. In 1981, twenty-five percent of the Title XX centers were operated for profit; seventy-five percent were either private or public nonprofit centers.

State agencies or other local delegates contract with local providers to deliver Title XX funded care. These providers must meet applicable standards of state and local laws to qualify for funds. However, there are no federal programmatic standards for Title XX. Administrative procedures must conform to federal regulations.

iii. Child Care Food Program

The Child Care Food Program (CCFP) helps states provide nutritious meals to children in child-care programs. It is administered by the United States Department of Agriculture which distributes funds to state agencies which in turn contract with local centers.

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167. Alaska and California do not use Title XX funds for child care but provide these services to low-income families with state funds. Oregon limits Title XX funding to child care protective services. H. Blank, supra note 59, at 3. California state subsidies for child care, information and referral, and state preschool totalled approximately $270 million for fiscal year 1984-85. Conversation with Jack Hailey, Executive Secretary on California Child Dev. Programs (June 21, 1984).


169. The Dep’t of Health and Human Servs. does not have data on the actual Title XX child care expenditures, but estimates them to be approximately 20% of the overall allocation. Statement of Jo Ann Gasper, Deputy Assistant Secretary for Social Services Policy, Dep’t of Health and Human Resources, submitted to House Select Committee on Children, Youth and Family, U.S. House of Representatives, April 4, 1984, at 9.


171. Id. at 12.

172. In 1981, Congress eliminated the requirement that Title XX and other federal child care programs follow federal programmatic requirements and amended Title XX to merely require day-care centers to meet “applicable standards of State and local law.” 42 U.S.C. 1397(d)(a)(7) (1982).


Head Start programs, and sponsors of family-day care home systems. Eligibility and procedures are established by federal regulation.\textsuperscript{175} In 1983, over one million children participated in the $40 million program.\textsuperscript{176} Approximately three quarters of these children were enrolled in child-care centers or Head Start programs.\textsuperscript{177} The remaining one quarter were enrolled in 50,000 family day-care homes administered nationwide by over 700 nonprofit sponsoring organizations.\textsuperscript{178}

The administration of a CCFP contract is a complicated and time-consuming undertaking because of the numerous and detailed requirements.\textsuperscript{179} Providers must carefully account for the children served, the kind of food dispensed, and the dollars expended.\textsuperscript{180} They are subject to audit. Disagreements concerning allocations are not uncommon, and sometimes lead to litigation.\textsuperscript{181}

Participation in the CCFP is conditioned upon meeting state and local laws and regulations.\textsuperscript{182} The CCFP has been credited as a primary incentive to bring family day-care providers into the regulatory system.\textsuperscript{183} It also serves as a significant program subsidy which allows providers to keep fees low while serving nutritious meals. Providers who participate in the program receive training and nutrition education, and are subject to monitoring through the nonprofit sponsor of family day-care home systems. The current program does not target low-income or rural children, and some advocates believe this results in underrepresentation of these children within the CCFP.\textsuperscript{184}

\textbf{iv. Community Development Block Grants}

Community Development Block Grant funds are designed to provide decent housing, a suitable living environment and expanding economic opportunities, primarily for persons of low and moderate

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\item \textsuperscript{175} 7 C.F.R. § 226 \textit{et seq.} (1985).
\item \textsuperscript{176} U.S. Dep't of Agriculture July 1983 CCFP ADA (unpublished worksheet); telephone conversation with Loribeth Weinstein, The Children's Foundation (July 12, 1984).
\item \textsuperscript{177} \textit{The Children's Foundation, Facts About the Child Care Food Program in Family Day Care 1} (Mar. 1984) [hereinafter cited as \textit{FACTS}].
\item \textsuperscript{178} \textit{Id.}
\item \textsuperscript{179} 7 C.F.R. § 226 \textit{et seq.} (1985).
\item \textsuperscript{180} 7 C.F.R. § 226.20 (1985).
\item \textsuperscript{181} 42 U.S.C. § 1766(i), (n) (1982).
\item \textsuperscript{182} 42 U.S.C. § 1766(a) (1982).
\item \textsuperscript{183} \textit{FACTS, supra note 177, at 2.}
\item \textsuperscript{184} Telephone conversation with Loribeth Weinstein, The Children's Foundation, Washington, D.C. (July 12, 1984).
\end{itemize}
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income.\textsuperscript{185} The Department of Housing and Urban Development administers grants to states, units of local government, and Indian tribes, with an overall appropriation of $3,468 million for each of the fiscal years 1984, 1985, and 1986.\textsuperscript{186} A number of activities eligible for funding are enumerated in the statute, including several which relate to child care. For example, funds may be used to provide public services, including child care, as long as the unit of general local government has not provided the services during the twelve months preceding the application for funds. However, this funding option is subject to the limitation that not more than ten percent of the overall assistance may be used for public services.\textsuperscript{187} In addition, funding may be granted to public and private nonprofit entities to plan, acquire, construct, or rehabilitate property.\textsuperscript{188}

Prior to receiving federal funds, the state or unit of general local government must prepare a statement of community development objectives and its projected use of funds based on information received at at least one public hearing.\textsuperscript{189} This public forum offers child-care advocates an opportunity to present information concerning local child care needs and to suggest appropriate projects for funding.

\textbf{v. Job Training Partnership Act}

The Job Training Partnership Act provides funding for programs that prepare economically disadvantaged youth and unskilled adults to enter the labor force and that provide job training to those in special need of such training.\textsuperscript{190} The Act provides that up to ten percent of participants in all programs may be individuals not necessarily economically disadvantaged but who have encountered barriers to employment, including displaced homemakers and teenage parents.\textsuperscript{191} AFDC recipients are also eligible for services under the Act.\textsuperscript{192} Services for these youths and adults may include "supportive services necessary to enable individuals to participate in the program and to assist them in retaining employment for a period not to ex-

\begin{footnotes}
\item[185.] 42 U.S.C. § 5301 (1982).
\item[188.] 42 U.S.C. § 5305(14) (1982).
\item[189.] 42 U.S.C. § 5304 (1982).
\end{footnotes}
ceed six months following completion of training." Child care is an obvious supportive service within the meaning of this provision, particularly in light of the target group.

vi. Vocational Education Act

Child care services for the children of students in secondary and post-secondary vocational education programs are authorized expenditures under the Vocational Education Act of 1923, as amended. This Act is designed to help states improve planning for vocational education. Federal grants are also authorized for several purposes. The Act specifies that a state may use funds to provide day-care services, including infant, preschool and school-age care for children of students (both male and female) and single parents.

c. Employer Supports

The potential for employers to provide child care assistance to their employees has received much attention recently. Advocates have stressed that employee turnover, recruitment, morale, absenteeism and public image can be related to providing child-care aid. In 1981 Congress adopted the Dependent Care Assistance Programs to encourage employer involvement. These programs, discussed above, primarily benefit employees, but they offer a clear mechanism for employer involvement as well. The following is a brief description of child-care related federal tax provisions as of this writing. These and other tax provisions are subject to change.

i. Business Deductions

Child-care expenses are deductible as ordinary and necessary business expenses when they are intended to benefit the employer's business by reducing absenteeism and turnover. While noncapital expenditures (such as salaries, the cost of contracts for services, and minor equipment) are deductible in the year in which they were incurred, capital costs (such as a building renovation or a computer) are deductible over time subject to the rules of the Accelerated Cost

197. See S. Burud, supra note 52.
Recovery System (ACRS).  

ii. **Investment Tax Credit**

Certain personal property of the employer is eligible for an investment tax credit. This is a credit against the value of the investment that may be claimed during the first year the property is placed in service by the employer.  

iii. **Voluntary Employee Beneficiary Association**

Employers may establish a Voluntary Employee’s Beneficiary Association (VEBA), a tax-exempt entity to administer benefits to the members of the association. The VEBA regulations specifically authorize the establishment of a day-care center for the benefit of the members.  

iv. **Rapid Amortization of Certain Facilities**

The capital costs of an employer child-care center established under a funded welfare benefit plan are entitled to rapid (five year) amortization if the center operates primarily for children of employees of the employer, is on depreciable property, and is located in the United States.  

v. **Charitable Donations**

Employers may make and deduct as charitable donations gifts to qualified tax-exempt organizations, such as many child-care centers, child-care information and referral agencies, and other community child-care organizations. The total amount of the gift may be deducted in the year it is given, subject to certain limitations.  

vi. **Targeted Jobs Credit**

Employers who hire certain economically disadvantaged persons to provide child care to its employees (or for other jobs) may be eligible for the targeted jobs credit equal to fifty percent of wages in the

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first year and twenty-five percent of wages in the second year up to a limit of $6,000 per year per employee.\textsuperscript{206} The employer's deduction for wages is reduced by the amount of the credit.\textsuperscript{207}

vii. \textit{State Tax Provisions}

Several states have brought state tax provisions in conformity with federal law with respect to the various policies affecting child care. In addition, a few states have begun to experiment with special tax credits and other incentives to encourage employer involvement in child care.\textsuperscript{208}

V. \textbf{CONCLUSION}

This article was written to convey to lawyers and others a greater understanding of the child-care field, its basic assumptions, terminology, financial constraints, and organization. Child-care law offers a new and challenging opportunity for public and private sector lawyers to use legal and advocacy skills to help develop, extend, and improve child-care services in the United States. It is the author's hope that this and the other articles in this symposium issue will stimulate further legal research, analysis, and publication in this important and emerging field.

\textsuperscript{207} \textit{Id.}
\textsuperscript{208} See D. Friedman, \textit{State and Local Strategies Promoting Employer Supported Child Care} (1983).