

# THE REGULATION OF CHILD CARE

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On June 23, 1989, the United States Senate passed the Act for Better Child Care Services of 1989 ("the ABC bill").<sup>1</sup> In the ABC Bill the Senate included in finding number (3) that "high quality child care programs can strengthen our society by providing young children with the foundation on which to learn the basic skills necessary to be productive workers," and number (7) "the number of quality child care arrangements falls far short of the number required for children in the need of child care services."<sup>2</sup> These two findings reflect a growing concern in the United States with the quantity and quality of child care currently available in the United States, as evidenced by the numerous newspaper and magazine articles on the subject.

The use of statistics plays a major role in the child care debate. These statistics can be placed in two categories: first, those reflecting the growing number of working mothers in all economic classes and the corresponding need for child care, and second, those revealing childhood poverty with its impact upon our future society and work force. There is no question that the availability of a mother in the home to care for pre-school age children has changed. In 1970, 30% of mothers with children under the age of six were in the labor force.<sup>3</sup> In 1987, the figure was 57%.<sup>4</sup> In 1970, 24% of mothers with children under the age of one year were in the labor force;<sup>5</sup> in 1987, the figure was 51%.<sup>6</sup> These figures impact upon public policy. More than one-half of mothers with small children work outside of the home. Child care is no longer an issue associated with the poor; a significant number of middle class families need child care services and are requesting government involvement in the development of a child care policy.<sup>7</sup> A poll taken in 1988 revealed that 63% of American want the federal government to develop policies to make child care more available and affordable.<sup>8</sup>

The other line of statistics reveals the degree of poverty among children in America. One out of every four children under the age of six lives in poverty, while one out of every nine lives in a family with income less than half the poverty level.<sup>9</sup> The poverty rate for black children is triple that of the rate for

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1. S. 5 101st Cong., 1st Sess. (1989). See *infra* text accompanying notes 173-179.

2. S. 5 § 102, 101st Cong., 1st Sess. (1989).

3. Pat Wingert & Barbara Kantrowitz, *The Day Care Generation*, NEWSWEEK, Special Issue, Winter/Spring 1990 at 86-87.

4. *Id.*

5. *Id.*

6. *Id.*

7. Sheila B. Kamerman, *Toward a Child Policy Decade*, 68 CHILD WELFARE 371, 376 (1989).

8. 44 Congressional Quarterly Almanac 365 (1988). The poll was conducted by a private firm for the Children's Defense Fund and the American Federation of State, County and Municipal Employees.

9. Edelman, Marian W., *FAMILIES IN PERIL: AN AGENDA FOR SOCIAL CHANGE* 26 (1987).

white children.<sup>10</sup> These factors have added further impetus to the call for better quality family and children programs, including child care. The argument is made that as a matter of self-interest America must start caring for its children. By the year 2020, it is projected that one out of every five Americans will be sixty-five or older. The number of working age persons available to support each elderly person is projected to drop from five in 1990 to two and a half in 2030.<sup>11</sup> It is argued that if a large number of these workers have been raised in poverty, with the accompanying problems of lack of education, crime, and drug addiction, they will be incapable of meeting the burdens thrust upon them.<sup>12</sup> As Senate finding number (3) to the ABC bill reveals, quality child care programs are advocated as a method of ensuring the future of society generally.

Research in the field of early child development consistently shows that quality early childhood programs can have a significant impact. In a study which tracked disadvantaged children who have participated in preschool programs, researchers discovered that "(t)he bulk of the evidence shows that children who attended preschool programs outperform similar children who did not. The graduates of preschool programs outperformed control-group children on test scores, were less likely to need special treatment, and were more likely to graduate from high school."<sup>13</sup> On the federal level, the Head Start program has proven itself to be durable, in part because it has proven itself successful.<sup>14</sup> Although there is little disagreement regarding the value of preschool education, its availability depends in large part upon the economic status of a child's family. In 1985, 54% of three year olds in families with an annual income of \$35,000 or more attended some sort of preschool program, whereas the figure was only 17% for three year olds from families with an annual income of less than \$10,000.<sup>15</sup>

Clearly, the importance of caring for America's preschool children is evident. And yet, in the words of one expert, "[t]orn asunder by different missions and ideologies, the policies, regulations, and funding patterns that govern the care and education of America's young children have yielded an inequitable, fragmented, and sadly mediocre array of services."<sup>16</sup> A group of American professionals in various fields, including medicine, law, business, and education recently visited France to study its child care system. The French have developed an effective, comprehensive child care system that, while not without flaws, meets the needs of a large percentage of French families of all economic classes. A striking difference between the French and American child care systems is that there is agreement across the political spectrum in France regarding the need for

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10. KAMERMAN, *supra* note 7, at 378.

11. Jonathon Rauch, Kids as Capital, *THE ATLANTIC*, Aug. 1989 at 56-7.

12. *Id.* at 57-60; EDELMAN, *supra* note 9, at 30-31.

13. David J. Irvine, et al., *Evidence Supporting Comprehensive Early Childhood Education for Disadvantaged Children* in *YOUNG CHILDREN AND SOCIAL POLICY*, *ANNALS AM. ACAD. POL. & SOC. SCI.* (Richard D. Lambert & Alan W. Heston eds. 1982).

14. Laura A. Miller, *Head Start: A Moving Target*, 5 *YALE L. & POL'Y REV.* 322 (1987). For a discussion of the Head Start program, see *infra* text accompanying notes 161-63.

15. Sharon L. Kagan, "The Care and Education of America's Young Children: At the Brink of a Paradigm Shift?", in *CARING FOR AMERICA'S CHILDREN* p. 70-72 (Frank J. Macciarola & Alan Gartner eds. 1989). During the same period, the Head Start program only covered 16% of the eligible children due to funding limitations. *Id.*

16. *Id.* at 70.

a national commitment to a systematic child care approach.<sup>17</sup> No such consensus exists in the United States. In fact, the child care dilemma has become an emotional conservative versus liberal debate over the fate of the American family. One side views the use of child care as leading to its destruction,<sup>18</sup> while the other sees the development of a support system for women and the poor as essential to its existence.<sup>19</sup>

Many unresolved issues stem from this basic, value-centered debate: the definition of quality in child care programs; the availability of programs; the source of funding; and the regulation of programs. This paper looks closely at the last of these issues, although all of the above are interrelated and cannot be discussed in isolation. In studying government regulation of child care, two factors become clear. One is that every state, and some localities, regulate child care, but the degree of regulation varies. The other is that, even though Congress has found it difficult to legislate a national comprehensive child care bill, the federal government has been involved quite heavily in child care for years. From these factors come a number of questions this paper addresses. Are there conflicts among various levels of state and local regulations? Are there wide differences in the regulations among the various states? What should the federal government's role be? Should it develop national child care standards? What impact will the newly enacted federal legislation have upon state and local regulatory schemes?

For the purposes of this discussion, child care is given the general meaning of non-parental care for children under the age of six outside of the child's home for part of a twenty-four hour period. Although there is governmental regulation of care given to school age children for after-school hours, this paper focuses on care given to children of preschool age. Within the broad term of child care are many forms of care: infant care; child care centers; family day care; and group family homes. These terms are defined differently by different regulatory bodies and will be clarified in the context of the various regulatory systems.<sup>20</sup> Included in the above definition of child care is the concept of preschool education or nursery school. Two distinct threads have developed within the American system of preschool: that of nursery school programs and that of day care. The first, mainly available to middle and upper income groups, has centered on the education of the preschool child. Generally available from two to three hours a day, its purpose has traditionally been seen as advancing the emotional and intellectual development of the child, rather than enabling the mother to work. Thus, it has not been viewed as a threat to the family.<sup>21</sup> The kindergarten began as part of this thread, and has only recently become part of most public school systems.<sup>22</sup> The other thread, that of day care, was developed to meet the needs

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17. Carol Lawson, *How France Is Providing Child Care to a Nation*, N.Y. TIMES, Nov. 9, 1989, at C1, C14.

18. See, e.g., *President Nixon's veto message for the Economic Opportunity Amendments of 1971*, 7 WEEKLY COMP. PRES. DOC. 1634 (Dec. 9, 1971).

19. Patricia Schroeder, *Is There a Role for the Federal Government In Work and the Family*, 26 HARV. J. ON LEGIS. 299, 309 (1989).

20. See *infra* text accompanying notes 58-62, 107-113, 120-121, and 136-139.

21. Judith W. Seaver, & Carol A. Cartwright, *Child Care Administration* 13 (1986); Mary Whitebook, *Caring For Children As Work*, 74 in MAKING DAY CARE BETTER; TRAINING, EDUCATION, AND THE PROCESS OF CHANGE (James T. Greenman & Robert W. Fuqua eds. 1984).

22. Seaver & Cartwright, *supra* note 21, at 14.

of the parent. The care is mainly custodial in nature, concerned with the physical safety and supervision of the child.<sup>23</sup> This distinction is important because it underlies much of the child care debate.<sup>24</sup> The distinction, however, does appear to be diminishing. Most day care centers now have educational components and many nursery schools have added extended day sessions to aid the working parent. It can, in fact, be argued that all child care involves education and that the distinction between the two threads has become artificial. The issue then is not in differences in the kinds of preschool care, but rather of the quality of all types of programs.<sup>25</sup>

## I. STATE AND LOCAL REGULATION OF CHILD CARE

Child care is currently regulated on a state-by-state basis, and thus it is not accurate to speak of a system of child care regulation in the United States. A recent report, *The National State of Child Care Regulations 1986* [hereinafter *Report on State Regulation*], runs several hundred pages and contains numerous charts and tables comparing details ranging from educational requirements for staff to the number of square feet required per child to hand-washing requirements in all fifty states.<sup>26</sup> The introduction to the report begins as follows:

The most striking characteristic of child care regulation in the United States is its diversity. From state to state, regulations differ on almost every aspect of what is required. Most child care/education programs are private and paid for by parents. Regulating them is a consumer protection responsibility of the states.

However, the level at which standards are set varies greatly among the states.<sup>27</sup>

Some states set high standards while others set only those needed to meet the most basic health and safety needs. The demand for more child care has been a force in some cases against setting high standards.<sup>28</sup>

State and local governments regulate child care in several ways: licensing; zoning; building and fire codes; and health and sanitation codes with the bulk of the regulations contained in licensing schemes. Licensing is defined as "a formal, legal permission for a program to operate and deliver services."<sup>29</sup> Licensing sets mandatory, not voluntary standards; failure to comply with licensing is generally a criminal offense.<sup>30</sup> Licensing of child care developed from foster care licensing, which in turn originated with the colonial poor laws.<sup>31</sup> Child care licensing was fit into a pre-existing regulatory scheme rather than being developed to meet the needs of daytime child care. Therefore, the licensing requirements may not necessarily meet the needs of today's system.<sup>32</sup>

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23. Kathleen A. Murray, *Child Care and the Law*, 25 SANTA CLARA L. REV. 261, 271 (1985).

24. See *infra* text accompanying notes 152-53.

25. Murray, *supra* note 23, at 271-72.

26. Gwen Morgan, *The National State of Child Care Regulations 1986* (1987). The report is currently being updated; a new edition is scheduled to be published in the fall of 1991.

27. *Id.* at Intro., p. 1. Although the new edition of the report will show changes in individual states' regulations, the variance of standards among states remains constant. Telephone interview with Gwen Morgan, June 11, 1991.

28. Lawrence Kotin, ET AL., *Legal Handbook For Day Care Centers* 67-68 (1981).

29. Seaver & Cartwright, *supra* note 21, at 319.

30. Morgan, *supra* note 26, at intro., p. 3.

31. Erica B. Grubb, *Day-Care Regulation: Legal and Policy Issues*, 25 SANTA CLARA L. REV. 303, 305-06 (1985).

32. Seaver & Cartwright, *supra* note 21, at 320.

States also certify child care facilities. Certification "signifies approval of a program to provide care subsidized by public funds,"<sup>33</sup> and can involve standards that are the same as, or are set higher than those for non-subsidized care. Accreditation and credentialization are forms of voluntary methods used to ensure quality. Several states have used the accreditation standards designed by the National Association for the Education of Young Children to develop their own accreditation standards. These are high quality goals rather than licensing requirements and are used to complement licensing.<sup>34</sup> Credentialing certifies that a child care worker has met certain training and education standards.<sup>35</sup>

Just how varied are the regulatory schemes in the various states? Is there much conflict in meeting the requirements within a particular system? As a method of analysis, this paper first looks at some general statistics revealed by the Report on State Regulations as of 1986<sup>36</sup> in four areas of current concern: the regulation of church-run child care, the child-staff ratios within facilities, the regulation of family day care, and the regulation of infant care. It then studies in more detail the systems in New York state (and New York City, which has its own system), South Carolina, and Iowa.

A first important area of comparison among states is the regulation of church-run child care. Child care programs that are in some way church-related are significant in number, particularly in rural areas and small towns.<sup>37</sup> As of 1986, twelve states had partially exempted church-related child care facilities from meeting child care licensing requirements.<sup>38</sup> The United States Supreme Court recently denied *certiori* in *Forest Hills Early Learning Center v. Grace Baptist Church*, in which the Fourth Circuit had upheld the constitutionality of Virginia's treatment of religiously affiliated child care centers.<sup>39</sup> The Virginia legislature exempts centers operated by religious institutions from the detailed mandatory regulations, requiring them to meet only the basic health and safety standards. This action was taken after some churches alleged that religious beliefs did not allow them to apply for a state license or to conform to state standards.<sup>40</sup> The Fourth Circuit upheld the statute because it fulfilled a "legitimate purpose to avoid interference with the execution of religious missions in nonprofit areas in which a church operates, without reference to the role played by churches in the past."<sup>41</sup> The issue of the impact of church-related child care upon regulations and funding has become particularly relevant in the child care debate on the federal level.<sup>42</sup>

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33. *Id.* at 323.

34. Kagan, *supra* note 15, at 73.

35. Kotin, *supra* note 28, at 69.

36. Morgan, *supra* note 26. The Report is based upon statistics compiled as of 1986. State child care regulations are frequently updated. The report is currently in the process of revision.

37. Religious institutions are estimated to provide one-third of all day care. Steven A. Holmes, *House Leaders Are Split on Day Care*, N.Y. Times, Mar. 22, 1990, at B 10. See 135 Cong. Rec. 7461 (daily ed. June 23, 1989).

38. Morgan, *supra* note 26, at 1-5. These states are Alabama, Florida, Illinois, Indiana, Maryland, Missouri, Mississippi, North Carolina, North Dakota, New Jersey, South Carolina, and Virginia.

39. 846 F.2d 260 (4th Cir. 1988), *cert. denied*, 488 U.S. 1029 (1989).

40. *Id.* at 262.

41. *Id.* at 263.

42. See *infra* text accompanying notes 174-176.

One indicator of quality in child care facilities recognized by American child development experts is the number of children supervised by a staff member.<sup>43</sup> The relevant figure is expressed as a ratio of child to staff. For example, a regulation requiring a 4 to 1 ratio mandates that a facility may not have more than four children per staff member. The requirement of low ratios is somewhat controversial since it directly increases the cost of child care.<sup>44</sup> There is variation in state ratios in part because states define the ratios differently: some include all staff employed by the facility while others include only those directly involved with children. Some general comparisons, however, can be made. A look at ratios for four year old reveals that as of 1986, seven states (Alabama, Delaware, Florida, Hawaii, North Carolina, Rhode Island, and South Carolina) set a maximum 20 to 1 ratio. Sixteen states (Arkansas, Connecticut, the District of Columbia, which is included in the Report as a state, Illinois, Massachusetts,<sup>45</sup> Maryland, Maine, Minnesota, Missouri, Montana, North Dakota, Oregon, Pennsylvania, South Dakota, Vermont, and Washington) had a 10 to 1 ratio requirement. New York state has the lowest ratio for four year olds at 7 to 1.<sup>46</sup>

Perhaps the most widely used form of child care is family day care. The numbers are unclear because so many, estimated to be as high as 94%, are unregulated.<sup>47</sup> One recent source states that 41.3% of children under five whose mothers work outside of the home are cared for in another person's home.<sup>48</sup> Family day care is generally defined as less than twenty four hour care given in a caregiver's home. Obvious problems exist when states regulate private homes, and the regulation of family day care is controversial. During the national debate on the ABC Bill, there was discussion of the regulation of grandmothers.<sup>49</sup> As a practical matter, few states have the resources to regulate a system where one facility may care for no more than five or six children. Comparing the regulation of family day care is difficult because, even when it is regulated, states often exclude those homes with a small number of children. For example, Georgia, Maine, New York, and New Hampshire are among the states excluding from regulation homes caring for fewer than three children. Approximately one-third of the states use registration rather than licensing to regulate family day care.<sup>50</sup> Registration varies, but usually involves mandatory standards. Registration differs from licensing because the caregiver may register without pre-inspection; the caregivers register that they are in fact already caring for children.<sup>51</sup> A number of states carve out another related category of child care, that of group family homes. These are defined to include care given in private homes for a larger group of children. Several states, including South Carolina, Texas, and Connec-

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43. Morgan, *supra* note 26, at 3-1; *N.Y. Times*, *supra* note 17, at C14.

44. Morgan, *supra* note 26, at 3-1; *see infra* text accompanying notes 170-172.

45. In Massachusetts, the ratio applies up to the age of four years, nine months.

46. Morgan, *supra* note 26, table 3.

47. June Solnit Sale, *What is Family Day Care?*, in Greenman & Fuqua, *supra* note 21, at 21.

48. *Newsweek*, *supra* note 3, at 87.

49. 135 Cong. Rec. S7473 (daily ed. June 23, 1981). For a discussion of a state's right to search a private home, *see infra* note 85.

50. Morgan, *supra* note 26, table 2.

51. Gwen Morgan, *Change Through Regulation*, in Greenman & Fuqua, *supra* note 21, at 170.

ticut, define group family homes as those where from seven to twelve children are cared for in a private home.<sup>52</sup>

Infant care is a fourth topic of current controversy in the area of child care regulation. There is the obvious concern about health problems for small infants exposed to a large group of infants and adults. Concern is also expressed over the emotional and developmental impact. A congressional committee in 1984 urged caution in the use of substitute care for infants, citing concern among child development experts regarding the long term impact upon infants under one year of age.<sup>53</sup> Research into the impact of infant child care on the long term development of children has resulted in mixed results, ranging from studies that show positive gains for children placed in substitute care at an early age to those showing negative impact. Dr. T. Berry Brazelton, noted pediatrician and professor of pediatrics at Harvard Medical School, has found that most of the former studies involved well-funded and regulated day care centers. His conclusion regarding infant day care is as follows:

Certainly, for millions of children, substitute care as it now exists may not be optimal, and we shall not understand fully the consequences for another generation. Yet day care does not have to be a negative force. Quality day care can and does function to make the family system work better, when the center is run properly—as some are. Day care which supports and strengthens the family as a whole needs to become the standard rather than the exception.<sup>54</sup>

In order to ensure these positive results, Dr. Brazelton recommends that there be at least one adult to care for every three infants.<sup>55</sup> In reality, state regulations of infant care range from more than half of the states which permit infants of any age to be admitted into group facilities to those of Hawaii which does not permit infants in care until two years of age without permission from the regulatory agency. The range for child to staff ratios for infants also varies widely from 8:1 in South Carolina to 3:1 in Maryland and Massachusetts, with the most common ratio being 4:1.<sup>56</sup>

Clearly, the range of regulatory details varies widely from state to state. In order to have a more cohesive view of how these regulations work, the next section studies the systems in three states in more detail.

## II. CHILD CARE REGULATIONS IN NEW YORK STATE AND NEW YORK CITY

### A. New York State

The New York state statutory scheme for regulating child care is set forth in section 390 of the Social Services law and regulations established pursuant to

52. Morgan, *supra* note 26, table 2.

53. Murray, *supra* note 23, at 265, n. 19. See STAFF OF THE SELECT HOUSE COMMITTEE ON CHILDREN, YOUTH AND FAMILIES, 98th Cong., 2D SESS., *Families and Child Care: Improving the Options* (Comm. Print 1984).

54. T. Berry Brazelton, *Issues For Working Parents*, in THE PARENTAL LEAVE CRISIS 36 (Edward Zigler & Meryl Frank, eds. 1988).

55. *Id.* at 48-49. The concern of child development experts regarding very early substitute care is part of the reason for an increase demand for a national parental leave policy. This policy would mandate that employers guarantee job security for parents who remain home to care for newborn infants. Jay Belsky, "A Reassessment of Infant Day Care" in Zigler and Frank, *supra* note 54, at 114.

56. Morgan, *supra* note 26, table 3.

the statute. There are currently three forms of regulated child care: day care centers, group family day care homes, and family day care homes. Newly revised section 390, effective November 19, 1991, provides for a system of licensing and registration. Excluded from the definition of child care are facilities certified by the departments of Social Services or Mental Health to provide subsidized care.<sup>57</sup> Section 390 1(a)(i) defines child care as follows:

care for a child on a regular basis provided away from the child's residence for less than twenty-four hours per day by someone other than the parent, step-parent, guardian, or relative within the third degree of consanguinity of the parents or step-parents of such child.<sup>58</sup>

"Child day care center" is defined as follows:

[a]ny program or facility caring for children for more than three hours per day per child in which child day care is provided by a child day care provider except those programs operating as a group family day care home as such term is defined in paragraph (d) of this subdivision, a family day care home, as such term is defined in paragraph (e) of this subdivision, and a school-age child care program, as such term is defined in paragraph (f) of this subdivision.<sup>59</sup>

The Regulations for Day Care Centers<sup>60</sup> clarify that day care includes both compensated and non-compensated services.

In 1986 the legislature established group family day care as a separate category of child care. Group family day care home is defined as follows:

[a] program caring for children for more than three hours per day per child in which child day care is provided in a family home for seven to ten children of all ages, including not more than four children under two years of age or up to twelve children where all of such children are over two years of age, except for those programs operating as a family day care home, as such term is defined in paragraph (e) of this subdivision, which are for seven or eight children.<sup>61</sup>

Family day care home is defined as a program caring for children for more than three hours per day per child in which day care is provided in a family home for three to six children.<sup>62</sup>

Part 417 of the Social Service regulations establishes a separate set of regulations for family day care homes.

Because of the language of section 390 (1)(e) and (2)(b), a child day care provider who cares for fewer than three children is not required to register or obtain a license. To summarize, in order to determine what set of regulations apply, potential care-givers in New York state would need to fit themselves into the following chart:

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57. N.Y. SOC. SERV. LAW § 390(1)(a)(ii)(C)(1)-(2) (McKinney Supp. 1991).

58. N.Y. SOC. SERV. LAW § 390(1)(a)(i) (McKinney Supp. 1991).

59. N.Y. SOC. SERV. LAW § 390(1)(c) (McKinney Supp. 1991).

60. N.Y. COMP. CODES R. & REGS. tit. 18, § 418 (1983).

61. N.Y. SOC. SERV. LAW § 390 (1)(d) (McKinney Supp. 1991). A group family day care home may also care for two or more children if they are of school age and cared for outside of school hours.

62. N.Y. SOC. SERV. LAW § 390 (1)(e) (McKinney Supp. 1991). A family day care home may care for one or two additional children if of school age and cared for before or after school hours.



Unregulated	Family Day Care Home Sec. 417	Group Family Day Care Home Sec. 416	Child Day Care Center Sec. 418
Fewer than 3 children  (417.6 (c) & (a))	3-6 children in a home; 7 or 8 if no more than six are less than school age; no more than 2 under the age of 2; no more than 5 under the age or 3	In family home; 7 to 10 children up to 12 if all are over 2; up to 14 if 2 are school children; no more than 4 under age of 2	7 or more children unless group family home def. applies

New York does not exempt church-affiliated facilities from regulation. The following types of care are excluded: day camps, after-school religious education programs, programs operated by public school systems, and kindergartens and nursery schools run by private schools operating in accordance with state education law requirements.<sup>63</sup> Because of the statutory definition of child day care centers, group family day care homes and family day care homes operating for three hours or less a day are excluded from coverage.<sup>64</sup> The statute does not apply to care by close relatives,<sup>65</sup> and further, excludes child day care centers in New York City.<sup>66</sup>

As could be expected, the regulations for day care centers (Part 418), group family day care homes (Part 416), and family day care homes (Part 417) vary in amount of detail according to the number of children in the facility regulated.<sup>67</sup> A comparison of the regulations for the three types of care in the area of infant care reveals several differences. In day care centers, a child must be at least eight weeks old to be admitted.<sup>68</sup> The regulations contain a vast amount of specifications for the care of infants, who are defined as children from eight weeks to three years old.<sup>69</sup> A day care center must provide an area for infants separate from areas with older children.<sup>70</sup> A registered nurse must visit the center at least once a week.<sup>71</sup> The child to staff ratio for infants from eight weeks to one and one-half years is 4 to 1 with a maximum group size of eight children. For infants from one and one-half to three years, the ratio is 4 to 1 for a maximum group of twelve or a ratio of 5 to 1 for a maximum group of ten.<sup>72</sup> The regulations

63. N.Y. SOC. SERV. LAW § 390(1)(a)(ii) (McKinney Supp. 1991).

64. N.Y. SOC. SERV. LAW § 390 (1)(c), (d), (e) (McKinney Supp. 1991).

65. N.Y. SOC. SERV. LAW § 390(1)(a) (McKinney Supp. 1991).

66. N.Y. SOC. SERV. LAW § 390(13) (McKinney Supp. 1991).

67. The Department of Social Service is presently rewriting the regulations pursuant to the revised statute. The current regulations remain in effect until the revisions are completed. Telephone conversation with Bureau of Child Care, Department of Social Services, (July 25, 1991).

68. N.Y. COMP. CODES R. & REGS. tit. 18, § 418.7 (1983).

69. N.Y. COMP. CODES R. & REGS. tit. 18, § 418.17(a) (1983).

70. N.Y. COMP. CODES R. & REGS. tit. 18, § 418.17(c) (1983).

71. N.Y. COMP. CODES R. & REGS. tit. 18, § 418.17(d) (1983).

72. N.Y. COMP. CODES R. & REGS. tit. 18, § 418.12(e) (1983).

contain such other details as that an infant must be taken from the crib for feeding,<sup>73</sup> cribs must be placed at least two feet apart,<sup>74</sup> and a minimum of thirty-five square feet must be provided per infant.<sup>75</sup>

A number of these regulations would be impossible or nonsensical in smaller facilities. Group family day care homes may admit infants at six weeks of age.<sup>76</sup> Infant care regulations are included with the general regulations and contain such items as "while awake, infants must not be left in a crib for more than one-half hour at any time,"<sup>77</sup> and "when toilet training is conducted in a group family day-care home, it must be carried out in a non-punitive manner."<sup>78</sup> A family day care home may not accept infants under the age of eight weeks.<sup>79</sup> The regulation of infant care is not separated from other care and is much more generally stated than in the other two categories, without any detailed specifications regarding feeding or space limitations. One regulation, for example, sets out that "[t]he program of the family day care home shall include a schedule of meals, naps and play. Such schedule shall be sufficiently flexible to provide a family atmosphere and to meet the needs of individual children."<sup>80</sup>

How does New York manage to enforce its regulations? All three of the sets of regulations discussed above contain provisions for visitation and inspection by the state agency.<sup>81</sup> With the increase in the number of facilities and the amount of regulated activity, it is evident that much of child care is unsupervised.<sup>82</sup> The newly revised statute mandates inspection. Licensed facilities must be inspected prior to the issuance or renewal of a license.<sup>83</sup> The legislature further mandates that the Department of Social Services inspect at least twenty percent of registered family day care homes and child day care centers annually.<sup>84</sup> Whether the state will provide adequate funding to enable such extensive inspection is doubtful. Along with the issue of sufficient staffing, the rights of child care operators must be considered.<sup>85</sup> Furthermore, there is the practical question of how to regulate compliance with such ambiguous requirements as "(a)ny discipline used must relate to the child's act and be handled without prolonged delay on the part of

73. N.Y. COMP. CODES R. & REGS. tit. 18, § 418.17(1) (1983).

74. N.Y. COMP. CODES R. & REGS. tit. 18, § 418.17(h)(1) (1983).

75. N.Y. COMP. CODES R. & REGS. tit. 18, § 418.17(g) (1983).

76. N.Y. COMP. CODES R. & REGS. tit. 18, § 416.16(2) (1983).

77. N.Y. COMP. CODES R. & REGS. tit. 18, § 416.13(h) (1983).

78. N.Y. COMP. CODES R. & REGS. tit. 18, § 416.15(i) (1983).

79. N.Y. COMP. CODES R. & REGS. tit. 18, § 417.6(b) (1983).

80. N.Y. COMP. CODES R. & REGS. tit. 18, § 417.12(a) (1983).

81. N.Y. COMP. CODES R. & REGS. tit. 18, § 416.20(a) (1983); N.Y. COMP. CODES R. & REGS. tit. 18, § 417.16 (1983); N.Y. COMP. CODES R. & REGS. tit. 18, § 418.20 (1983).

82. See Morgan, *supra* note 26, at 1-5, 1-6.

83. N.Y. SOC. SERV. LAW § 390 (2)(d)(i) (McKinney Supp. 1991).

84. N.Y. SOC. SERV. LAW § 390(4)(a) (McKinney Supp. 1991).

85. The problem is most severe in the regulation of child care provided in private homes because of the protection from unreasonable searches and seizures granted by the Fourth Amendment in the U.S. Constitution. U.S. CONST. amend XIV. For a discussion of the need for a warrant, and the standard of care required to obtain a warrant in the inspection of private homes providing child care, see Comment, *Protecting Children in Licensed Family Day Care Homes: Can The State Enter a Home Without a Warrant*, 25 SANTA CLARA L. REV. 411 (1985). By statute, New York allows either announced or unannounced inspections of child care providers. N.Y. SOC. SERV. LAW § 390(3)(a) (McKinney Supp. 1991).

the provider and/or any assistant to the provider so that the child is aware of the relationship between his/her acts and the consequences thereof."<sup>86</sup>

New York's child care regulations are not the only controls placed upon child care facilities. The operator of a child care facility must also comply with any relevant health, fire, safety, and zoning codes. The child care regulations frequently tie in with the local codes. For both day care centers and family day care homes there are provisions mandating compliance with state and local health requirements.<sup>87</sup> The group family day care regulations do not include this provision; the relevant section lists a number of health requirements instead.<sup>88</sup> Additionally, in order to obtain a group family day care permit, certain applicants must meet the following requirement:

where a group family day-care program will be located on other than the ground floor of a multiple dwelling not classified as fireproof or fire-resistant, a statement from the landlord or appropriate official or authority that the dwelling meets standards for sanitation and safety where local fire, health and/or building code authorities require approval.<sup>89</sup>

There are also tie-ins with local codes for family day care homes and day care centers. An application for a permit to operate a day care center, in fact, must include reports from all inspections done by local authorities.<sup>90</sup> There do not appear to be conflicts in complying with the state child care requirements and local health, safety, and fire codes.

Conflicts have occurred, however, with local zoning ordinances. In *People v. Halloran*,<sup>91</sup> the defendants provided child care for no more than six children pursuant to a family day care permit from the state Department of Social Services. The village of Rockville Centre issued summonses alleging that the defendants violated the village zoning code by conducting a business in a residential neighborhood. The court denied the defendants' motion to dismiss, and rejected their arguments that the zoning code was both preempted by state law and void because it was inconsistent with state law. Defendants claimed the zoning code was preempted by section 410-d of the Social Services Law which sets forth the following:

[T]he absence of adequate day care and residential child care facilities is contrary to the interest of the people of the state, is detrimental to the health and welfare of the child and his parents and prevents the gainful employment of persons, who are otherwise qualified, because of the need to provide such care in their home. It is the purpose of this article to encourage the timely construction and equipment of such facilities with mortgage loan participation by the New York state housing finance agency. The provision of such facilities is hereby declared to be a public policy of the state to encourage.<sup>92</sup>

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86. N.Y. COMP. CODES R. & REGS. tit. 18, § 416.15(b) (1983).

87. N.Y. COMP. CODES R. & REGS. tit. 18, § 417.7(b) (1983); N.Y. COMP. CODES R. & REGS. tit. 18, § 418.9(b) (1983).

88. N.Y. COMP. CODES R. & REGS. tit. 18, § 416.10 (1983).

89. N.Y. COMP. CODES R. & REGS. tit. 18, § 416.3(3) (1983).

90. N.Y. COMP. CODES R. & REGS. tit. 18, § 418.4 (1983).

91. 497 N.Y.S.2d 248 (N.Y. Justice Ct. 1985).

92. N.Y. SOC. SERV. LAW § 410-d (McKinney 1983).

The court found that the purpose of the statute was to encourage the construction of residential child care facilities and thus was not preemptive in the area of family day care.<sup>93</sup> The court also found that there was no inconsistency between the zoning code and state law. The court stated that any inconsistency was with a regulation of the state Department of Social Services, as distinguished from a state law.<sup>94</sup>

The court in *People v. Bacon*<sup>95</sup> held that the defendant did not violate the zoning code for the town of Hempstead by operating a family day care in a residential area. The court based its holding on the finding that the use of the premises as a family day care home was a permitted use under the zoning ordinance,<sup>96</sup> and thus did not reach the preemption issue. A day care licensing specialist for the Department of Social Services had testified for the defendant, claiming that it was the position of the Department that the Social Services Law preempts local zoning ordinances.<sup>97</sup>

A recent Appellate Division decision found that by enacting section 390 of the Social Services law, the state had preempted the regulation of family day care homes.<sup>98</sup> The town of Clarkstown had amended its zoning ordinances to include performance standards for day care homes imposed by the state.<sup>99</sup> The court held that although section 390 does not expressly prohibit local regulation of child care, the state "has evinced an intent to preempt the regulation of family day-care homes."<sup>100</sup>

The New York State Legislature addressed the zoning issues, along with fire and safety code issues, by enacting section 390 (13)(d) which states:

Notwithstanding any other provision of law: for the purposes of this subdivision, no local government may prohibit use of a single family dwelling for group family day care where a permit for such use has been issued in accordance with regulations issued pursuant to this section; nor may any local government prohibit use for group family day care, of a multiple dwelling not classified as fireproof, where in either case a permit for such use has been issued in accordance with regulations adopted pursuant to this section and such use is otherwise permitted under state fire and safety standards (the state code) and under any other existing standard for permitted uses of the multiple dwelling.<sup>101</sup>

Regulation of child care in New York is complicated not only by separate systems for licensing and certification of subsidized care and by zoning codes, but also by the fact that New York City has its own system of regulation.

## **B. New York City**

Section 390(13) excludes from its coverage "child day care centers in the city of New York." As "child day care center" is defined to exclude group family

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93. 497 N.Y.S.2d at 249.

94. *Id.* at 250.

95. 133 Misc. 2d 771, 508 N.Y.S.2d 138 (1986).

96. *Id.* at 140.

97. *Id.* at 139.

98. *People v. Clarkstown*, 160 A.D.2d 17 (N.Y. App. Div. 1990).

99. *Id.* at 24-5.

100. *Id.* at 21.

101. N.Y. Soc. Serv. § 390(13)(d) (McKinney 1991).

day care home and family day care home, the only form of child care in New York City currently outside the reach of state regulations are the centers. New York City's child care regulations are contained in the Health Code, promulgated in 1963 when the New York City Sanitary Code was repealed and replaced with the Health Code. The Health Code revised the Sanitary Code's regulation of day care facilities, but relinquished its regulation of institutions boarding children to the state Department of Social Services.<sup>102</sup>

The constitutionality of these child care provisions was upheld in *Metropolitan Association of Private Day Schools v. Baumgartner*.<sup>103</sup> The court found that the city, through the state, had broad police powers to regulate health and welfare and that the regulations were not inconsistent with the state law.<sup>104</sup> The relevant regulations are contained in three sections. Article 45, General Provisions Covering Day Care Services, Schools, and Children's Institutions, contains those items applicable to all three types of institutions. Article 47 contains the regulations applying only to day care centers. Article 53 applies to family day care. Article 45 defines day care service as follows:

any service which during all or part of the day regularly gives care to six or more children, not of common parentage, who are under six years of age, whether or not the care is given for compensation, whether or not it has a stated educational purpose, and whether the service is known as a child care center, day nursery, day care agency, nursery school, kindergarten, play school, progressive school or by any other name.<sup>105</sup>

Excluded from the definition are services which care for children five hours or less a week or for one month a year or less.<sup>106</sup> Any facility with fewer than six children, therefore, is regulated only through Article 53.

The notes to section 45.01 explain that the term "day care service" includes private individuals.<sup>107</sup> Section 45.03 states that the Health Department shall administer the code "with due regard to the duties and responsibilities" of the board of education, the state department of social welfare, and the state department of health.<sup>108</sup> The regulations particular to day care, in Article 47, establish the minimum age limit for admission to a day care service at two years of age, unless the facility holds a special permit.<sup>109</sup> The notes to section 45.01 explain this age limit: "Since recent studies have shown that family day care is preferable for children under two years of age, such children cannot be admitted to a day care service."<sup>110</sup> The child to staff ratio for groups of four year old children is 6:1.<sup>111</sup> Article 53, on the other hand, provides a different approach for family day care, defined as the "regular day time care of not more than five children

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102. See sections 45, 47, and 53 New York City Health Code (1985). See, Introductory Notes to the Sanitary Code Revision Project, Third Draft (For Adoption in Principle) (Feb. 1959).

103. 245 N.Y.S.2d 733 (N.Y. Sup. Ct.1963).

104. *Id.* at 736-37.

105. N.Y.C. HEALTH CODE § 45.01(a) (1985).

106. *Id.*

107. *Id.*

108. N.Y.C. HEALTH CODE § 45.03(a) (1985).

109. N.Y.C. HEALTH CODE § 47.07(a) (1985).

110. N.Y.C. HEALTH CODE § 45.01 (1985).

111. N.Y.C. HEALTH CODE § 47.11 (1985).

apart from their parents or guardians, in the home of an unrelated family."<sup>112</sup> Article 53 introduces a form of regulation termed a certificate of approval. A certificate of approval is unrelated to state certification for subsidized care. There are two facets to the certificate of approval. A caregiver caring for any children under two years of age must have a certificate of approval.<sup>113</sup> A caregiver caring for fewer than five children over the age of two may voluntarily apply for a certificate of approval.<sup>114</sup> A certificate of approval will not be issued to a first time applicant over sixty years of age or to a man.<sup>115</sup> Once a caregiver receives a certificate of approval, she is listed on a registry of approved homes available to the public.<sup>116</sup>

How do the New York City Health Code regulations relate to the state Social Service regulations? Although the previous wording of section 390 of the regulations excluded non-subsidized care in New York City from coverage except for group family day care,<sup>117</sup> the new statute excludes only day care centers. Therefore, although the Health Code contains regulations of group family homes and family day care homes, in the case of any conflicting regulations, the state regulations would preempt those of the city.<sup>118</sup>

To understand the variance in child care regulations not only within the state, but also that among different states, the regulatory schemes of two additional states will be analyzed.

### III. CHILD CARE REGULATIONS IN SOUTH CAROLINA

South Carolina's child care regulatory system is administered by its Department of Social Services. A State Advisory Committee on the Regulation of Child Day Care Facilities is created by statute.<sup>119</sup> A child day care facility is defined as any facility providing "care, supervision or guidance" for any minor child who is not related by blood, marriage, or adoption to the owner or operator.<sup>120</sup> Child day care facilities are divided into "child day care centers", which include facilities caring for thirteen or more children; "group day care homes", facilities caring for at least seven but not more than twelve children; and "family day care homes", occupied residences providing care for no more than six children. The latter category does not apply to homes in which the children are related to the caregiver or are all the children of one family unrelated to the caregiver.<sup>121</sup> Care for children for fewer than four hours a day or more than twenty four hours at a time is excluded completely from regulation.<sup>122</sup> Child day care centers and group day care homes are licensed; family day care homes are registered.<sup>123</sup> It is in the public policies underlying the statutes that a wide difference between South

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112. N.Y.C. HEALTH CODE § 53.01 (1985).

113. N.Y.C. HEALTH CODE § 53.03 (1985).

114. N.Y.C. HEALTH CODE § 53.07 (1985).

115. N.Y.C. HEALTH CODE § 53.07(b)(3) & (d) (1985).

116. N.Y.C. HEALTH CODE § 53.09 (1985).

117. N.Y. SOC. SERV. LAW § 390(14) (McKinney 1983).

118. See *supra* notes 98-100 and accompanying text.

119. S.C. CODE ANN. § 20-7-3040 (Law. Co-op. 1985).

120. S.C. CODE ANN. § 10-7-2700(b) (Law. Co-op. 1985).

121. S.C. CODE ANN. § 0-7-2700 (e), (f), and (g) (Law. Co-op. 1985).

122. S.C. CODE ANN. § 20-7-2700(a) (Law. Co-op. 1985).

123. S.C. CODE ANN. § 20-7-2780 and § 20-7-2840 (Law. Co-op. 1985).

Carolina and New York can be seen. The South Carolina statute and accompanying regulations express overt concern for the freedom of parents and operators involved with religiously-affiliated facilities. The section setting out the statutory purpose states that "[i]t is the further intent . . . that the freedom of religion of all citizens shall be inviolate."<sup>124</sup> Representatives of church-operated child day care centers (one an operator and one a parent of a child receiving care) are given, by statute, two positions on the State Advisory Committee on the Regulation of Child Day Care Facilities.<sup>125</sup> Excluded from the definition of "child day care facilities" are "child day care centers and group day care homes owned and operated by a local church congregation or an established religious denomination or a religious college or university which does not receive state or federal financial assistance for day care services." These facilities must meet the basic health and safety provisions and may voluntarily become licensed.<sup>126</sup> They are also subject to less intrusive standards than those for other facilities.<sup>127</sup>

Another area of policy difference between New York and South Carolina is reflected in the following statement in the "Purpose" section of the South Carolina statute: "Nothing in this subarticle shall create authority for the Department of Social Service to influence or regulate the curriculum of child day care facilities."<sup>128</sup> The regulations for New York's state group family homes, on the other hand, include the following:

- (a) The group family day-care provider must develop a written plan of program activities and routines. Such a plan must be shared with the parents. Such plan must include a schedule of meals, naps, and learning activities through play and must be flexible enough to accommodate the needs of individual children and the group as a whole.
- (b) The program must be varied in order to promote the physical and emotional well-being of the children and must encourage the development of language, cognitive, physical and social skills appropriate to the age of the children.<sup>129</sup>

Looking at the details contained in the South Carolina regulations, other differences can be seen. In a child day care center, for example, infants may be admitted from the time of birth. The child to staff ratio for infants is 8 to 1.<sup>130</sup> In New York state, infants may not be admitted to day care centers until they are eight weeks old; the child to staff ratio for infants from eight weeks to one and one-half years of age is 4 to 1, with a maximum group size of eight.<sup>131</sup> The child to staff ratio for four year olds in South Carolina is 20 to 1;<sup>132</sup> the ratio for New York state is 7 to 1 or 8 to 1 depending on group size.<sup>133</sup> The bulk of the South Carolina regulations deal with health and life safety issues rather than with qualitative types of standards such as staff education and training.

124. S.C. CODE ANN. § 20-7-2710(b) (Law. Co-op. 1985). This section excludes child care given during religious services, as does the New York statute.

125. S.C. CODE ANN. § 20-7-3040(a)(5) (Law. Co-op. 1985).

126. S.C. CODE ANN. § 20-7-2700(b) (Law. Co-op. 1985).

127. S.C. CODE ANN. § 20-7-2900 (Law. Co-op. 1985).

128. S.C. CODE ANN. § 20-7-2710(c) (Law. Co-op. 1985).

129. N.Y. COMP. CODES R. & REGS. tit. 18, § 416.13(a) (1983).

130. S.C. CODE REGS. 114-5-13 (Law. Co-op. Supp. 1990).

131. N.Y. COMP. CODES R. & REGS. tit. 18, § 418.13(e) (1983).

132. S.C. CODE REGS 114-5-13 (Law. Co-op. Supp. 1990).

133. N.Y. COMP. CODES R. & REGS. tit. 18, § 418.12(e) (1983).

#### IV. CHILD CARE REGULATIONS IN IOWA

Iowa's child care system is regulated by the state Department of Human Services. The controlling statute,<sup>134</sup> also establishes a state day care advisory committee to advise the Human Services Department and recommend improvements in licensing and registration.<sup>135</sup> The definition of child day care is that of care by a non-relative for periods less than twenty-four hours a day outside of the child's home.<sup>136</sup> A child care center means care for seven or more children, unless the facility is registered as a group day care home or family day care home.<sup>137</sup> A group day care home provides care for more than six but fewer than twelve children and is prohibited from providing care for more than six children under the age of six at any one time.<sup>138</sup> A family day care home is a program providing care for fewer than seven children. A family day care home may provide care for up to twelve children for a period of less than two hours if six children attend school full-time.<sup>139</sup> Iowa's definition of child care facility includes "preschool", defined as a facility providing care for children ages three to five for not longer than three hours a day and providing developmental programs.<sup>140</sup> Iowa does not exempt religiously affiliated child care facilities.

Iowa has a varied regulatory system. Child care centers must be licensed.<sup>141</sup> A family day care home may register; a group day care home must obtain a certificate of registration.<sup>142</sup> The statute confronts the problem of conflicts with local safety and fire codes by tying into the local codes. For example, it mandates that the Human Services Department adopt rules in consultation with the state fire marshall relating to fire safety for group day care homes.<sup>143</sup> Furthermore, local boards of health are permitted to make inspections of licensed centers and a center must be inspected by a state fire inspector before a license is renewed or granted.<sup>144</sup>

Iowa's child care regulations provide fewer details than either New York or South Carolina. They provide for a child to staff ratio for four year olds of 12 to 1.<sup>145</sup> Infants may be admitted to centers at two weeks of age, and the child to staff ratio for infants from two weeks to two years of age is 4 to 1.<sup>146</sup> There are some special requirements for infant care. Regulation 109.7(4) provides that infants must be "held, rocked, played with and talked with individually several times a day" with the same adult caring for the same infant "insofar as

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134. IOWA CODE ANN. §§ 237A.1-237A.26 (West Supp. 1991).

135. IOWA CODE ANN. §§ 237A.21 - 237A.22 (West Supp. 1991).

136. IOWA CODE ANN. § 237A.7 (West Supp. 1991).

137. IOWA CODE ANN. § 237A.8 (West Supp. 1991).

138. IOWA CODE ANN. § 237A.1.9(b) (West 1985).

139. IOWA CODE ANN. § 237A.1.9(a); § 237A.3.1 (West Supp. 1991).

140. IOWA CODE ANN. § 237A.1.14 (West 1985).

141. IOWA CODE ANN. § 237A.2 (West Supp. 1991). In the discussion on the Senate floor prior to the passage of the ABC bill, Iowa Senator Grassley compared Iowa's system of child care regulations with that of New York stating that Iowa is able to provide excellent child care without an extensive system of regulation as that which exists in New York. 135 CONG. REC. S7464 (daily ed. June 23, 1989).

142. IOWA CODE ANN. § 237A.3 (West 1985).

143. IOWA CODE ANN. § 237A.3.2 (West 1985).

144. IOWA CODE ANN. § 237A.4 (West Supp. 1991).

145. IOWA ADMIN. CODE r. 441-109.4(4) (1989).

146. *Id.*



possible."<sup>147</sup> The regulations for registration of family and group day care homes are extremely brief and are contained in three pages. To summarize child care regulations in Iowa, it can be said that the general policy is more similar to New York than to South Carolina, but that New York is more involved in the detailed operation of facilities than is Iowa.

The following chart reveals the range encountered in regulations in one area of great current concern among child care experts, that of infant care.

*Age For Admission of Infants to Child Care Centers*

New York State	New York City	South Carolina	Iowa
May not be admitted until 8 weeks old	May not be admitted unless center has special permit	Admitted from birth	admitted from age 2

Clearly, the states vary widely in the standards they impose upon child care facilities and in the policy issues behind the standards. Added to the already complicated child care regulatory system is the current debate over the role of the federal government.

## V. THE FEDERAL ROLE IN THE REGULATION OF CHILD CARE

The issue of the appropriate federal role in the area of child care has become the center of a potent political debate. Underlying the controversy is the issue of how involved the federal government should become in the regulation and subsidization of child care and, indeed, in the development of a federal family policy.

A view at one end of the political spectrum is that the government should take a leadership role in developing family policies, and should become a center for problem-solving for issues confronting the family, including those relating to the high number of working mother and single parent families. Proponents of this view actively support national legislation in the area of mandatory parental leave policies and in the development of affordable, high quality, child care. Congresswoman Patricia Schroeder from Colorado, a sponsor of the Family and Medical Leave Act,<sup>148</sup> requiring employers to grant unpaid leave time to employees to care for infants, seriously ill children, or elderly parents, recently wrote the following:

The changes in our country's demographics, family life, and economy make it imperative that our federal government provide leadership in family policy . . . . There are several changes that the federal government must make in order to meet the needs of today's families . . . . If the federal government recognizes its

147. IOWA ADMIN. CODE r. 441-109.7(4) (1989).

148. Family and Medical Leave Act of 1987, S. 345, H.R. 770, 101st Cong., 1st Sess. (1989). Although passed by both houses, the measure was vetoed by president Bush. The House sustained the veto, falling fifty-four votes short of an override. 136 CONG. REC. 45501 (daily ed. July 25, 1990).

obligation to families and deals with these issues, it can improve the functioning of American families and can brighten the outlook for our country's future.<sup>149</sup>

This view can be contrasted with that of Thomas Tauke, representative from Iowa, who supported the Republican alternative to the ABC bill, tax credits for families with children under six, with no direct subsidization except for the poorest of families and no interference by the federal government with state standards. President Bush also supports this approach.<sup>150</sup> In discussing these contrasting approaches, Representative Tauke has stated that the following:

Two general legislative approaches to the child care issue were advanced in the 100th Congress. The first would heavily involve government in the provision of child care and in the choices made by parents; the second would provide additional resources directly to parents in order to expand the options available to them. (citations omitted).<sup>151</sup>

This distinction reflects a dichotomy in the discussion of child care in the last twenty-five years. According to many, out-of-the-home child care is needed for America's poor, and should in fact be encouraged so that these mothers can work instead of relying on welfare. This same child care, however, should not be encouraged for "normal" middle income families since to encourage these mothers to work is to contribute to the decline of the American family.<sup>152</sup> This approach has meant that the federal government spends a considerable amount of money on child care for the poor, but does not provide leadership or assistance in the development of quality programs. The exception, the Head Start program, discussed below, has limitations as a provider of child care support for working mothers. That the federal government is heavily financially involved in child care is undisputed. In 1989, it provided \$2.9 billion in direct child care subsidies, and \$4 billion in income tax lost through child care tax credits.<sup>153</sup>

The statements of several recent presidents reveal the dichotomy in the prevalent approach. Former President Ford vetoed the child care provisions of the Social Security Amendments of 1976. In his veto message, he stated that he opposed the measure because it "would perpetuate rigid federal child day care standards" and was an "unwarranted federal interference in States' administration of these programs."<sup>154</sup> He later signed a bill extending the aid for poor families, but without any federal standards.<sup>155</sup> Former President Nixon stated this approach most clearly. In 1971 he vetoed the Comprehensive Child Development Amendments to the Economic Opportunity Act.<sup>156</sup> His veto message stated that the "most deeply flawed" provision was that which would have established a comprehensive child development program. His concern was with the "family-weakening implications:"

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149. Schroeder, *supra* note 19, at 299, 309.

150. Lance Leibman, *Evaluating Child Care Legislation: Program Structure and Political Consequences*, 26 HARV. J. ON LEGIS. 357, 382-83 (1989).

151. Thomas J. Tauke, *Choice-The Essential Component of Family Legislation*, 26 HARV. J. ON LEGIS. 465, 470 (1989).

152. James T. Greenman, "Perspectives in Quality Day Care," in Greenman and Fuqua, *supra* note 21, at 6-7.

153. Liebman, *supra* note 150, at 368.

154. 12 Weekly Comp. Pres. Docs. 579 (Apr. 6, 1976).

155. *Id.*

156. S. 2007, 92 Cong. 1st Sess., 117 CONG. REC. 45, 612 (daily ed. Dec. 9, 1971).

There is a respectable school of opinion that this legislation would lead toward altering the family relationship . . . and commit the vast moral authority of the National Government to the side of communal approaches to child rearing against the family-centered approach.<sup>157</sup>

Former President Reagan clarified the current Republican approach to child care legislation in his proclamation of National Child Care Awareness Week in 1988. He stated that caring for children is the "primary responsibility of a parent." In addition, he explained the policy behind child care legislation:

To be fair to all families, child care policy analysis must recognize the contributions of women who work, those who would prefer to work part-time rather than full-time jobs, and homemakers who forego employment income altogether to raise children at home. Surely all of these are "working mothers."<sup>158</sup>

The debate, compromises, and final content of the recently enacted child care legislation reflect the controversy arising when the federal government enters family policy-making. In order to understand the details of this legislation, a brief history of federal intervention in child care is helpful.

An active role for the federal government in child care began in the 1930's, when New Deal legislation contained provisions for support of child care while parents worked. The Social Security Act of 1935<sup>159</sup> established child welfare services. The Lanham Act<sup>160</sup> authorized federal funds for day care services to enable women to work during World War II. After World War II, there was little new federal involvement until the addition of Head Start by the Great Society in 1965. Head Start has operated continually for the last twenty-five years, and has in fact expanded considerably through the years. As of 1987, it provided funds for pre-school programs for 452,000 children ages three to five. The Department of Health and Human Services operates Head Start by granting awards to community organizations.<sup>161</sup> It has been described as a watershed program because its purpose is to help children rather than provide child care services for mothers.<sup>162</sup> Head Start programs are generally half-day so that a working mother must supplement it with other forms of care. Because of its acknowledged success, Head Start is one of the few social welfare programs to be popular with conservatives as well as with liberals. In 1990, President Bush signed a measure vastly increasing the federal head start program. If fully funded, the measure would allow participation by all eligible preschoolers by 1995.<sup>163</sup>

The child care bill vetoed by Former President Nixon in 1971<sup>164</sup> would have been another watershed. Although Nixon's Secretary of Health, Education, and

157. 7 Weekly Comp. Pres. Docs. 1635-6 (1971).

158. 24 Weekly Comp. Pres. Docs. 450-1 (Apr. 11, 1988).

159. Grubb, *supra* note 31, at 311. The Grubb article contains a more detailed look at the history of both federal and state involvement with child care.

160. Pub. L. No. 77-137, 55 Stat. 361, Title II, § 201 (1941).

161. See Miller, *supra* note 14, at 322-23.

162. Seaver and Cartwright *supra* note 21, at 16.

163. See Miller *supra*, note 14, at 342; 1990 CONG. Q. ALMANAC 3721. Recent studies have highlighted some other problems with Head Start. These studies show mixed results regarding the impact of Head Start as children continued to school. Edward Zigler, former Head Start administrator and currently professor of sociology at Yale University concludes that one year of preschool, without follow-up programs can only have a limited impact upon children raised in poverty. Susan Chira, *Preschool Aid for the Poor: How Big a Head Start?*, N.Y. TIMES, Feb. 14, 1990 at A1, B6.

164. See *supra* text accompanying notes 156-57.

Welfare, Elliot Richardson, helped draft this legislation, according to one source, Nixon vetoed the bill because he needed to placate conservatives after the opening of China.<sup>165</sup> The bill would have established community child development programs available to children regardless of economic background. Any locality with a population of at least five thousand could have applied to sponsor a program.<sup>166</sup> The enactment of the bill would have made "a legislative declaration of the appropriateness of public funding for this purpose."<sup>167</sup>

A further chapter in the history of federal involvement with child care occurred with the government's use of federal standards for federally subsidized child care in the period from 1968-1981. The Federal Interagency Day Care Requirements were replaced in 1980 by the Department of Health and Human Services Day Care Regulations.<sup>168</sup> These standards were mandatory for any facilities receiving federal assistance, but had an even wider impact as many states used them as a model for developing their own licensing regulations. These standards were abolished in 1981 by the Reagan administration with the amendment of Title XX of the Social Security Act which provided for block grants.<sup>169</sup> As a result, child care facilities receiving current funds must meet only state and local standards. When these federal standards were operative, they were controversial, in part because they were frequently stricter than local standards, and in part because they added to the expense of child care. An example of these problems is seen in the case of *Stiner v. Califano*.<sup>170</sup> A suit was brought by day care operators and parents using day care to enjoin enforcement of the standards. The operators, who could not care for any child whose parents received federal assistance without complying with the federal standards, alleged that the standards violated due process and equal protection rights under the federal constitution. The operators claimed that they could not afford to remain in business if they were compelled to meet the child to staff ratios of 6 to 1 for infants under six weeks and 4 to 1 for children six weeks to thirty-six weeks. The court upheld the government's regulatory power to establish these ratios.<sup>171</sup> The financial burden imposed upon both the caregivers and the parents by the regulations is presented by evidence introduced in this case. The affidavit of one parent who used the facility but was not receiving federal assistance claimed that the operator informed her that the weekly charges would be increased from twenty dollars to one hundred dollars a week because of the new child to staff ratio. The mother asserted that this increase would force her to stop working.<sup>172</sup>

The first federal comprehensive child care legislation since the Nixon veto in 1971 was the ABC bill passed by the Senate in June 1989.<sup>173</sup> This bill, co-

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165. See Liebman, *supra* note 150, at 377.

166. 1971 CONG. Q. ALMANAC 504.

167. See Liebman, *supra* note 150, at 378-9.

168. See Kotin, *supra* note 28, at 68.

169. *Id.*

170. 438 F. Supp. 796 (W.D. Okla. 1977).

171. *Id.* at 799.

172. *Id.* at 801.

173. S. 5 101 Cong. 1st Sess., 135 Cong. Rec. S7479 (daily ed. June 23, 1989). The House of Representatives passed its own version of a child care bill, The Early Childhood and Development Act, on March 29, 1990. The measure differs from the Senate's ABC bill in a number of ways, but does require that states establish standards. N. Y. Times, March 30, 1990, § A at 1.

sponsored by Senator Christopher Dodd, Democratic senator from Connecticut, and Orrin Hatch, Republican from Utah, included a tax credit package, a health insurance program for children, additional money for Head Start, and \$1.75 billion in grant money for states for the current fiscal year to expand child care programs and to help low income parents pay for child care. This measure was a compromise, developed after the Senate's failure to pass the original "ABC" bill in 1988. The two most problematic areas in this bill were the provisions establishing specific mandatory federal regulations to be set by a national advisory board, and the granting of federal aid to religiously-affiliated facilities.<sup>174</sup>

The ABC bill allowed indirect aid to religious affiliated care by enabling parents eligible for a financial aid certificate to use the certificate in a facility selected by the parent, including one run by a sectarian organization.<sup>175</sup> There is some question about the constitutionality of the exemption of child care certificates from the prohibition of use of federal funds for sectarian purposes.<sup>176</sup>

Another compromise in the ABC bill is apparent in the child care standard sections. The final version of the ABC bill did not contain federally mandated standards. It did, however, contain provisions establishing the federal government's role in the development of standards. Section 115, entitled "Federal Administration of Child Care," established a national administrator of child care in the Department of Health and Human Services and a National Advisory Committee on Recommended Child Care Standards. This committee was given the task of developing proposed recommended standards for the categories of center-based child care services, family child care services, and group family child care services. The standards in all categories were to include child:staff ratios and health and safety requirements, as well as standards for staff qualifications and in-service training. No standard was to be "less or more rigorous than the least or most rigorous standard that exists in any of the States."<sup>177</sup> Pursuant to section 107(c)(3)(C), each state was required to set standards in each of the areas detailed in section 118 to ensure that each eligible child care provider complies with the state standards in those areas.<sup>178</sup> Further, in section 119, the bill also established a child care standards improvement incentive grant program to assist states in improving their child care programs.

The impact of an enacted ABC bill upon the wide variety of state standards currently in place is far from clear. A number of conclusions are, however, evident. Although it did not contain mandated standards, the ABC bill would have placed the federal government in a leadership role in the development of child care regulations impacting in particular upon states with minimal standards. The federal government would have itself established recommended standards. Although these standards were not mandated standards, it is likely that, just as many states adopted the Federal Interagency Day Care Requirements as standards

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174. 1988 Cong. Quarterly Almanac 365-7.

175. Cong. Rec. S. 7489 (daily ed., June 23, 1989).

176. Letters from Professors Lawrence Tribe of Harvard University School of Law and Gary Sims of Cornell Law School questioning the constitutionality of vouchers used for religious purposes were submitted as evidence in the Congressional Record during discussion of the ABC bill. 135 Cong. Rec. S7,443 (June 23, 1989).

177. S. 5 101st Cong. 1st Sess. §106 (1989).

178. S. 5 101st Cong. 1st Sess. § 107(c)(3)(C)

for all licensed facilities, the ABC federal recommended standards would have been frequently adopted as mandated standards by states.

Although the enactment of the ABC bill could have established the federal government as a force in the development of uniform national child care standards, the subsequent history of the measure reveals that such standards are unlikely in the foreseeable future. The Senate passed the ABC bill in June 1981; a compromise child care measure was not enacted by Congress until November 1990. The measure, entitled the Child Care and Development Block Grant was added to the budget reconciliation measure.<sup>179</sup>

The Block Grant authorizes \$750,000,000 in funding for fiscal year 1991, \$825,000,000 in fiscal 1992, \$925,000,000 in fiscal 1993 and "such sums as may be necessary" in fiscal 1994 and 1995 for grants to states to improve the quality, availability, and affordability of child care.<sup>180</sup> To receive the grants, the states must agree to use twenty-five percent each fiscal year to improve the quality of day care and to provide before and after school and early development services. Up to seventy-five percent must be used to provide child care services to low income families either through direct payment to providers or the distribution of certificates to the parent.<sup>181</sup> Like the ABC bill, the Block Grant permits parents to use certificates for sectarian child care services.<sup>182</sup>

The Block Grant does not attempt to establish, or even encourage, national standards for the regulation of child care. It requires that all providers receiving funding pursuant to the Block Grant comply with all state and local licensing and regulatory requirements.<sup>183</sup> It also requires that within eighteen months after a state applies for a grant, it must review its child care regulatory requirements unless it has reviewed them in the three years prior to November 5, 1990.<sup>184</sup> States are required to have health and safety standards in place for care provided with funds under the Block Grant.<sup>185</sup> The Block Grant does provide funds to improve child care quality and the enforcement of state and local standards. Of the funds that states must use to improve the quality of child care at least twenty percent must be used for the development of resource and referral programs; grants or loans to child care providers to assist them in meeting standards; improvements of the enforcement standards; training programs; or improvement of the salaries of the child care centers' staff.<sup>186</sup>

What impact will the Block Grant have upon child care standards? The use of the statute to initiate federal leadership in unifying the child care system is unlikely. Child care advocates have already expressed concern with the Bush Administration's actions since Congress enacted the statute. The Family Support Administration which handles welfare programs, rather than the Administration for Children, Youth and Families has been designated as the Health and Human Services Department agency to administer the program. The fear is that by

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179. 42 U.S.C.A. § 9858-9858p (West Supp. 1991).

180. 42 U.S.C.A. § 9858 (West Supp. 1991).

181. 42 U.S.C.A. § 9858c(c)(3) (West Supp. 1991).

182. 42 U.S.C.A. § 9858n(2) (West Supp. 1991).

183. 42 U.S.C.A. § 9858c(c)(2)(E) (West Supp. 1991).

184. 42 U.S.C.A. § 9858c(c)(2)(I) (West Supp. 1991).

185. 42 U.S.C.A. § 9858c(c)(2)(F) (West Supp. 1991).

186. 42 U.S.C.A. § 9858e (West Supp. 1991).

administering the program as a welfare program, rather than a child care development program, the Administration will stigmatize the program.<sup>187</sup>

Moreover, proposed federal regulations for a new program to provide federal funds for child care to families considered at risk of becoming welfare recipients<sup>188</sup> have led to concerns that the federal government's efforts may actually lead to the lowering of child care standards. The proposed rules would forbid the states setting higher standards for certain subsidized care than for care receiving no public money. The impact of this regulation could be to force states to relax child care standards, leading to fears that the poorest children may receive a lesser standard of care than they now receive.<sup>189</sup>

## VI. CONCLUSION

The States' child care standards vary widely in their range of details and quality of care required from caregivers. America is placing an indeterminate number of very young children into many minimally regulated facilities. The impact of this level of care upon a generation which will be asked to carry an unprecedented burden in its care for the elderly is far from clear. What is clear is that studies done so far, with varying results, have been conducted for the most part on well-regulated child care facilities. Also clear is the belief among child care experts that to have a positive impact upon a young child, a child care facility must be of high quality and well-regulated.<sup>190</sup>

Presently, a system of well-regulated, high-quality child care does not exist in the U.S. In many states, infants may be placed from birth in facilities regulated by minimum standards. It is estimated that over 50% of child care currently available is "grossly inadequate," particularly in facilities serving the poor.<sup>191</sup>

It is essential that the federal government place its fiscal and regulatory resources behind the development and funding of child care. Despite a nostalgic belief on the part of many politicians that mothers should be at home caring for their children, the reality is that every year more mothers are joining the work force, and often because of financial necessity. Making child care better and more available must be seen, not as leading to the destruction of the American family, but rather as an adjunct to modern family life. Even without federally mandated standards, the ABC bill could have been valuable in the placing of federal authority behind the acceptance of a national child care program as essential to society, both for the development of America's young children and as a support for its working parents. Unfortunately, the present federal impact appears to move the United States even further away from the development of a comprehensive national child care program.

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187. Karen DeWitt, *U.S. Plan on Child Care Is Reported to be Stalled*, N.Y. Times, Jan. 27, 1991, § 1, at 18.

188. 56 Fed. Reg. 29054 (1991).

189. Robert Pear, *New Proposal by U.S. on Child Care Leads to Dispute Over State's Role*, N.Y. Times, July 22, 1991, § A, at 10.

190. Brazelton, *supra* note 54, at 49.

191. *Id.*

