FUNDING CHILD CARE FOR LOW-INCOME FAMILIES

The 1988 presidential election sparked new interest in the growing need for a national child-care policy. Although few people question this need, there is much debate over what kind of care is best and who should pay for it, particularly for the growing number of low-income families in this country.[1] During the presidential race Republican George Bush proposed a tax refund of at least one thousand dollars to help parents with child-care needs,[2] while Democratic candidate Michael Dukakis supported distribution of money to the states and called for improved licensing of child care centers.[3] Both candidates made references to low-income families, but neither party expressly tailored the thrust of its proposal to low-income working couples until after the election.[4] Families with very low-income levels face the greatest need in the area of child care, and yet little has been done to resolve this issue.

Many factors have contributed to the dramatic need for child-care services in the United States, particularly among low-income families. Increasing numbers of women with young children are entering the labor force every year.[5] This is due to both the feminist movement of the 1960's and the cycle of economic recession and inflation of the 1970's.[6] Changes in family composition have also contributed to an increase of "female-headed households."[7] These changes in

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1. Ten million children under the age of six have two working parents or a single parent who supports the family. By 1995 two-thirds of all preschoolers will have mothers in the work force. And yet, in 1986, there were only 40,000 day-care centers and 105,000 licensed day-care homes for 2.1 million children. Kantrowitz, *Who Cares About Day Care?*, NEWSWEEK, March 28, 1988, at 73.
2. The program proposed by Bush provides a tax credit of up to $1,000 for each child under the age of four in working families who make up to $13,000 a year. The tax credit would be provided to families whose incomes range from $8,000 to $13,000 a year in the 1990 tax year, and the credit itself would be refundable for families with little or no tax liability. The proposal would cost $2.5 billion a year by the time the program was fully implemented in 1993. N.Y. Times, March 16, 1989, at Y10, col. 1. *See* S.601, 101st Cong., 1st Sess., 135 CONG. REC. S2722-3 (daily ed. Mar. 15, 1989). *See* notes 79 to 84 *infra* and the accompanying text for a more detailed discussion of Bush's proposal.
3. The Democrats proposed the Act for Better Children, a $2.5 billion child- care measure calling for national action on the problem. N.Y. Times, July 25, 1988, at B6, col. 4.
4. *See supra* note 1.
5. Employment of women with children under six years old increased from 12 % in 1950 to 54% in 1985. For women with children under age one, the increase was from 31% in 1976 to 48% in 1985 (U.S. Bureau of the Census 1986). J. AUERBACH, IN THE BUSINESS OF CHILD CARE 14 (1988). It is predicted that the number of children under six who will need daytime supervision will grow more than 50%. Wallis, *The Child-Care Dilemma*, TIME, June 22, 1987, at 55.
6. Between 1973 and 1983, the median income for young families fell by more than 16%. *See* Wallis, *supra*, at 57.
7. "Female-headed households," a single-parent family headed by a mother, increased by 100% between 1970 and 1983, while husband-wife households increased by only 12% in the same period. Experts predict that 40% of all current and potential marriages among young women who are now in their late twenties and early thirties will eventually end in divorce. While the courts typically award custody to mothers, they often order fathers to provide child support. However, many of these fathers fail to pay such child support payments. *See* AUERBACH, *supra* note 5, at 14-5. *See also* Glick, *American Household Structure in Transition,* FAMILY PLANNING PERSPECTIVES, Sept.-Oct. 1984, at 205-11.

family composition are primarily due to the increase in out-of-wedlock pregnancies, as well as the doubling of the divorce rate since 1970. Such changes have dramatically affected the working poor who have traditionally relied on neighbors or extended family for child care.[8] Presently one-quarter of the nation's working families have incomes indicating that they cannot afford anything more than a nominal payment for the purchase of child care.[9]

Traditionally, child care has been provided on a national scale only when linked to larger social problems of unemployment, disadvantage or disaster.[10] However, high-quality child care is critical for all low-income families for at least three reasons. First, child care has the possibility of decreasing welfare expenditures by helping mothers reach economic independence.[11] It becomes essential if women are to participate in training programs or in jobs that allow them to move their families toward self-sufficiency.[12] Presently, the poorest mothers are caught in a vise. Working is the only way out of poverty, but it means putting children into unaffordable day care.[13] Second, if low-income families had child care and seemed to be making an effort to contribute to their support, the level of respect for them and the tolerance of public assistance could rise markedly.[14] Lastly, child care with early childhood education helps children become more productive adults. Early childhood education sharpens children's cognitive, social and emotional abilities to function in school and in adult life.[15] Such programs could be available without consideration of the parents' need to work or public welfare costs and may have the potential to prevent a child from dropping out of school or coming to the attention of the juvenile courts.[16] Overall, low-income families benefit from child care when it helps parents reach economic independ-

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8. *See* Wallis, *supra* note 5, at 57.
9. Winget, *The Dilemma of Affordable Child Care*, in DAY CARE: SCIENTIFIC AND SOCIAL POLICY ISSUES 357 (E. Zigler & E. Gordon eds. 1982).
10. *See* AUERBACH, *supra* note 5, at 33.
11. Massachusetts claims to have saved $121 million in 1986 in welfare costs alone. *See* Wallis, supra note 5, at 59. However, some studies show that this financial trade-off is almost negligible.

    > In a study of the Washington, D.C., welfare program, Steiner (1971) found that a working mother with two children in day care and one in elementary school would save the Washington Department of Welfare about $56 per month. If more than two children in the family were in day care, the department would save money by supporting the mother at home.

    G. STEINER, THE STATE OF WELFARE (1971).
12. A recent Census Bureau survey asked women who were not in the labor force whether they would work if child care were available at a reasonable cost. 36% of low-income women with family incomes under $15,000 replied yes. The U.S. Commission on Civil Rights (1981) further notes that the inability to locate affordable child care restricts women's employment and training opportunities, as well as their ability to participate in federally supported education programs. Blank, *The Special Needs of Single-Parent and Low-Income Families*, in GROUP CARE FOR YOUNG CHILDREN 25 (B. Caldwell ed. 1987).
13. The typical cost of full-time care is about $3,000 a year for one child, or one-third of the poverty-level income for a family of three. *See* Wallis, *supra* note 5, at 57.
14. Summers, *The Impact of Changing Federal Policy on Day Care and Early Intervention*, in EARLY CHILDHOOD EDUCATION: SPECIAL ENVIRONMENTAL, POLICY, AND LEGAL CONSIDERATIONS 266 (E. Goetz & K. Allen eds. 1983). *See* Tropman, *Copping Out or Chipping in (Image of the Poor)*, HUMANIST, 1981, at 41.
15. *Id.*
16. *Id. See* Blank, *supra* note 12, at 27.

ence and helps children establish a foundation of intellectual, social and emotional well-being that is crucial to their success as adults.[17]

This note discusses existing child-care programs at the state and federal levels. It then examines various proposals made at the federal level during the past two years for new or modified programs. This note concludes by discussing the method of funding which the authors feel would best suit the child-care needs of low-income families.

CHILD CARE AT THE STATE AND LOCAL LEVELS

To meet the growing need of working parents for child care for their children, state and local governments, employers, unions and community groups are increasing assistance to working parents.[18] State child-care programs for low-income families are becoming common nationwide as part of efforts to reduce the welfare rolls,[19] and many state governments aid federal efforts to help the poor by taking a "human investment perspective of assistance."[20] States that fund child care with state monies typically have strong community groups that actively campaign for adequate child care.[21]

Despite this increase in state involvement in solving the child-care dilemma for the working poor, many states continue to ignore the other special needs of low-income families. The lack of resources for child care at the state level has led to eligibility policies that punish poor families who have managed to obtain child-care assistance. In essence, families are forced to remain poor if they want adequate child care for their children.[22] For example, states that have specific income guidelines for child-care assistance penalize parents who experience small wage increases. Parents often refuse promotions because even a minimal pay increase can lead to the loss of a $2,500 child-care subsidy.[23]

Shortsighted state policies also limit child care for mothers enrolled in school or training programs. Some states deny any support to mothers seeking skills beyond high school, while others limit child-care assistance to one year.[24] These mothers are often left with no child care while they search for a job. Once they do find a job they face a waiting list for child-care assistance or do not qualify for assistance at all.[25]

Despite the perils many states are encountering in providing and funding child-care assistance to low-income families, some state and local governments have taken the lead in assisting the poor to attain or regain independence. For

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17. *See* Blank, *supra* note 12, at 25.
18. Noble, *Child Care: The Federal Role Grows in the 80's*, N.Y. Times, May 1, 1988, Sec. 4, at 4, col. 1.
19. Bishop, *On the West Coast, It's a Local Matter*, N.Y. Times, May 1, 1988, Sec. 4, at 4, col. 2.
20. *See* Summers, *supra* note 14, at 279.
21. *Id.*
22. *See* Blank, *supra* note 12, at 39.
23. *Id.* Some states, such as Wisconsin and Massachusetts, have policies which take this problem into account. In Wisconsin, families earning up to 70% of the state's median income are initially eligible for child-care assistance. Once families are receiving help, they are allowed to earn up to 84% of the median income. Massachusetts also makes continuity of child care a primary consideration in its eligibility policies.
24. *Id.*
25. *Id.*

example, in 1987 the State of California spent $319 million on child-care subsidies for one hundred thousand children, while also funding a network of seventy-two resource and referral agencies.[26] Massachusetts also has a statewide referral network and has gone one step further in working out a program with employers, school boards and unions to encourage the improvement of child-care facilities. Small companies and groups are eligible for low-interest loans from the state to build child-care facilities, and school systems can get financial aid for after-school programs.[27] Like California and Massachusetts, New Jersey has taken the lead in quality child care with its community-based child-care system.[28]

Local governments are also getting involved in the expansion of child-care facilities. In San Francisco, developers of new office and hotel buildings are required to include an on-site child-care center or pay one dollar per square foot of space to the city's child-care fund.[29] Similar innovative approaches have been proposed in cities across the country.[30]

While California, Massachusetts, and New Jersey are among the few states[31] that have devoted considerable resources to improving child-care programs, most states have done virtually nothing. As of 1986, twenty-three states were providing fewer children with child care than in 1981, and thirty-three have lowered their standards and enforcement for licensed child-care centers.[32]

Because such state programs are the exception, corporations and community groups are also increasing assistance to working parents.[33] However, this assistance rarely targets low-income families, and it is limited in scope.[34] Many companies band together to share the costs of providing child-care services to employees,[35] but in 1986, only three thousand businesses nationwide provided child-care assistance for their employees.[36] Unions also play a very minor role in employer-supported child care, and it is doubtful that they will become more involved in the future.[37]

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26. *See* Wallis, *supra* note 5, at 59. A workfare alternative for persons on welfare was also proposed in California in 1985. It requires able-bodied welfare recipients to attend school or enroll in job training, but is voluntary for single-parent families with children under six. L.A. Daily Journal, Sept. 18, 1985, at 4, col. 1. *See also* Faust & Klafter, *The Billion Dollar Baby: Reforming Regulation of Day Care in California*, 12 U.C. DAVIS L. REV. 770 (1979).
27. Massachusetts' E.T. (employment and training) program spent an estimated $27 million on child care in 1987. *See* Wallis, *supra* note 5, at 59.
28. *See* Roberts, *Child Care in New Jersey: An Experiment in Community Control*, 10 CLEARINGHOUSE REV. 861 (1977).
29. Bishop, *supra* note 19, col. 3. *See also* Wallis, *supra* note 5, at 59.
30. For example, bar associations have organized child-care establishments for their members' children. *See* Graham, *Local Bar Groups Conceive New Child Care Centers*, LEGAL TIMES OF WASHINGTON, at 2, col. 1. *See also* Middleton, *L.A., Chicago Bars Eye Day-care Role*, 7 BAR LEADER 28 (1981).
31. Minnesota, New York, and Connecticut have also devoted resources to improving child-care programs. *See* Wallis, *supra* note 5, at 58.
32. *Id.*
33. *Id.* at 60.
34. Most of the employees who take advantage of employer-based child-care programs are professionals, supervisors, and white collar workers. *See* Summers, *supra* note 14, at 279.
35. *See* Wallis, *supra* note 5, at 60.
36. 3,000 businesses participating in child care represents a 50% increase over 1984. *See* Chapman, *The Number One Cause of Executive Guilt: Who's Taking Care of the Children and How Will They Turn Out?* FORTUNE, Feb. 16, 1987, at 30,33. *See also* Clark, *Corporate Employee Child Care: Encouraging Business to Respond to a Crisis*, 15 FLA. ST. U.L. REV. 839 (1987).
37. This lack of future involvement stems from two factors: availability of funds and level of

Employer-supported child-care assistance often consists of a combination of direct services,[38] information,[39] financial assistance[40] or alternative work schedules.[41] An expansion of this employer-sponsored child care could help serve the needs of the working poor if it were implemented across a broader spectrum of the labor force.[42] Many strongly believe that the public is actually turning to employers and community groups to provide child care instead of to government because of the stigma of government programs.[43]

CHILD CARE AT THE FEDERAL LEVEL

A. Existing Programs

Of the existing federal programs, Title XX of the Social Security Act[44] has provided a major source of child-care funding for low-income families since 1975. Prior to its amendment by the Omnibus Budget Reconciliation Act of 1981,[45] this program funded seventy-five percent of each state's total expenditures for child-care services.[46] Each state could thereby purchase child-care services directly from the providers on the condition that such providers met either established state standards if they provided in-home child care[47] or federal standards if they furnished child care outside the child's own home.[48] Children from eligible families were then placed in these subsidized programs.[49]

The passage of the Omnibus Budget Reconciliation Act of 1981[50] amended Title XX to create a Social Services Block Grant. The new Social Services Block

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union organization. Union members historically have preferred that collective bargaining money go to wage increases for all members, rather than to a program, such as child care, that is perceived to benefit only a few. Also, many women now work in industries and work places that are not union organized. This is particularly true for working mothers in low or unskilled service sector jobs in which pay is kept low partly because there is no union representation. *See* AUERBACH, *supra* note 5, at 151-4.

38. Direct services provide actual child-care spaces such as family day care networks and on-or-off site centers. *Id.* at 67.
39. Information includes referral services, employee assistance programs, and parent education. *Id.* at 75.
40. Financial assistance varies by the size of the company and existing community resources. *Id.* at 78.
41. Alternative work schedules allow parents to care for their children much of the time. *Id.* at 86.
42. *See* Summers, *supra* note 14, at 279.
43. *See* AUERBACH, *supra* note 5, at 33.
44. Social Services Amendments of 1974, Pub. L. No. 93-647, 88 Stat. 2337 (codified as amended at 42 U.S.C. sec. 1397 (1982 & Supp. IV 1986)).
45. Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357, 867-874 (codified as amended at 42 U.S.C. sec. 1397 (1982 & Supp. IV 1986)) [hereinafter Omnibus Reconciliation Act]. For a more detailed examination of the Title XX program and the Omnibus Budget Reconciliation Act's effect on it, *see* Zeitlin & Campbell, *Strategies to Address the Impact of the Economic Recovery Tax Act of 1981 and the Omnibus Budget Reconciliation Act of 1981 on the Availability of Child Care for Low-Income Families*, 28 WAYNE L. REV. 1601, 1630-1640 (1982).
46. 42 U.S.C. sec. 1397a(a)(1)(1976).
47. 42 U.S.C. sec. 1397a(a)(9)(A)(i)(1976).
48. 42 U.S.C. sec. 1397a(a)(9)(A)(ii)(1976). More specifically, these federal standards are "the Federal interagency day care requirements as approved by the Department of Health, Education, and Welfare and the Office of Economic Opportunity on September 23, 1968. . . ." *Id.*
49. 42 U.S.C. sec 1397a(a)(4)(1976). This provision required that states provide a specified percentage of funds to low-income families. *Id.*
50. Omnibus Budget Reconciliation Act, *supra* note 45.

Grant has reduced the available funds for child care by twenty-five percent.[51] In addition, not only do these amendments practically eliminate any federal role in directing the use of funds,[52] but such funds are no longer required to be specifically allocated to child-care services.[53] Most importantly, states are no longer required to allocate a specified amount of funds to child-care services for low-income families.[54]

The federally-funded, state-administered Aid to Families with Dependent Children program (AFDC)[55] has also given low-income families a means to finance child care. Under AFDC, any employment-related expenses are disregarded in a determination of whether or not an applicant for AFDC benefits has met the income requirements;[56] therefore, an AFDC recipient receives a greater amount of assistance since the disregarded child-care expenses lower his or her income level. Prior to 1981, child-care expenses could be totally excluded as employment-related expenses from an eligible income computation;[57] however, when the

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51. Zeitlin & Campbell, *supra* note 45, at 1631.
> Although over the past several years Congress has been able to restore some funds to title XX, following the huge cut in 1981, the fiscal year 1988 funding level of $2.7 billion remained $200 million below the fiscal year 1981 level of $2.9 [billion]. In real terms, adjusted for inflation, Federal funding for title XX is now only about 72 percent of the 1981 level. . . .

135 CONG. REC. S203, 204 (daily ed. Jan. 25, 1989, Part II)(remarks of Sen. Alan Cranston (D-Cal.)).

52. Funds given to the states may be granted to any child-care services which meet applicable standards of state and local law; these services need no longer meet any federal standards. 42 U.S.C. sec. 1397d(a)(7)(1982), *amended by* Medicare and Medicaid Patient and Program Protection Act of 1987, Pub. L. No. 100-93, sec. 8(i)(1), 101 Stat. 680, 695 (1987).

53. Prior to 1981, 42 U.S.C. sec. 1397a(a)(17)(A)(Supp. IV 1980) specifically required that states allocate a portion of their Title XX funds to child-care services; however, this provision was deleted when Title XX was amended by the Omnibus Budget Reconciliation Act. Omnibus Budget Reconciliation Act, *supra* note 45, sec. 2352(a) at 867-8. This provision was deleted because, with Title XX's conversion to a block grant program, federal funds given to the states were targeted for the general area of social services, leaving state and local officials to decide specifically how the funds should be allocated. Donnelly, *Block Grants: An Old Republican Idea*, 39 CONG. Q. WEEKLY REP. 449 (1981).

See also HOUSE SELECT COMM. ON CHILDREN, YOUTH AND FAMILIES, FEDERAL PROGRAMS AFFECTING CHILDREN, 1987, H.R. REP. NO. 258, 100th Cong., 1st Sess. 83 (1987)[hereinafter FEDERAL PROGRAMS AFFECTING CHILDREN] which states, "Funds [provided by the Social Services Block Grant] may not be used to pay for, among other things, cash payments to intended recipients of child care services, subsidies for the direct provision of child care services, or construction or renovation."

54. Zeitlin & Campbell, *supra* note 45, at 1633 & n. 196 (citing to H.R. CONF. REP. NO. 208, 97th Cong., 1st Sess. 992, *reprinted in* 1981 U.S. CODE CONG. & ADMIN. NEWS 1010, 1354).

55. AFDC is governed by subchapter IV of the Social Security Act, 42 U.S.C. sec. 602-619 (1982 & Supp. IV 1986).

For a more detailed examination of AFDC, its work programs and the Omnibus Budget Reconciliation Act's effect on them, *see* Zeitlin & Campbell, *supra* note 45, at 1640-67.

56. 42 U.S.C. sec. 602(a)(7)(Supp. IV 1986).
> A disregard for work expenses, including child care expenses, enables AFDC beneficiaries to choose the kind of care they wish for their children. However, because they must pay for care out of their own pockets, and then later be "reimbursed" through the disregard, AFDC beneficiaries must first have the money to pay for care before it can be purchased, which is difficult for low income individuals living on tight budgets (footnotes omitted).

Zeitlin & Campbell, *supra* note 45, at 1644.

57. 42 U.S.C. sec. 602(a)(8)(B)(i)(1976). The state welfare agency had the power to determine whether all or a portion of child-care expenses should be excluded, subject to limitations by the Secretary of Health and Human Services. *Id.*

Omnibus Budget Reconciliation Act of 1981[58] was enacted, a cap was put on child-care expenses excluded from eligible income.[59] The cap was set at $160 per month per dependent child of an AFDC recipient.[60]

Several work-related programs under AFDC also provide child care for low-income families. A potential AFDC recipient must enroll in the Work Incentive Program (WIN) before he or she may be eligible to receive AFDC benefits.[61] Once enrolled, the individual is automatically provided child care.[62] The state welfare agency also pays a recipient's child-care expenses if he or she in involved in the Community Work Experience Program[63] or Job Search[64].

The dependent care tax credit[65] has supplied the largest portion of federal child-care support overall.[66] As a tax credit, this Internal Revenue Code provision reduces a taxpayer's income tax liability dollar for dollar.[67] Expenses qualifying for the dependent care tax credit are those, including child care, which are employment-related.[68]

The qualifying expenses for the dependent care tax credit are subject to three limitations.[69] First, the qualifying expenses are limited by the amount of earned

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58. Omnibus Budget Reconciliation Act, *supra* note 45, at 357.
59. *Id.*, sec. 2301, at 843.
60. 42 U.S.C. sec. 602(a)(8)(A)(iii)(Supp. IV 1986). This cap would appear to penalize AFDC recipients since it would only cover a portion of their child-care expenses based on an estimated cost of $250 per month. *See* note 13 *supra*.

    If an AFDC recipient is unemployed or employed only part-time during the month, the Secretary retains the discretion to direct that a lesser amount be excluded. *Id. See also* 45 C.F.R. sec. 233.20(a)(11)(i)(C)(1987).
61. 42 U.S.C. sec. 602(a)(19)(A)(1982 & Supp. IV 1986).
62. 42 U.S.C. sec. 602(a)(19)(G)(ii)(1982 & Supp. IV 1986) (added by Act of Dec. 28, 1971, Pub. L. No. 92-223, sec. 3(a)(7), 85 Stat. 803, 804 (1971)). The state determines the means by which it will provide child-care services for WIN participants. However, "[w]hen more than one kind of child care is provided, the mother or other caretaker relative may choose the type, but may not refuse to accept child care services if they are available." 45 C.F.R. sec. 224.30(c)(1)(1987).
63. 42 U.S.C. sec. 609 (1982 & Supp. IV 1986)(added by Omnibus Budget Reconciliation Act, *supra* note 45, sec. 2307(a), at 846-8). "The purpose of the community work experience program is to provide experience and training for individuals not otherwise able to obtain employment, in order to assist them to move into regular employment." 42 U.S.C. sec. 609(a)(1)(1982 & Supp. IV 1986). Through this program, AFDC recipients work on community projects which benefit the general public in some way while utilizing their prior training, experience and skills to gain job experience.
64. 42 U.S.C. sec. 602(a)(35)(1982 & Supp. IV 1986)(added by Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, sec. 154(a)(3), 96 Stat. 324, 396 (1982)). This program requires that an AFDC applicant actively search for employment for a period of eight weeks following his application or at other times as determined by the state welfare agency for periods not to exceed a total of eight weeks in 12 consecutive months. During this interval, the state welfare agency pays for any costs incurred as part of the job search, such as those for child-care services. *Id.*
65. I.R.C. sec 21 (Supp. IV 1986)(formerly I.R.C. sec. 44A which was renumbered by the Deficit Reduction Act of 1984, Pub. L. No. 98-369, sec. 471(c), 98 Stat. 494, 826 (1984)).
66. Divine-Hawkins & Livingston, *Preface to the Federal Role in Child Care*, 25 SANTA CLARA L. REV. 247, 250 (1985). *See also* Mineta, *Federal Child-Care Income Tax Provisions: Legislative Initiatives in the Ninety-Ninth Congress*, 25 SANTA CLARA L. REV. 395, 397 & n. 13 (1985)(citing HOUSE SELECT COMM. ON CHILDREN, YOUTH AND FAMILIES, FAMILIES AND CHILD CARE: IMPROVING THE OPTIONS, H.R. REP. No. 1180, 98th Cong, 2d Sess. 82 (1984)).
67. Zeitlin & Campbell, *supra* note 45, at 1610.
68. I.R.C. sec. 21(a)(1)(Supp. IV 1986). Employment-related expenses are defined in I.R.C. sec. 21(b)(2)(Supp. IV 1986), *amended by* Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, sec. 10101(a), 101 Stat. 1330, 1330-384 (1987).
69. Initially a taxpayer must maintain a household with one or more qualifying individuals. I.R.C.

income.[70] Dollar limits of $2,400 for one dependent child and $4,800 for two or more dependent children are then applied to the qualifying expenses.[71] An applicable percentage of the qualifying expenses falling within the earned income and dollar limitations is then used to determine the amount of the tax credit.[72]

The Internal Revenue Code also provides for a Dependent Care Assistance Program (DCAP).[73] A DCAP allows an employee to exclude from gross income an amount up to five thousand dollars[74] which his or her employer provides for dependent care assistance[75] and which does not exceed the employee's earned income.[76] While the employer may offer the DCAP as a separate benefit to his or her employees, he or she may also make it available under a cafeteria plan.[77]

B. Federal Proposals for New or Modified Programs

Although more than one hundred child care-related bills were introduced in Congress in 1988, none were passed into law.[78] However, with the last election's

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sec. 21 (a)(1)(Supp. IV 1986). A qualifying individual is defined as:

> (A) a dependent of the taxpayer who is under the age of 15 and with respect to whom the taxpayer is entitled to a deduction under section 151(c), (B) a dependent of the taxpayer who is physically or mentally incapable of caring for himself, or (C) the spouse of the taxpayer, if he is physically or mentally incapable of caring for himself.

I.R.C. sec. 21(b)(1)(Supp. IV 1986).

70. I.R.C. sec. 21(d)(Supp. IV 1986).

71. I.R.C. sec. 21(c)(Supp. IV 1986). These amounts were increased from $2,000 and $4,000 respectively by the Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, sec. 124(b)(1), 95 Stat. 172, 197-8 (1981)[hereinafter Economic Recovery Tax Act].

72. I.R.C. sec 21(a)(2)(Supp. IV 1986). The applicable percentage was modified from 20% across the board to 30-20% on a sliding scale for income levels from $10,000 to $28,000. (The amount of the credit declines 1% for each additional $2,000 of adjusted gross income.) Economic Recovery Tax Act, *supra* note 71, sec. 124(a), at 197-8. This change allows low-income families to receive a proportionately larger benefit from the tax credit, especially since this tax credit has now been made available to those who do not itemize deductions.

73. I.R.C. sec. 129 (1982 & Supp. IV 1986)(as enacted under the Economic Recovery Tax Act, *supra* note 71, sec. 124(e)(1), at 198-201). For a more in-depth discussion of DCAPs, *see* Minc, *Providing a Section 129 Dependent Care Assistance Program through a Section 125 Cafeteria Plan*, 66 TAXES 361 (1988) and Geerhold, *Establishing Dependent-Care Programs through Cafeteria Plans: Fulfilling the Need for a Well-Balanced Benefit Menu*, 25 SANTA CLARA L. REV. 455 (1985).

74. I.R.C. sec. 129(a)(2)(Supp. IV 1986)(as amended by the Tax Reform Act of 1986, Pub. L. No. 99-514, title XI, sec. 1163(a), 100 Stat. 2005, 2510 (1986)).

75. I.R.C. sec. 129(a)(1)(Supp. IV 1986)(as amended by the Tax Reform Act of 1986, Pub. L. No. 99-514, title XI, sec. 1163(a), 100 Stat. 2205, 2510 (1986)). The assistance must be provided pursuant to a DCAP meeting the requirements of I.R.C. sec. 129(d)(1982)(as paraphrased in Minc, *supra* note 73, at 362-3):

> (1) the plan must be in writing;
> (2) the employee's rights under the plan must be enforceable;
> (3) the employees must be given reasonable notification of the benefits available under the plan;
> (4) the plan must be maintained for the exclusive benefit of employees; and
> (5) the plan must be established with the intention of being maintained for an indefinite period of time (footnotes omitted).

Additionally, a DCAP may not discriminate in favor of highly-compensated employees. I.R.C. sec. 129(d)(2)(1982).

76. I.R.C. sec. 129(b)(1982 & Supp. IV 1986).

77. I.R.C. sec. 125 (1982 & Supp. IV 1986). *See also* Treas. Reg. sec. 1.125-2T(1988). "A cafeteria plan is a written plan under which [participating employees] may choose among two or more benefits consisting of taxable benefits, and certain other permissible nontaxable benefits." Minc, *supra* note 73, at 363 (footnote omitted). For a more detailed discussion of cafeteria plans, *see* Minc, *supra* note 73, and Geerhold, *supra* note 73.

78. Fierman, *Child Care: What Works—and Doesn't*, FORTUNE, Nov. 21, 1988, at 163. Members

renewed focus on the child-care issue and President Bush's call for legislation in the area, Congress in 1989 has been faced with a wide variety of proposals related to the funding of child care for low-income families. Foremost among the new proposals advocating a refundable child care tax credit is President Bush's Working Family Child Care Assistance Act.[79] Under the Bush proposal, a refundable child care tax credit would be available in the amount of fourteen percent of the parents' earned income[80] up to a maximum of one thousand dollars[81] per child under the age of four.[82] Low-income families would especially benefit since the tax credit is aimed at families with an income of less than $13,000 a year.[83] Because this tax credit would be available as an advance payment added to the parents' paychecks,[84] these families would have the opportunity to choose child-care services themselves and avoid paying for such services out of their own pockets.

Another bill which focuses on tax credits is the Parental Choices in Child Care Act of 1989.[85] Like the Bush administration's proposal, this bill provides for a refundable tax credit which low-income families may receive in advance with their paychecks.[86] However, this proposal would also work to help those families ineligible for federal assistance by providing tax credits to businesses which establish dependent care assistance programs for their employees.[87]

The Act for Better Child Care Services ("ABC" bill)[88] cosponsored by Senators Christopher Dodd (D-Conn.) and Orrin Hatch (R-Utah) has been one of the most highly publicized child-care bills introduced. With its focus on providing child care for low-income families,[89] the "ABC" bill would authorize a federal appropriation of $2.5 billion[90] with the states contributing twenty percent matching funds.[91] The states through a designated lead agency would then

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of Congress introduced two types of bills: (1) bills which would regulate and expand the number of child-care providers and (2) bills which would create subsidies for child care. *Id.* at 163, 166.

79. S.601, *supra* note 2.
80. *Id.*, sec. 2(a)(proposed sec. 32A(a)).
81. *Id.* The $1,000 maximum was derived by limiting the earned income against which the tax credit is taken to $7,143. *Id.*
82. *Id.*, sec. 2(a)(proposed sec. 32A(c)(2)(D)).
83. *Id.*, sec. 2(a)(proposed sec. 32A(b)). *See also* 135 CONG. REC. S2721 (daily ed. Mar. 15, 1989)(remarks of Sen. Robert Dole (R-Kan.)).
84. S.601, *supra* note 2, sec. 4.
85. S.187, 101st Cong., 1st Sess., 135 CONG. REC. S1383-4 (daily ed. Feb. 8, 1989).
86. *Id.*, sec. 101. Several limitations apply, however. Only children under the age of 6 are qualified dependents. *Id.*, sec. 101 (proposed sec. 35(c)(2)). In addition, the tax credit would be limited to $1,000 per qualified dependent and would be phased out for families with incomes exceeding $20,000. *Id.*, sec. 101 (proposed sec. 35(b)(1) & (2)).
87. *Id.*, sec. 201. The tax credit would be equivalent to 10% of the employer's expenditures on the DCAP. *Id.*, sec. 201 (proposed sec. 43(a)).

    See the previous discussion of dependent care assistance programs, *supra* notes 73 to 77 and the accompanying text.
88. S.5, 101st Cong., 1st Sess., 135 CONG. REC. S191-200 (daily ed. Jan. 25, 1989, Part II).
89. Sec. 7(c)(4)(A) states that:

    > The plan shall provide that — (A). . .the State will. . .provide child care services. . .on a sliding fee scale basis. . .with priority being given for services to children of families with very low income, taking into consideration the size of the family. . . .

    Id.
90. *Id.*, sec. 4.
91. *Id.*, sec. 17(a)(2)(A) & 17(a)(3). The states must apply for federal funds by submitting a 4-year plan detailing its proposed use of funds. *Id.*, sec. 7.

distribute the available funds directly to eligible child-care providers[92] or to local governmental units which would contract with eligible child-care providers[93] to provide services for eligible children.[94] In addition, the designated lead agency would distribute child-care certificates to eligible parents who could then purchase services from any eligible child-care provider.[95]

While the "ABC" bill would require that states "design activities. . . to encourage businesses in the state to support or provide child care services. . . .,"[96] the Kids in Day Care Services Act[97] would support private sector involvement in child care by allowing a twenty-five percent tax credit for small businesses.[98] Additionally, the Kids in Day Care Services Act would provide a refundable child care tax credit to families with annual incomes of less than $16,000.[99] To allow states to be responsive to each one's unique child-care needs, the Kids in Day Care Services Act would also provide funding directly to the states,[100] allowing them to set their own child-care standards.[101]

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92. *Id.*, sec. 8(a)(1)(A). An "eligible child care provider" is defined as
    (A) a center-based child care provider, a group home child care provider, a family child care provider, or other provider of child care services for compensation that —
        (i) is licensed or regulated under State law;
        (ii) satisfies —
            (I) the Federal requirements, except as provided in clause (iii); and
            (II) the State and local requirements;
        (iii) after the expiration of the 4-year period beginning on the date the Secretary establishes minimum child care standards under section 18(e)(2), complies with such standards that are applicable to the child care services it provides; or
    (B) a child care provider that is 18 years of age or older who provides child care services only to an eligible child who is, by affinity or consanguinity, the grandchild, niece or nephew of such provider, if such provider complies with any State requirements that govern child care provided by relatives.
    Id., sec. 3(8).
93. *Id.*, sec. 8(a)(1)(B).
94. An "eligible child" is defined as a person
    (A) who is less than 16 years of age;
    (B) whose family income does not exceed 100 percent of the State median income for a family of the same size; and
    (C) who —
        (i) resides with a parent or parents who are working, seeking employment, or enrolled in a job training or educational program; or
        (ii) is receiving, or needs to receive, protective services and resides with a parent or parents not described in clause (i).
    Id., sec. 3(7).
    100% of the state median income is approximately $32,777 for a family of four on a national level. *Summary of the Act for Better Child Care Services of 1989*, 135 CONG. REC. S190 (daily ed. Jan. 25, 1989, Part II).
95. *Id.*, sec. 8(a)(1)(C).
96. *Id.*, sec. 14.
97. S.55, 101st Cong., 1st Sess. (1989).
98. *Summary of Major Provisions of the Wilson Kids Bill*, 135 CONG. REC. S361, 362 (daily ed. Jan. 25, 1989, Part II). The tax credit would apply to "expenses up to $100,000 for the establishment of an on-site or near-site child care facility." *Id.*
99. *Id.* These low-income families would receive $750 credit per child up to a maximum of $1,500. *Id.*
100. *Id.*, S361. The bill would appropriate $400 million for a state block grant with a 15% state match. *Id.*
101. *Id.*, S362.

A bill which combines state block grants with employer tax credits is the Choices for Children Act.[102] The Choices for Children Act would provide $100 million for a state child-care voucher program.[103] This bill would also fund school district[104] and family-provided child-care services.[105] In order to develop a private sector-public sector partnership regarding child care, the Choices for Children Act would additionally provide a twenty-five percent employer tax credit to businesses which establish on-site or off-site child-care facilities.[106]

The Child Care Service Enhancement and Quality Improvement Act[107] focuses on state block grants as a means to provide low-income families with child care without greatly increasing the federal deficit.[108] The proposal would amend the State Dependent Care Development Grants Act[109] to provide $300 million in state block grants[110] with a twenty-five percent state match.[111] The states themselves would then adopt their own child-care standards.[112]

An unusual bill which would combine a refundable child care tax credit with increased Title XX funding is the Partnerships in Child Care Act of 1989.[113] The Partnerships in Child Care Act would amend the child care tax credit to cover twenty to forty percent of child-care expenses on a sliding scale for families with income up to $32,000.[114] Low-income families could then elect to receive the refundable tax credit throughout the year.[115]

In addition, the Partnerships in Child Care Act would appropriate an additional $300 million in Title XX funding.[116] The states would be required to provide twenty-five percent matching funds.[117] The states would then use the funds for the general creation and expansion of child-care services[118] with emphasis on specific, high-priority programs.[119]

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102. S.569, 101st Cong., 1st Sess. (1989).
103. *Section-by-Section Summary of Choices for Children*, 135 CONG. REC. S2651, sec. 5 summary (daily ed. Mar. 15, 1989). The states would be required to give preference to "programs which target those families earning not more than 200 percent of poverty level income. . . ." *Id.*
104. *Id.*, sec. 9 summary.
105. *Id.*, sec. 8 summary.
106. *Id.*, sec. 6 summary.
107. S.512, 101st Cong., 1st Sess., 135 CONG. REC. S2151-2 (daily ed. Mar. 3, 1989).
108. 135 CONG. REC. S2150-1 (daily ed. Mar. 3, 1989)(remarks of Sen. Nancy Kassebaum (D-Kan.)).
> For me, then, the question has not been whether there is a need for better child care. The question has been how can we afford to address the need in light of all our other legitimate needs, including the one for spending restraints. I have come to the conclusion that we just cannot afford to establish a Federal child care infrastructure that will require more Federal dollars with each passing year. Nor can we afford to use direct payments or Tax Code adjustments to help with the expenses of all parents with children in day care.

Id., S2150.
109. 42 U.S.C. sec. 9871-9877 (Supp. IV 1986), *amended by* Human Services Reauthorization Act of 1986, Pub. L. No. 99-425, sec. 301-304, 100 Stat. 966, 967-8 (1986).
110. S.512, *supra* note 107, sec. 101.
111. *Id.*, sec. 102 (proposed sec. 9874(c)).
112. *Id.*, sec. 103 (proposed sec. 9875(b)(2)).
113. S.187, 101st Cong., 1st Sess., 135 CONG. REC. S545-8 (daily ed. Jan. 25, 1989, Part II).
114. *Id.*, sec. 4(a) (proposed subsec. (2)).
115. *Id.*, sec. 4(b) (proposed subsec. (f)(3)(A)). Under proposed subsections (f)(1) & (2), families with an income not exceeding $32,000 may receive a refund of up to 75% of their allowable tax credit.
116. *Id.*, sec. 3(4) (proposed sec. 2012).
117. *Id.*, sec. 3(4)(proposed sec. 2017(a)(2) & (3)).
118. *Id.*, sec. 3(4)(proposed sec. 2016(a)).
119. *Id.*, sec. 3(4)(proposed sec. 2016(b)).

Another bill which proposes amending the Title XX programs[120] is the Day Care for Working Families Act of 1989.[121] Not only would funding for child care be increased by $200 million,[122] but a reserve fund expressly for child-care services under Title XX would be created.[123]

The bill also proposes establishing "a demonstration program under which matching grants are provided to employer-community day care councils to expand the availability of affordable, high quality day care services to individuals, particularly low-income families."[124] These programs would be funded with a $50 million authorization[125] and a fifty percent state matching grant.[126] The funds would be specifically used to operate local child-care resource and referral programs[127] and to establish, renovate and expand facilities, "with priority given to facilities in which a significant portion of children cared for are low-income children."[128]

Finally, the Day Care for Working Families Act would amend the Small Business Act[129] to create a loan program for renovating and constructing child-care facilities.[130] With priority given to those facilities serving children from low-income families,[131] the amendment would provide loans up to a total of $30 million.[132]

CONSIDERATION OF VARIOUS PROPOSALS

The development of an ideal scheme for funding child care for low-income families must factor in important considerations of some of the existing programs and recent legislative proposals. Clearly the largest problem with any federally-funded program which provides child care for low-income families is the cost of such programs, especially in this era of a large federal deficit.[133] If a proposed

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119. *Id.*, sec. 3(4)(proposed sec. 2016(b)).
Specific uses for the funds would include establishing
(1) programs for the recruitment and training of day care workers;
(2) after-school programs for the children of working parents;
(3) day care services for infants and handicapped and special needs children;
(4) grant and loan programs to enable child care providers to meet licensing standards prescribed by the State;
(5) programs that involve the use of older Americans as child care workers;
(6) programs serving low-income areas;
(7) child care informational [sic], resource, and referral. . . .
Id.

120. See the previous discussion of the Title XX programs, *supra* notes 44 to 54 and the accompanying text.

121. S.146, 101st Cong., 1st Sess., 135 CONG. REC. S493-4 (daily ed. Jan. 25, 1989, Part II).

122. *Id.*, sec. 4(a).

123. *Id.*, sec. 4(b).

124. *Id.*, sec. 3(a)(1). This program would be available to even those low-income families who do not qualify for Title XX assistance. *Id.*, sec. 3(c)(4).

125. *Id.*, sec. 3(d).

126. *Id.*, sec. 3(a)(2).

127. *Id.*, sec. 3(c)(2).

128. *Id.*, sec. 3(c)(5).

129. 15 U.S.C. sec. 636 (1982 & Supp. IV 1986).

130. S.1271, *supra* note 112, sec. 5(a).

131. *Id.* (proposed 15 U.S.C. sec. 636(m)(1)).

132. *Id.* (proposed 15 U.S.C. sec. 636(m)(2)).

133. Kosterlitz, *Family Cries*, NAT'L J., May 16, 1988, at 994, 997. *See* remarks of Sen. Kassebaum, *supra* note 108.

program allocates federal funds to child care for low-income families, consideration must be given to whether other types of federally-funded programs will be cut, whether the federal deficit will be increased or whether taxes will have to be raised to pay for the program.

A tax credit proposal, such as the one endorsed by President Bush, must consider that such a tax incentive will result in loss of revenues.[134] The fact that a nonrefundable tax credit benefits low-income families only slightly must also be given some thought.[135] Putting a cap on the income level eligible to claim the dependent care tax credit should be considered as well to allow more aid to be redirected to the poor.[136]

Dependent care assistance plans as a general rule do not benefit low-income families. Because not all employers adopt such programs due to financial reasons, low-income families who generally work for smaller companies do not have the opportunity to participate in such programs.[137] Another important consideration is the fact that "the value of the DCAP exclusion increases or remains steady as the income level rises, while the value of the DCC (dependent care tax credit) decreases or remains fixed."[138] Therefore, low-income families would benefit more by claiming a dependent care tax credit as opposed to participating in a dependent care assistance program, unless such programs were more widely available.

PROPOSAL

Based on the aforementioned considerations, Congress should attack the problem of child-care funding for low-income families on two fronts—the public sector and the private sector. Congress should first revise Title XX so that federal funds are specifically allocated for child-care services similar to what was provided for prior to the 1981 amendments.[139] Since the states would then use these funds to provide child-care services directly, the working poor would be better able to afford child-care services because they would not be forced to provide the out-of-pocket expenses themselves. States can also help to alleviate the problem by using sliding-scale income eligibility in administering both federally-funded programs (*i.e.*, Title XX) and programs expressly created by the states to meet their own needs.

Since not all low-income families will meet Title XX income eligibility requirements, Congress should also amend the dependent care tax credit as has

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134. In fiscal year 1987, the existing dependent care tax credit resulted in $2.7 billion in forgone revenue. FEDERAL PROGRAMS AFFECTING CHILDREN, *supra* note 53, at 245.
135. Because low-income families have little or no tax liability which the tax credit can offset, a non-refundable tax credit will not fully reimburse such families for their child-care expenditures. Wolfman, *Child Care, Work and the Federal Income Tax*, 3 AM. J. TAX POLICY 153, 191 (1984). *See also* Zeitlin & Campbell, *supra* note 45, at 1616-1630, which discusses ways to maximize the benefit of the tax credit, including the use of the Earned Income Tax Credit.
136. FORTUNE, Nov. 21, 1988, at 176. "Ronald Haskins, minority staff member of the Ways and Means Committee of the House, estimates that limiting the credit to families who earn less that $50,000 a year would free up $1 billion that could be redirected to the poor." *Id.*
137. Wolfman, *supra* note 126, at 167.
138. Minc, *supra* note 73, at 367.
139. *See* note 53 *supra* and the accompanying text.

been proposed by several bills which have been introduced this session[140] to make it refundable and to increase the percentage of qualifying expenses. The tax credit must be made refundable to actually benefit low-income families since they generally have little tax liability for the credit to offset. In addition, the amount refundable should be made available in advance via periodic payments added to the parents' paychecks so that they can pay for child-care services as they are used. The percentage of qualifying expenses allowed also needs to be increased to reimburse those families who fail to meet Title XX income eligibility requirements.

In terms of the private sector, Congress should provide incentives to employers, both large and small, who establish on-site or off-site child-care facilities or who provide dependent care assistance programs to their employees. Such incentives should consist of tax credits to offset the employers' expenses and low-interest loans to help defray the cost of establishing child-care facilities.

CONCLUSION

Both the public and private sectors must work together in order for low-income families to have the best opportunities to afford child-care services. Although federal deficit concerns militate against public sector involvement, not all states have the resources necessary to adequately fund child care for their citizens.

Without these modifications to existing programs for funding child care, low-income families will continue to be unable to lift themselves out of poverty.

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140. See the previous discussion of the Working Family Child Care Assistance Act, *supra* notes 79 to 84 and the accompanying text; the Parental Choices in Child Care Act of 1989, *supra* notes 85 to 87 and the accompanying text; the Kids in Day Care Services Act, *supra* notes 97 to 101 and the accompanying text; and the Partnerships in Child Care Act, *supra* notes 113 to 118 and the accompanying text.

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