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OVERHAULING STATE LICENSING REQUIREMENTS: MAKING QUALITY CHILD CARE A REALITY

INTRODUCTION

Experts have long discussed the lack of adequate child care facilities,¹ the need for expansion of child care services,² and the lack of policies and programs to meet the changing needs of American families. Only recently, however, has sexual abuse in child care facilities attracted unprecedented public attention.³ Perhaps the best known example was that of the "McMartin" alleged child care molestation case in Manhattan Beach, California.⁴

In *McMartin*, hundreds of young children were allegedly sexually abused over a ten year period.⁵ Many teachers and staff members of the preschool were involved in the incident.⁶ Publicity surrounding the *McMartin* case sensitized the community to sexual abuse and led to the discovery of abuse in other local day care centers.⁷ The case spurred Los Angeles police to conduct investigations which uncovered child molestation at three other preschools in the surrounding area.⁸ Such discoveries support the belief of some commentators that the few reported cases of child abuse represent only the tip of the iceberg of a much larger problem.⁹

The recent child sexual abuse cases evidence the need for comprehensive legislation to ensure the quality of child care services. Ironically, the incidence of

1. Experts see a clear trend establishing that mothers are working in increasing numbers, even though quality child care is not available. See, e.g., Beck, *Child Care: Story of Neglect*, 86 AFL-CIO AMERICAN FEDERALIST 9, 11 (1979). The consensus of experts is that countries such as the Soviet Union, Hungary, East Germany, Israel and France do a much better job of providing child care facilities for all their citizens. See, e.g., *A Radical, Direct, Simple, Utopian Alternative to Day-Care Centers*, N. Y. TIMES MAGAZINE, Apr. 30, 1972, § 6, at 74.
2. Many experts have called for a federally subsidized system of day care centers as a solution to the lack of adequate child care facilities. Hill, *Private Demand For Child Care: Implications for Public Policy*, 2 EVALUATION Q. 523 (1978). However, many articles have merely recognized the growing demand without offering solutions. See, e.g., Kamerman, *Child Care Services: A National Picture*, 106 MONTHLY LAB. REV. 35, 39 (1983); Beck, *supra* note 1, at 9-11. Government studies have also concluded that there is a need to expand child care services in this country. U.S. DEPT. OF HEALTH, EDUCATION AND WELFARE, STATISTICAL HIGHLIGHTS FROM THE NATIONAL CHILD CARE CONSUMER STUDY 25 (1976).
3. Articles appear almost daily in periodicals around the country with new discoveries of abuse in child care centers from Florida to California to New York. See, e.g., *What Price Day Care*, NEWSWEEK, Sept. 10, 1984, at 14; N.Y. Times, Apr. 4, 1984, at A21, col. 1. See also U.S. DEPT. OF HEALTH AND HUMAN SERVICES, MODEL CHILD CARE STANDARDS ACT 5 (1985) (cites the recent discoveries of abuse in child care centers).
4. The *McMartin* case is cited in almost every major article decrying the recent discoveries of child sexual abuse in day care facilities. See, e.g., N. Y. TIMES, Mar. 31, 1984, § Lt, col. 2; *What Price Day Care?*, NEWSWEEK, Sept. 10, 1984, at 19.
5. N.Y. Times, Mar 31, 1984, at A9, col 2.
6. N.Y. Times, Apr. 7, 1984, A8, col. 4.
7. Publicity surrounding prosecuted cases frequently leads to discovery of other local incidents of abuse. N. Y. Times, Mar. 31, 1984, at A9, col. 2. Increased attention of abuse incidents has led to new disclosures. U.S. DEPT. OF HEALTH AND HUMAN SERVICES, MODEL CHILD CARE STANDARDS ACT 5.
8. Unfortunately, it took many horrible allegation of child sexual abuse to spur investigators to find abuse in other nearby cities. N.Y. Times, Mar. 31, 1984.
9. Experts readily acknowledge that cases of sexual abuse and child abuse are grossly underestimated. U.S. DEPT. OF HEALTH AND HUMAN SERVICES, EDUCATION AND PUBLIC WELFARE DIVISION, CHILD ABUSE HISTORY, LEGISLATION AND JOURNAL SOURCES 12 (1981).

known sexual abuse is increasing in child care facilities¹⁰ even though experts view child care services as a means of preventing the abuse of children within the family.¹¹

Current day care legislation affords inadequate protection to children. Most states regulate only formal day care center operations — those consisting of a large number of children in facilities — and not the more widely used family day care homes which care for a smaller number of children in informal settings.¹² Also, most states only regulate operators of day care centers and not their support staff.¹³ Such limited regulations enhance the problems exemplified in a Florida case where a thirty-five year old man, on parole from a prior conviction of child molestation, was arrested for sexually abusing ten dozen children at an unlicensed baby sitting service which he ran out of his home.¹⁴ Many reported cases of sexual abuse in child care centers involve acts committed by support staff such as janitors and handymen.¹⁵ Finally, many states exempt child care centers operated by religious groups from licensing regulations, even though many of the recent abuse cases have occurred in such facilities.¹⁶ The tragic consequences of a lack of comprehensive child care legislation demonstrate the need to license and regulate *all* types of child care facilities and to conduct background checks on *all* child care personnel.

This note contends that while state licensing provisions provide some protection to children in day care centers, they do not represent the best solution. State legislators must remedy the current problems and provide adequate protection by enacting new legislation. This note describes the problem of inadequate information on child abuse outside the family. It then discusses the need for child care facilities. Finally, it evaluates the current federal and state legislation and the newly proposed Health and Human Service Department's Model State Care Standards Act and the statutes in some model states.

AN UNCLEAR PICTURE OF CHILD ABUSE

Incomplete and incorrect information characterizes the majority of current material on child sexual abuse. Numerous articles and books have raised public consciousness about child abuse.¹⁷ Meanwhile legislators have enacted laws to protect children from such abuse.¹⁸ The major focus of this literature and law,

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10. In 1984, allegations of sexual abuse have begun surfacing throughout the country. U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, MODEL CHILD CARE STANDARDS ACT 5 (1985).
 11. Adequately trained child care workers can become role models for parents and help parents understand normal child behavior. They can also help parents understand normal child behavior. They can also help parents learn ways of coping with the stress of child rearing. D. FRIEDMAN, J. SALES AND V. WEINSTEIN, NATIONAL ABUSE, CHILD CARE AND THE FAMILY 24 (1984).
 12. See, e.g., N.D. CENT. CODE § 50-11.1-03-06 (1981); WASH. REV. CODE ANN. § 74.15.020-060 (1982); GA. CODE ANN. § 99-214 (1981).
 13. For the most part, the few states which demand background checks only run them on child care facility operators and not on support staff. See, e.g., GA. CODE ANN. § 99-56 (1981).
 14. *What Price Day Care?*, NEWSWEEK, Sept. 10, 1984, at 19.
 15. See, e.g., N.Y. Times, Mar. 31, 1984, § A9, col. 2. See also *What Price Day Care*, NEWSWEEK, Sept. 10, 1984, at 17.
 16. See, e.g., ALA. CODE § 38-7-3 (Supp. 1984).
 17. See, e.g., Wilson, Thomas and Schuette, *The Silent Screams: Recognizing Abused Children*, 104 EDUC. 100, 104 (1983); M. MARTIN, THE ABUSED CHILD (1976).
 18. The Federal Child Abuse Prevention and Treatment Act, enacted in the early 1970's, provided states with financial assistance for the prevention of child abuse. It established a national center to research and gather information on child abuse and neglect as well as to provide technical assistance to the states. 42 U.S.C. § 5101-15 (1983). All 50 states now have child abuse laws, including laws which require professionals to report suspected abuse cases to authorities and criminal laws which punish those who abuse children. U.S. DEPT. OF HEALTH & HUMAN SERVICES, *supra* note 9, at 14.

however, has been on child abuse within the context of the family.¹⁹ Official government statistics on child abuse include only those cases in which the perpetrator is a parent.²⁰ Furthermore, Federal child abuse legislation provides remedies only for abuse which occurs within the family setting.²¹ Recent sexual abuse cases²² show, however, that child sexual abuse does occur outside of the family unit.

Experts agree that no one knows why child abuse occurs, how often it occurs, and whether it can be prevented.²³ Moreover, no one really knows whether child abuse occurs more often today than in the past or whether it is simply being reported more extensively.²⁴ Only one national survey has attempted to determine the number of children who have been abused.²⁵ Although the survey indicated that 14 out of every 100 American parents engage in some form of abusive behavior towards their children, the surveyer acknowledged that the survey underestimated the true number.²⁶ Both the National Center For Child Abuse and the U.S. Department of Health, Education and Welfare in separate statements conceded that their estimate that over 1,000,000 children are abused per year is grossly underestimated.²⁷

The problem of inadequate information is exacerbated because the incidence of sexual abuse²⁸ of children is more difficult to ascertain than the incidence of regular child abuse.²⁹ The effects of sexual abuse are not immediately obvious. Many sexually abused children are too frightened to relate their experiences to anyone.³⁰ Moreover, many professionals, particularly doctors, refuse to reveal the sexual abuse information which they have gained from patients and clients, thereby further deflating statistical estimates on sexual child abuse.³¹ While sex-

19. Wilson, *supra* note 17, at 100. For an example of a government publication focusing on child abuse solely within the family, see U.S. DEPT. OF HEALTH & HUMAN SERVICES, *supra* note 9, at 14.

20. For instance, the U.S. Dept. of Health and Human Services' statistics on the incidence of child abuse in the United States stated that one of their objectives was to describe the characteristics of the families involved in official reports of abuse. See U.S. DEPT. OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1981: NATIONAL ANALYSIS OF OFFICIAL CHILD NEGLECT AND ABUSE REPORTING STUDY METHODOLOGY 577 (1981).

21. Under the 1974 Child Abuse Prevention and Treatment Act, as extended by the Omnibus Budget Reconciliation Act of 1981, states which receive block grants from the Federal Government to prevent abuse are required to give funding preference to parental self-help organizations dealing with child abuse. Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-135, 95 Stat. 357, 48-89 (codified at 42 U.S.C. §§ 5101-15 Supp. II 1982).

The priorities of the National Center on Child Abuse and Neglect are also aimed solely at the prevention of child abuse within the family. Its two main goals are to provide educational services to families in order to help them manage their child-rearing responsibilities and to encourage families who are at risk of child abuse to obtain self-help. U.S. DEPT. OF HEALTH & HUMAN SERVICES, *supra* note 9, at 14.

22. See *supra* notes 5-6 and 9-12 and accompanying text.

23. Leishman, *Child Abuse: The Extent of the Harm*, ATLANTIC MONTHLY, Nov., 1984, at 26.

24. For a discussion on this uncertainty, see Finkelhor, *How Widespread is Child Sexual Abuse?* CHILDREN TODAY, July-Aug. 1984, at 18-20.

25. The study which was conducted by Dr. Murray Strauss who interviewed a sample 1,146 American families with at least one child. M.A. STRAUSS, R.J. GILLES & K. STEINMETZ, BEHIND CLOSED DOORS, VIOLENCE IN THE AMERICAN FAMILY (1980).

26. Strauss suggests that his figures are underestimated because he was relying on parental self-reports. U.S. DEPT. OF HEALTH & HUMAN SERVICES, *supra* note 9, at 12.

27. Experts such as the National Center for Child and Neglect (NCAN) have repeatedly stressed that all reported cases of child abuse are underestimated. Wilson, *supra* note 17, at 100.

28. For purposes of this note, sexual abuse refers to a sexual experience going beyond mere touching between a child 12 or under with a partner at least 5 years older. Finkelhor, *supra* note 24, at 20.

29. For purposes of this note, child abuse refers to the repeated mistreatment or neglect by adult figures resulting in injury or harm. Wilson, *supra* note 17, at 101.

30. An admission from sexually abused children is usually not forthcoming and such abuse is often not discovered until a visit to a physician reveals torn, stained, or bloody underclothing; pain or itching in the genital area; or signs of venereal disease. Wilson, *supra* note 17, at 106.

31. A confidential physician survey in Massachusetts indicated that doctors knew of at least twice as many

ual child abuse is far more extensive than actual statistics indicate, more sexual abuse cases will go undetected.³² Government officials can afford to investigate only the most egregious cases reported.³³ Therefore, the majority of child molestation incidents simply go unreported.³⁴

REASONS FOR PROMOTING DAY CARE

The information available on child care services and facilities is complicated and incomplete because national data is not collected systematically.³⁵ Additionally, not enough is known about the extensiveness of the demand for and supply of child care services and facilities.³⁶

Historically, increases in child care services were a response to societal crises.³⁷ Today, however, the demand for child care services is a function of the increasing number of working women.³⁸ Currently, the demand for toddler child care services is great because of the influx of mothers with pre-school age children into the workforce.³⁹ Many women are driven into the workforce not only by career aspirations, but also because of the economic strain of a divorce or a husband's illness or death. Moreover, the growing number of families headed by women also increases the demand for child care services.⁴⁰ For some women, child care is often not a choice, but an economic necessity.⁴¹ States must promote child care facilities in order to meet this increased demand.

Current research indicates, however, that there are many other reasons to promote the increased use of child care services. Studies have shown that quality

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- cases of sexual child abuse than they had reported. Leishman, *supra* note 23, at 22. Furthermore, in New York physicians reported only 8 out of 3,000 cases. *Id.*
32. For instance, in fiscal year 1983, Federal funds used to prevent child abuse were reduced from \$22.9 million to \$16.2 million. For fiscal year 1984, the administration suggested cutting the fund by 59% to \$6.7 million. Leishman, *supra* note 23, at 31.
 33. A survey of state Child Protection Service Agencies indicated that the cutbacks had caused child abuse neglect laws to be interpreted more narrowly and only allowed investigation of "really serious-sounding cases." *Id.* at 31.
 34. Most articles reporting on the incidence of child sexual abuse will qualify their findings by stating that most incidents are not reported. See, e.g., U.S. DEPT. OF HEALTH & HUMAN SERVICES, *supra* note 9, at 12; King, *Children and the Courts*, NEWSWEEK, May 14, 1984, at 33 (1984); Leishman, *supra* note 23, at 22.
 35. For instance, experts felt that even the much cited National Consumer Day Care Study was poorly designed because it only focused on certain geographical areas in the country. Kamerman, *supra* note 2, at 37. Furthermore, the only recent national survey on day care centers, completed by Abbot Associates in 1977, did not include many child care programs in its analysis. *Id.* at 36.
 36. Little is known about child care facilities due to the lack of adequate research on facilities and a lack of comprehensive surveys. Grossman, *Almost Half of All Children Have Mothers in the Labor Force*, 100 MONTHLY LAB. REV. 41, 43 (1977).
 37. For instance, Federal day care centers were set up for the duration of World War II only to be dismantled at the end of the war. D. FRIEDMAN, *supra* note 11, at 10.
 38. In the 1970's an extraordinary increase occurred in the labor force participation rates of women, particularly those with school age children. Markowitz, *Attitudes of Mothers of Preschoolers toward Government Regulation of Day Care*, 97 PUB. HEALTH REP. 571, 572 (1982). Currently, over 28 million American children have working mothers. Grossman, *supra* note 36, at 41. This figure reflects the longterm increase in the labor force participation rate of married women with young children. *Id.* In 1983, for the first time, over half of all mothers with children under the age of six were in the labor force. Kamerman, *supra* note 2, at 35. Evidence strongly indicates that, in the late 1980's and early 1990's, women will continue to enter the market place in ever increasing numbers. Markowitz, *supra*, at 572. In fact, it is safe to say that in the near future most preschoolers will have working mothers, just as most school-age children already do. Kamerman, *supra* note 2, at 35.
 39. Kamerman, *supra* note 2, at 39.
 40. Nine million mothers currently head their own families. Beck, *supra* note 1, at 12. This results from the growing incidence of marital disruption by divorce as well as the growing number of mothers who choose to have children outside of wedlock. Grossman, *supra* note 36, at 41.
 41. Historically, child care was only considered proper as a service for mothers who were too poor to stay at home. Bourne, *What Day Care Ought to Be*. The NEW REPUBLIC Feb., 1972, at 18-23.

child care can minimize child abuse and increase a parent's chances of becoming better parents, workers, and friends.⁴² Studies also show that children in child care develop and perform better in their cognitive and social skills than children who remain at home.⁴³

Our country has good reason to promote child care. But as the recent child molestation cases demonstrate, we may be promoting danger, rather than care, for our children. Because of inadequate regulation, increasing the number of children cared for by child care services greatly increases the risk of sexual abuse.⁴⁴ Unfortunately, current child care laws cannot effectively negate this risk.

SURVEY OF FEDERAL AND STATE CHILD CARE PROGRAMS

A study of the few existing Federal and state sponsored child care programs and regulations elucidates the type of legislation needed to help prevent the sexual abuse of children cared for by child care facilities. Only adequate child care legislation can prevent further abuse.

The Federal Government does not readily supply funds or resources to promote quality child care services in the United States.⁴⁵ In the past, Federal child care legislation has been a short term response to societal crises.⁴⁶ For example, throughout the civil war, the Federal Government developed and funded day nurseries in response to the large number of fatherless families.⁴⁷ The Federal Government also subsidized day care services throughout the 1930's in an effort to lift the country out of the depression.⁴⁸

The Federal Government, however, did not implement any major national child care programs nor promulgate any child care regulations from the end of World War II⁴⁹ until the mid-1970's. In 1971, the Comprehensive Child Development Act,⁵⁰ which would have provided Federal funds for child care services for millions of children, passed both houses of Congress only to be vetoed by

42. Today, child care can provide support to the family and strengthen it, rather than weakening it, by alleviating stress, providing free time for parents, and providing teachers as role models to parents. D. FRIEDMAN, *supra* note 11, at 8-24.

43. *Id.* at 27-28.

44. For instance, Dr. Roland Summit, a psychiatrist at U.C.L.A. who has specialized in the treatment of sexually abused children for 15 years, stated that research has made it clear that the "risk of exploitation of children increases directly as the child is removed further from the biological care of the mother." N.Y. Times, Apr. 4, 1984, at A21, col. 1.

45. It is well recognized by child-care experts that Title XX, the only Federal statute governing child care, does not reach enough children. Since Title XX's purpose is only to provide necessary services to reduce welfare dependency, eligibility is restricted and furthermore, child care is merely one of several social services amalgamated under Title XX. *Id.* Furthermore, Title XX does nothing to regulate the quality of child care services. Previously, Title XX had contained Federal intra-agency requirements which regulated child/staff ratios, educational child care aspects, nutritional child care programs and parental participation. These provisions were repealed, however, in 1975. 42 U.S.C. § 1397(a)(a)(a) (1975).

The second largest Federal child care project, Head Start, an early childhood educational program aimed at educating the poorest of the poor, also only reaches a small percentage of children in need of adequate child care. Beck, *supra* note 1, at 10.

46. D. FRIEDMAN, *supra* note 11, at 10.

47. Civil War day nurseries allowed mothers to earn a living for their families. *Id.*

48. *Id.*

49. Throughout World War II, the Lantham Act (Lantham Act, 42 U.S.C. §§ 1521-24 (1982)) provided for Federally funded day care centers to encourage women to work in defense-related industries. Despite the fact that Federal funds for the centers were withdrawn after the war, all women did not, as anticipated, return to the home, but instead became a permanent part of the work force. Bourne, *supra* note 41, at 19.

50. The Act, which was sponsored by Senator Walter F. Mondale (D-Minn.) and Rep. John Brademas (D-Ind.), would have provided a comprehensive national child care program providing a full range of health, education and social services to help children achieve their full potential. S. 92-48, 92nd Cong., 1st Sess., § 501 (1971).

President Richard Nixon.⁵¹ In 1975, a similar attempt to enact national child care legislation was killed in committee⁵² after a massive letter writing campaign opposed such legislation and labelled it as communistic.⁵³

In an effort to respond to the massive demand for child care services, Congress made child care one of the eligible services under Title XX of the Social Security Act.⁵⁴ Under Title XX, the Federal Government reimburses the states through block grants for social service expenditures.⁵⁵ By giving states the discretion to choose what types of social services are funded,⁵⁶ however, Congress intended that Title XX reduce welfare dependency,⁵⁷ not promote adequate child care. Moreover, Title XX only reaches the poorest segment of the population and, as a result, millions of children of working families are left without any adequately funded or regulated child care services.⁵⁸ Furthermore, because Federal funding for Title XX has been significantly cut since 1981, the already limited funding and regulation of child care centers will be further restricted and in essence allow for continued sexual abuse.⁵⁹

The only significant Federal child care program which has not been subjected to cuts is the tax credit allowance which treats day care as an employment related expense.⁶⁰ Unless the credit is increased and made refundable, however, it will have little value to lower class families. The tax credit will benefit only upper class families because lower class families have an insufficient income from which to take the deduction.⁶¹

The lack of adequate Federal child care regulations coupled with large cuts in Federal funding to state child care programs has left the states with the primary responsibility for establishing, funding, and regulating child care programs. Existing state regulations, however, offer inadequate protection for child care. Different agencies in each state govern standards and enforcement of licensing and registration requirements for child care facilities.⁶² Some state authorities, but not

51. The veto was accompanied by stinging rhetoric indicating that national subsidies to child care services would weaken the American family. Veto Message, Economic Opportunity Amendments of 1971, S. 92-48, 92nd Cong., 1st Sess. (Dec. 9, 1971), *reprinted in* J. JACOBUS, FAMILY LAW AND POVERTY (1971).

52. Beck, *supra* note 1, at 10.

53. *Id.*

54. Title XX reimburses through block grants the states for child care services they provide. 42 U.S.C. § 621 (1982).

55. *Id.*

56. In the 1970's, child care was one of many social services funded through the states under Title XX of the Social Security Act. Until 1981, Title XX funded the states primarily to provide services for families on welfare. In 1981, however, the program was amended to transform it into a social services block grant to the states and gave the states discretion in choosing what types of social services to fund.

57. 42 U.S.C. § 621 (1982).

58. *See supra* note 45 and accompanying text.

59. For example, in 1983 Title XX funds spent on preventing child abuse were reduced from 22.9 million to 16.2 million dollars. In 1984, the Reagan administration suggested cuts down to 6.7 million dollars. Leishman, *supra* note 23, at 3. Although few day care programs have yet been forced to close, they may have to close in the future. Kamerman, *supra* note 2, at 38. Furthermore, funding cuts may force states to forego enforcing regulations. Only the most severe regulation violations will be able to be inspected because of the reduction in staff and supplies at State agencies. *Id.*

60. The child care tax credit has in fact expanded because the maximum dependent care expense has increased from \$200.00 to \$400.00. 26 U.S.C. § 44(A) (1982).

61. Unless the tax credit is increased and made refundable, it will not benefit lower class families who have low incomes from which to take deductions and who are in need of a greater subsidy than \$400.00 per year to pay for child care. Kamerman, *supra* note 2, at 38-39.

62. Some of the titles of the different agencies in the states which enforce child care regulations are: the Department of Public Welfare, A.L.A. CODE § 38-7-7 (1975); the Department of Social Services, COLO. REV. STAT. § 26-6-106 (1982); the Department of Human Resources, D.C. CODE ANN. § 3-302

enough, make unannounced visits to inspect child-care centers.⁶³ While all states require licenses for some child care facilities,⁶⁴ many states have neither the staff nor the money to enforce the limited standards which are in effect.⁶⁵ Most states exempt church-sponsored child care centers from regulations⁶⁶ and fail to require complete background and reference checks on all child-care personnel⁶⁷ or to encourage parental involvement in child care facilities.⁶⁸

All states regulate the safety and health aspects of at least some state-wide child care facilities.⁶⁹ The emphasis of most State regulation of child care facilities on safety, however, indicates that the primary concern of current child care regulation is with the building itself rather than the well-being of the child.⁷⁰ Although states should provide health and safety regulation of child care facilities, regulating only the physical environment without regulating personnel does not adequately protect these children from the risk of abuse.

Most states regulate large, commercial day care centers in which staff members care for children in facilities away from home.⁷¹ However, most states rarely regulate and do not require the licensing of family day care homes — private homes which operate as child care facilities.⁷² Family day care homes account for approximately 90% of all child care facilities in the country.⁷³ Consequently, most child care facilities in the United States are in fact unregulated.

Most parents use family day care homes because they are economically, loca-

(1979); the Department of Health and Human Services, LA. REV. STAT. ANN. § 1402 (1982); and the State Department of Children's Services, OR. REV. STAT. § 418.810 (1981).

63. Almost half of the states do require that such unannounced inspections be required by state officials. *See, e.g.*, FLA. STAT. ANN. § 402.311 (West 1983), ILL. STAT. ANN. Ch. XXII, § 2215(f) (Smith-Hurd 1983), VA. CODE § 63.1-198 (1983).
64. All states have some licensing requirements for day care centers. U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, MODEL CHILD CARE STANDARDS ACT 6 (1985).
65. Although many states require licensing of family day care homes, few can afford to enforce the requirements. Markowitz, *supra* note 38, at 575.
66. Most states exempt church run centers from regulation. U.S. DEPT. OF HEALTH, EDUCATION AND WELFARE, MODEL CHILD CARE STANDARDS ACT 6 (1985). *See, e.g.*, ARK. STAT. ANN. § 83-918 (1983), CONN. GEN. STAT. § 19a-77 (1984), MO. PEN. STAT. § 210-211(5) (1983).
67. *See* U.S. DEPT. OF HEALTH, EDUCATION AND WELFARE, MODEL CHILD CARE STANDARDS ACT 21-36 (1985).
68. *Id.* at 11-19.
69. The day care regulations in many states emphasize regulation of the safety aspects of the building. *See, e.g.*, MISS. CODE ANN. § 43-20-15 (1983), WIS. STAT. ANN. § 48.67 (West 1985), WYO. STAT. § 14-14-104 (1984). State efforts to license and identify family day care providers who account for more than 90% of all day care in the United States have not been successful. *See, e.g.*, Markowitz, *supra* note 38, at 575. Although many states require licensing of family day care homes, few can afford to enforce the requirements. *Id.*
70. In an attempt to regulate larger day care centers, many states draw arbitrary numbers and only regulate facilities which care for more than a specified number of children. Markowitz, *supra* note 38, at 575. For example, West Virginia only regulates facilities which care for more than 7 children. W. VA. CODE § 49-2b-3 (1980). Massachusetts only regulates facilities which care for more than 6 children. MASS. GEN. LAWS ANN. Ch. 28A § 10 (West 1983). Connecticut only regulates child care facilities which care for more than 5 unrelated children. CONN. GEN. STAT. § 196-97 (1984).
71. Fourteen states specifically exclude family day care homes from licensing: Kansas, North Dakota, South Dakota, Texas, Georgia, Idaho, Illinois, Michigan, Montana, New Hampshire, West Virginia, Pennsylvania, Virginia and Washington. Furthermore, the states which draw arbitrary numbers and only regulate facilities which care for a certain number of children exclude many family day care centers which care for only a few children. *See* MODEL CHILD CARE STANDARDS ACT *supra* note 61, at 21-36.
72. Unregulated family day care homes account for more than 90% of all day care in the United States. Markowitz, *supra* note 38, at 575.
73. Parents prefer family day care homes because they provide day care services to a small number of children, are less expensive, more convenient and offer a homelike atmosphere. Wall St. J., Oct. 26, 1982, at 1, col. 1. Furthermore, family day care homes are usually located closer to the consumer family, are more flexible, contain more intimate settings and cross-age grouping which allows siblings to be together, and will accept infants, toddlers and non-toilet trained or moderately ill children. D. FREIDMAN, *supra* note 11, at 12.

tionally, and educationally more favorable than larger child care centers.⁷⁴ It is essential that such homes be regulated. Although several states provide for voluntary registration for family day care homes,⁷⁵ voluntary procedures are inadequate because potential child abusers will rarely, if ever, subject themselves to voluntary regulations. Moreover, registration criteria normally concern only safety aspects of the building and not the quality of either the program or the staff.⁷⁶ States should regulate both major day care centers and child care homes regardless of the number of children cared for. The regulation must cover both the facility's building and safety concerns as well as *all* of the facility's personnel. Currently, child abusers can open up a home and care for only a small number of children to easily avoid state regulation.

States should establish separate regulations, such as California has done, for major day care centers and for family day care homes.⁷⁷ Such regulations would take into account the need to be more flexible in regulating family day care homes.⁷⁸ The regulations should, however, distinguish and not cover in-home care.⁷⁹ Attempts to regulate babysitters, friends, or relatives who care for the child in the child's home would be too burdensome, too expensive, and nearly unenforceable.⁸⁰ Parents who rely on this type of care can establish their own rules or can usually rely on a close friend or a pool of friends and neighbors to provide protection for their children.⁸¹

A few forward-looking states have enacted regulations designed to protect children in day care from child abuse. Model state regulations should regulate all child care facilities including family day care homes, require complete background checks on all child care personnel, encourage unannounced parental inspections and parental involvement in child care facilities, mandate unannounced state inspection visits, and remove all exemptions for church run child care facilities.

MODEL CHILD CARE GUIDELINES

Pursuant to congressional directive, the Health and Human Services Department (HHS) recently issued a Model Child Care Standards Act. The HHS child care guidelines, along with the regulations of several states, provide excellent model employment history and background check regulations. These checks are essential and would have prevented recent incidents of sexual abuse at child care

74. Sixteen states provide for voluntary registration of family day care homes, but, in general, the registration requirements are minimal and only regulate the safety aspects of the homes. They do not provide any regulation for the programs or background and qualifications of the home provider. *See, e.g.*, FLA. STATE ANN. § 402.303 (West 1983), MICH. STAT. ANN. § 25.358(2) (Callaghan 1984), R.I. GEN. LAWS § 40-13.1-3 (1983).

75. *See, e.g.*, FLA. STAT. ANN. § 402.303 (West 1983), R.I. GEN. LAWS § 40-13.1-3 (1983). State and local officials recognize that over 90% of family day care is unregulated, even where it is illegal to operate without a license or registration, U.S. DEPT. OF HEALTH AND HUMAN SERVICES, MODEL CHILD CARE STANDARDS ACT 7 (1985). Congress directed the Department to examine parental visitation, employment history checks, staff qualifications, staff probationary periods, and staff and training ratios. *Id.* at 9.

76. California has established separate regulations for day care facilities and family day care homes which take into account the need for more flexibility in family day care homes to ensure that this type of care, which many parents prefer, is not prohibited or discouraged by the cost of complying with many unnecessary regulations. CAL. HEALTH & SAFETY CODE § 1527-38 and § 1597 (1984).

77. *Id.*

78. In-home care is defined as care in the child's home on an irregular basis by a babysitter.

79. Congress did not believe that such care should be regulated because these types of care are not usually subject to local or State requirements. U.S. DEPT. OF HEALTH AND HUMAN SERVICES, MODEL CHILD CARE STANDARDS ACT 7 (1985).

80. When using babysitters, parents should rely on a pool of friends or neighbors who are known to them and lay down rules on paper. D. FRIEDMAN, *supra* note 11, at 17.

81. *See, e.g.*, *What Price Day Care?*, NEWSWEEK, Sept. 10, 1984, at 19.

facilities involving persons previously convicted of child molestation.⁸²

Only five states currently run criminal record checks on both administrators and support staff, including teachers, aides and janitors.⁸³ Six states, however, make criminal record investigations of only the owner/applicant.⁸⁴ This procedure provides inadequate protection because, as evidenced in many sexual abuse incidents, the molesters were not the applicants or owners, but staff members such as janitors or teachers.⁸⁵ The HHS model guidelines suggest that background screening checks be run on child care directors,⁸⁶ but they do not stress the need to run screening checks on all child care employees.⁸⁷ States should run background checks on *all* child care personnel — administrators, owners, and support staff — at *all* formal day care centers or family day care homes.

The guidelines also recommend that a reference check similar to those used by most businesses as standard hiring practice be run on caregivers.⁸⁸ Many states already require references for the directors of day care centers and homes to obtain information about the care giver's ability to care for children.⁸⁹ State agencies could easily obtain references from all child care facility employees or family members in the family day care homes. References should also be demanded from all support staff who work with the children on a regular basis, including bus-drivers, aides, and janitors in all child care facilities. Such checks would not only expose potential abusers, but might also deter those contemplating abusive behavior from seeking employment at day care facilities.

The HHS guidelines also suggest that an education and training history check be run on all child care personnel. Such a check would verify that the provider of care has the necessary skills to provide adequate child care and would substantiate or negate any background information.⁹⁰ Only twenty states currently require these checks for staff or directors of formal day care centers, and only a few states require them for family day care providers.⁹¹

Moreover, most states have child abuse and neglect registries which list the names of past abusers. Yet only a few states use them in screening providers of child care to identify potential child abusers.⁹² The HHS guidelines propose using the registries as an additional background check.⁹³ A simple computer check of the state child abuse and neglect registry would be an easy way for states to identify past child abusers who seek child care employment.

Only three states run FBI criminal record screenings of directors and other staff.⁹⁴ The HHS guidelines suggest that FBI criminal checks, including finger-

82. California, CAL., HEALTH & SAFETY CODE § 1520 (West 1984), Ohio, OHIO REV. CODE ANN. § 5104.05 (1982) Iowa, IOWA CODE § 237a.5 (1983), Washington, WASH. REV. CODE ANN. § 74.15.020 (1982), and North Carolina, N.C. GEN. STAT. § 110-91(7) (1982).

83. Colorado, Georgia, Kansas, Maine, Minnesota and West Virginia. See, e.g., COLO. REV. STAT. § 26-6-104 (1982), W. VA. CODE § 49-2b-3 (1980).

84. A handyman at a day care center in Los Angeles, for example, molested several children. N.Y. Times, Mar. 31, 1984, at 2, col. 2.

85. U.S. DEPT. OF HEALTH AND HUMAN SERVICES, MODEL CHILD CARE STANDARDS ACT 35 (1985).

86. Such checks would indicate both the ability of the applicant to care for children and conditions which might endanger children under the applicant's care. *Id.* at 21-36.

87. The guidelines leave open the possibility of running background checks on the staff members besides the director. *Id.* at 21.

88. Reference checks used by most employers are relatively inexpensive and useful. *Id.* at 22.

89. *Id.* at 22-23.

90. *Id.* at 23.

91. States which require such education checks only run them on recently employed child care employees. *Id.* at 24.

92. *Id.* at 25.

93. *Id.*

94. Currently, only California, Georgia (directors only) and Minnesota run F.B.I. criminal record screenings. *Id.* at 27.

print checks, are the only comprehensive and feasible way for states to conduct a nationwide criminal record check.⁹⁵ The guidelines recommend a probationary hiring of employees until their backgrounds are verified by criminal background checks, a process that takes several weeks.⁹⁶

California has taken the forefront in child day care legislation. Its comprehensive legislation requires a background check on *all* employees of child care centers.⁹⁷ Since it does not establish a minimum number of children to be cared for at a facility before the regulations require background checks,⁹⁸ California perceptively requires that background check procedures be conducted on both family day care homes and formal day care centers. The California regulations also require a nationwide fingerprint test and a previous employment history check⁹⁹ be run on the operators of day care centers.¹⁰⁰ A model statute would, however, require such checks to be run on the family care provider, spouse, other adults in the home, and adolescent children of the provider since these are persons likely to come into contact with the children on a fairly frequent basis.

Model child care legislation should also encourage parental involvement in child day care. Both the HHS guidelines and a few states recommend the use of regulations which encourage parental involvement in child care facilities as a primary means of eliminating abuse.¹⁰¹ Parents should have the opportunity to observe their children without notice at the facility at anytime, and to meet with the caregiver and discuss the child's development. States should also require that child care facilities provide parents with detailed information about the child care program itself and how to detect abuse. The HHS guidelines view parental involvement, especially through unannounced visits, as the best way to combat child sexual abuse.¹⁰² Parental involvement varies from parent meetings with staff to observation of day care activity to the distribution of informational materials to parents.¹⁰³ State and local governments should also encourage parental involve-

95. Only the FBI criminal background checks have a comprehensive list of child sexual molestation from all the states. *Id.* at 30.

96. *Id.* at 33.

97. The California State Code states:

Subsequent to initial licensure, any person specified in subdivision (b) and not exempted from fingerprinting shall, as condition to employment, residence, or presence in a community care facility, be fingerprinted and sign a declaration under penalty of perjury regarding any prior criminal convictions. The licensee shall submit these fingerprints to the licensing agency not later than 20 days following employment residence, or initial presence in the community care facility. Except for persons specified in §(2) of subdivision (b), the licensee shall endeavor to ascertain the previous employment history of persons required to be fingerprinted under this subdivision. If it is determined by the Department of Social Services, on the basis of the fingerprints submitted to the Department of Justice, that the person has been convicted of a sex offense against a minor, or has been convicted of an offense specified in Section 273a or 273d of the Penal Code, or has been convicted of a felony, the Department of Social Services shall notify the licensee to act immediately to terminate the person's employment, remove the person from the community care facility, or bar the person from entering the community care facility. The Department of Social Services may subsequently grant an exemption pursuant to subdivision (e). If the conviction was for another crime except a minor traffic violation, the licensee shall, upon notification by the Department of Social Services, act immediately to either (1) terminate the person's employment, remove the person from the community care facility, or bar the person from entering the community care facility; or (2) seek an exemption pursuant to subdivision (e). The Department of Social Services shall determine if the person shall be allowed to remain in the facility until a decision on the exemption is rendered.

CAL. HEALTH & SAFETY CODE § 1522(c) (West 1984).

98. See CAL. HEALTH & SAFETY CODE § 1597.30 (1984).

99. *Id.*

100. *Id.*

101. U.S. DEPT. OF HEALTH & HUMAN SERVICES, MODEL CHILD CARE STANDARDS ACT 11 (1985), CAL. HEALTH & SAFETY CODE § 1597.30 (West 1982).

102. U.S. DEPT. OF HEALTH & HUMAN SERVICES, MODEL CHILD CARE STANDARDS ACT 16 (1985).

103. *Id.*

ment through community education and training. The expansion of information and child care referral organizations provide parents with lists of state approved child care facilities and guides to choosing a caregiver.¹⁰⁴

The HHS guidelines do not provide for unannounced inspections by state agencies. Less than half of the states impose this requirement.¹⁰⁵ In most states that require surprise inspections, however, the inspection requirements are vague because they merely require an inspection without listing any guidelines.¹⁰⁶ State regulation should not only provide for unannounced inspections of day care facilities, but it should also require on-site interviews of children cared for at the facility during the unannounced inspection. State employees who have been properly trained in questioning children on child abuse could expose what would otherwise be undetected incidents of abuse.

Finally, effective child care legislation must remove exemptions of church-run centers. Although the HHS guidelines note that most state regulations have these exemptions,¹⁰⁷ recent incidents of sexual abuse at church-run child-care facilities¹⁰⁸ demonstrate that such facilities should not be exempt from child care legislation requirements.

RECOMMENDATIONS

Pursuant to the recently enacted Comprehensive Crime Control Act,¹⁰⁹ states that wish to continue receiving Title XX funds for child care facility regulation must run nation-wide criminal record checks of *all* employees caring for children.¹¹⁰ To remain eligible for Federal funds and, more importantly, to have child day care legislation which adequately protects our children, states should adopt legislation which includes the following recommendations:

(1) Regulate *all* child care facilities — family day care homes as well as formal day care centers;

(2) Regulate church sponsored day care facilities without exempting them from statutory compliance;

(3) Regulate *all* child care personnel — owners, administrators, directors, teachers, and support staff — and require background, reference, fingerprint, and criminal checks of all personnel;

(4) Require appropriate officials in state agencies to make unannounced inspections of all child care facilities and to question those children cared for at such facilities for signs of child abuse;

(5) Require child care facilities to permit and encourage unannounced parental inspections and involvement in the child care.

Legislation allowing the establishment of child care facilities carries with it the responsibility of providing adequate protection to children cared for at such facil-

104. The child care referral agencies offer their own guidelines and a check list for choosing the center that best meets their needs. N.Y. Times, Apr. 4, 1984 at A21, col. 4.

105. As an example of states which provide for unannounced visits, see FLA. STAT. ANN. § 402.311 (West 1983), 62 PA. CONS. STAT. § 10021 (1975).

106. For instance, the Wisconsin Code merely states that "the Department may visit and inspect each child care facility. . . and day care center licensed by it, and for such purpose shall be given unrestricted access to the premises described in the license." WIS. STAT. § 48.73 (1979). See *supra* note 60 and accompanying text.

107. U.S. DEPT. OF HEALTH AND HUMAN SERVICES, MODEL CHILD CARE STANDARDS ACT 6 (1985).

108. See, e.g., N. Y. TIMES Mar. 31, 1984, §1 at 9 col. 2. See also *What Price Day Care*, NEWSWEEK, Sept. 10, 1984, at 17.

109. See Comprehensive Crime Control Act, Oct. 12, 1984, Pub. L. No. 98-473, 1984 U.S. CONG. CODE & AD. NEWS 2196.

110. *Id.*

ities. State legislators must not overlook this responsibility and must adopt comprehensive child care legislation which substantially decreases the incidents of sexual child abuse that has plagued our day care system.

CONCLUSION

State legislatures must carefully examine their current child care licensing requirements and enact, if necessary, new legislation that effectively prevents abuse of children in child care facilities. Congress should require child care regulations beyond the criminal background check required in the Comprehensive Crime Control Act as a prerequisite to receipt of Title XX day care funds. The enactment of child care regulations such as those suggested by this note and the HHS Model State Child Care Act would be the first step towards improving the quality of child care facilities. Child care regulations must address more than the safety of the physical building; they must also address the quality of the child care provider and program. Failing to enact effective child care legislation will invite further abuse of children and will scar those who are America's future.

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