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April 30, 2007

**Comments on the notice of proposed rule-making regarding error rate reporting in the Child Care and Development Fund**

The National Women's Law Center ("Center") appreciates the opportunity to comment on the notice of proposed rule-making (NPRM) regarding error rate reporting in the Child Care Program,<sup>1</sup> issued pursuant to the Improper Payments Information Act of 2002.<sup>2</sup>

Child care is a major Center priority, and its work is designed to improve the availability, affordability and quality of child care for working families. For three decades, the Center has played a major role in developing and advancing some of the key early care and education policies secured to date. The Center's central role has been based on its extensive legal and policy expertise on a broad range of early care and education issues. The Center has authored and disseminated a broad range of written materials on child care issues, including the Center's annual in-depth look at data on states' child care subsidy systems,<sup>3</sup> and a first-of-its-kind study which examined the military's successful reform of its seriously deficient child care system and drew lessons for policy makers,<sup>4</sup> advocates, providers, parents and others who seek to improve civilian child care and early education. In addition, the Center has developed and disseminated several definitive works on state and federal child care tax policies, including a quadrennial report and report card on state tax provisions that help families meet their child care expenses.<sup>5</sup>

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<sup>1</sup> Child Care and Development Fund Error Rate Reporting, 72 Fed. Reg. 9491 (proposed March 2, 2007) (to be codified at 45 C.F.R. pt. 98) [hereinafter NPRM].

<sup>2</sup> Improper Payments Information Act of 2002, Pub. L. No. 107-300, 116 Stat. 2350 (2002) [hereinafter IPIA].

<sup>3</sup> See, e.g., Karen Schulman and Helen Blank, National Women's Law Center, *State Child Care Assistance Policies 2006: Gaps Remain, with New Challenges Ahead* (2006), available at <http://www.nwlc.org/pdf/StateChildCareAssistancePoliciesReport2006web.pdf>.

<sup>4</sup> Nancy Duff Campbell, National Women's Law Center, *Be All that We Can Be: Lessons from the Military for Improving Our Nation's Child Care System* (2000), available at <http://www.nwlc.org/pdf/military.pdf>.

<sup>5</sup> See, e.g., Nancy Duff Campbell et al., National Women's Law Center, *Making Care Less Taxing: Improving State Child and Dependent Care Tax Provisions* (2006), available at <http://www.nwlc.org/pdf/MakingCareLessTaxing2006.pdf>.

The Center supports the effort to ensure that funds distributed through the Child Care Program serve their intended beneficiaries: low-income working families who need child care assistance to be able to pursue gainful employment. Indeed, incorrect payments undermine the goals of the program by inappropriately diverting funds that could be used for expanding access to child care and improving services, in the case of overpayments, or by providing insufficient amounts to families in need, in the case of underpayments. However, policies to identify and reduce improper payments must be carefully crafted to respect the core features and mission of the Child Care Program. In particular, the flexibility that states have in administering child care funds and the resulting diversity in approaches to implementation are hallmark features of this program and should be accounted for in error reporting requirements. Also, as a program aimed at enabling families to earn a livelihood, the program should not be so encumbered by its obligations under the error reporting scheme as to sacrifice its emphasis on helping low-income families access quality child care services.

The Center has several concerns about the NPRM. First, the broad language of the regulation would allow for the imposition of far more extensive review and reporting requirements than discussed in the preamble and tested in the pilot study. Consequently, the full impact of the regulation has not been properly assessed. Second, some of the required error reporting measures are not very helpful in assessing program integrity and could create misimpressions about the accuracy of program operations. Third, the NPRM suggests that the measures be used in inappropriate ways to set unreasonable goals and determine disallowances. The recommendations in these comments are designed to ensure that the error rate reporting rule can be implemented fairly, effectively and in conformity with the goals of the overall Child Care Program.

#### Scope and impact of the proposed rule

To develop the proposed rule, the Child Care Bureau initiated a consultation process with the states. This included the development of a pilot study that tested a particular error reporting methodology, first in four states, Arkansas, Colorado, Illinois and Ohio, and later in five others, Florida, Kansas, New Jersey, Oregon and West Virginia.<sup>6</sup> The pilot study employed a case review process examining administrative errors in client eligibility determinations that resulted in improper authorizations.<sup>7</sup>

The preamble in the notice of proposed rule-making states that the new regulation, which requires states to conduct case reviews and report errors every three years, is based upon the methodology of the pilot study.<sup>8</sup> The published instructions to the states on implementing the proposed rule<sup>9</sup> generally reflect the methodology of the pilot study.<sup>10</sup>

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<sup>6</sup> NPRM, *supra* note 1, at 9492-93.

<sup>7</sup> *Id.* at 9492.

<sup>8</sup> *Id.*

<sup>9</sup> Child Care Bureau, U.S. Dep't of Health and Human Services, Measuring Improper Authorizations for Payment in the Child Care Program: Improper Authorization for Payment Data Collection Instructions

However, the scope of the information collection authorized by the proposed rule is significantly broader than that of the pilot study, limiting the usefulness of the results of the pilot in assessing the impact of the regulation on the states, counties, and nonprofits that administer the child care program.

In three important respects, the regulatory language authorizes a broader collection of information than was examined in the pilot study. First, the pilot focused on identifying administrative errors based on review of case files rather than errors in the independent verification of eligibility and authorization data elements.<sup>11</sup> Secondly, the pilot only examined errors in the area of client eligibility.<sup>12</sup> The language of the proposed regulation, which defines error as “any violation or misapplication of statutory, contractual, administrative or other legally applicable requirements governing the administration of CCDF funds, regardless of whether such violation results in an improper payment,”<sup>13</sup> would encompass reviews of provider eligibility and other issues. Third, the pilot looked at improper authorizations for payment, which are related to—but different from—improper payments.<sup>14</sup> The regulation nonetheless uses the “improper payment” term,<sup>15</sup> thereby broadening the scope of the states’ reporting requirements beyond what was tested in the pilot.

Since only the more limited information collection was tested in the pilot, the costs of expanded data collection are unknown; however, implementation of a more expansive error reporting regime is likely to result in program administrators bearing significantly greater costs. For example, determining administrative error requires a review of existing documentation to ensure that the law was correctly applied to the facts as known, whereas a study of client or provider error can be much more involved. In other programs, investigations of the latter sort have entailed independent data collection, site visits and collateral contacts.<sup>16</sup> In fact, when one state, Colorado, experimented with reporting client and provider error, the administrative burden was found to be considerably greater.<sup>17</sup> Moreover, intense scrutiny of client error may lead program administrators to require participants in the program to comply with further reporting and

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(2007), available at [http://www.acf.hhs.gov/programs/ccb/ccdf/ipi/dci/ipi\\_instructions\\_2007.pdf](http://www.acf.hhs.gov/programs/ccb/ccdf/ipi/dci/ipi_instructions_2007.pdf) [hereinafter Instructions].

<sup>10</sup> There were a few notable differences. While the pilot study examined cases from only one month, the instructions require states to examine sample cases from 12 months; also, the pilot study used a sample with a precision level of 6 percent at the 90 percent confidence interval, whereas the states’ samples must have a precision level of 5 percent. NPRM, *supra* note 1, at 9493.

<sup>11</sup> *Id.* at 9492.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 9498.

<sup>14</sup> *Id.* at 9492.

<sup>15</sup> *Id.* at 9498.

<sup>16</sup> *See, e.g.*, 7 C.F.R. § 275.12(c) (2007).

<sup>17</sup> Child Care Bureau, U.S. Dep’t of Health and Human Services, Improper Payments in the Child Care Program: A Pilot Project of the ACF Child Care Bureau – Final Report, Section V: Recommendations (2005), available at [http://www.acf.hhs.gov/programs/ccb/ccdf/ipi/phase2/sec5\\_1.htm](http://www.acf.hhs.gov/programs/ccb/ccdf/ipi/phase2/sec5_1.htm).

documentation procedures, which could, in turn, impede their ability to sustain employment.

While the preamble to the regulation and the instructions to the states focus on the more narrow data collection elements of the pilot study, the preamble explains that these are the reporting requirements “for the time being.”<sup>18</sup> As the preamble acknowledges, the regulatory language would allow for a widening of the parameters of the reporting requirements.<sup>19</sup> Although the NPRM says that there would be notice and comment through the information collection process before the definition of “error” was expanded,<sup>20</sup> this would not provide as broad an opportunity for comment nor as rigorous an analysis as would the regular rule-making notice and comment process, which includes participation by the public.

### Defining meaningful measures of improper authorization

The proposal raises several issues regarding both the definition and operationalization of improper authorization measures, particularly in the context of states’ experience with other programs and the pilot study of CCDF improper authorization reporting. An effective error rate reporting scheme must be structured to measure the right data and to create proper incentives for program administrators. However, some of the measures that the proposed regulation requires to be reported are not closely related to improper authorizations and may lead to misperceptions which could generate unproductive and potentially harmful responses.

1. The regulation explicitly requires program administrators to report the “[p]ercentage of cases with an error (regardless of whether such error resulted in an over or under payment)...”<sup>21</sup> As an example of such errors, the implementation instructions cite as an error a form that has not been signed by both a worker and a supervisor.<sup>22</sup> The percentage of cases with administrative errors bears almost no relation to the level of improper authorizations, as evidenced by the pilot study.<sup>23</sup> Requiring program administrators to track and report data about errors that do not impact eligibility or authorization amounts seems to place an unnecessary burden on child care agencies and to take attention away from errors that have a direct effect on program integrity.

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<sup>18</sup> NPRM, *supra* note 1, at 9495.

<sup>19</sup> *Id.* at 9493.

<sup>20</sup> *Id.* at 9496.

<sup>21</sup> *Id.* at 9499.

<sup>22</sup> Instructions, *supra* note 9, at 24.

<sup>23</sup> Child Care Bureau, U.S. Dep’t of Health and Human Services, Improper Payments in the Child Care Program: A Pilot Project of the ACF Child Care Bureau – Final Report, Section IV: Findings and Next Steps (2005), *available at* [http://www.acf.hhs.gov/programs/ccb/ccdf/ipi/phase2/sec4\\_1.htm](http://www.acf.hhs.gov/programs/ccb/ccdf/ipi/phase2/sec4_1.htm).

2. Pursuant to the Improper Payments Information Act of 2002, the proposed regulation defines improper payments as both overpayments and underpayments.<sup>24</sup> This approach is appropriate and necessary to ensure that the Child Care Program is providing the correct services to the intended beneficiaries. However, the specific reporting method mandated in the regulation undermines the effort to address both types of improper payments. The regulation requires that states report a combined “improper authorizations” figure that sums over-authorizations and under-authorizations together.<sup>25</sup> In contrast, the quality control programs of the Social Security Administration and the Food Stamp Program report separate figures for underpayments and overpayments, in addition to a combined figure.<sup>26</sup>

Reporting only combined figures can be misleading as to the extent of improperly expended government funds. Even in the Food Stamp program, where separate figures are required in addition to a combined number, it is often the total number that receives public attention as evidence of government waste.<sup>27</sup> If only a combined figure is available, this mistake is bound to occur even more frequently. The combined figure may also mask the underlying source of the errors, and thereby frustrate efforts to improve accuracy. The impact of this flawed measure is increased by the requirement, included in the instructions to the states, that states report what amount of “actual improper payments” they expect to recover, if any, as a result of the reporting process.<sup>28</sup> This phrasing implies that the improper payments are recoverable, when a portion thereof may be amounts that were improperly withheld. In contrast, there is no mention of what efforts will be made to remedy possible underpayments.

3. Because factors affecting authorized payment levels, such as earnings and hours of child care use, can fluctuate from month to month for each client, states have been granted considerable discretion in determining the magnitude of changes that must be reported to child care agencies, provided that they do not affect eligibility or co-pay levels.<sup>29</sup> Changes that do not reach this threshold need not be applied in

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<sup>24</sup> IPIA, *supra* note 2, § 2 (d)(2)(A); NPRM, *supra* note 1, at 9498.

<sup>25</sup> NPRM, *supra* note 1, at 9499.

<sup>26</sup> For Social Security, see Social Security Administration, FY 2006 Performance and Accountability Report Appendix, p. 204, *available at* <http://www.ssa.gov/finance/>. For Food Stamps, see U.S. Department of Agriculture, FY 2005 Performance and Accountability Report, Appendix B, p. 368, *available at* <http://www.ocfo.usda.gov/usdarpt/par2005/usdarpt.htm>.

<sup>27</sup> *See, e.g.*, Dorothy Rosenbaum, Center on Budget and Policy Priorities, Food Stamp Error Rates Hold at Record Low Levels in 2005, at 3 (2006).

<sup>28</sup> Instructions, *supra* note 9, at 64.

<sup>29</sup> *See, e.g.*, Kathleen Snyder, Patti Banghart, and Gina Adams, Supporting Child Care Subsidy Access and Retention: Ideas from Seven Midwestern States (2006), *available at* <http://www.urban.org/publications/311388.html>, and National Child Care Information Center, Child Care and Development Fund: Report of State and Territory Plans FY 2006-2007, Part 4, pp. 9-12, *available at* <http://www.nccic.org/pubs/stateplan2006%2D07/>.

calculating payments and thus should not be considered in determining improper authorizations even if case records are retroactively updated to reflect them. This is the usual practice in the Food Stamp program, which faces similar problems with small monthly variations in recipients' finances.<sup>30</sup> This approach to minor fluctuations is especially critical to the calculation of the number and percentage of cases with an improper authorization, since counting small vacillations in clients' financial status as errors would artificially inflate this percentage and create a confusing and possibly misleading picture of the level of improper authorizations.

4. Among the proposed reporting measures, the ratio of improper authorizations to total authorizations is by far the most useful indicator for assessing program integrity. It is also the measure targeted in the Performance and Accountability reports for programs such as Social Security and Food Stamps, for which agencies have extensive experience in monitoring improper payments.<sup>31</sup> For the purposes of setting goals for improved payment accuracy (discussed further below), this is the most appropriate measure. Setting targets for all of the measures required to be reported may create difficulty in assessing performance and confusion in targeting resources.

#### Using error rate measures

While the purpose of collecting information about improper payments is to facilitate efforts to reduce them, goals for reducing error must be set appropriately. In particular, the Center is concerned about how states are being encouraged to respond to their error rates. In addition to the preamble's instruction that states aim for a zero error rate, the rule requires states to set targets for reducing error across each category of data reported.<sup>32</sup> The targets must be lower than their most recent estimated error rates, regardless of how low those rates were.<sup>33</sup> In contrast, the Food Stamp Program does not require states with an error rate of 5.90% or less to develop a corrective action plan.<sup>34</sup>

The pursuit of perfection in program administration carries real costs, especially in a flexible block grant program that is intended to serve low-income working families. Under the proposed scheme, even high-performing programs will be encouraged to devote more resources and attention to monitoring and reducing administrative errors at

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<sup>30</sup> See, e.g., Government Accountability Office, Food Stamp Program: States Have Made Progress Reducing Payment Errors, and Further Challenges Remain (2005), available at <http://www.gao.gov/new.items/d05245.pdf>.

<sup>31</sup> See, e.g., Social Security Administration, *supra* note 26, and U.S. Department of Agriculture, *supra* note 26.

<sup>32</sup> NPRM, *supra* note 1, at 9499.

<sup>33</sup> *Id.*

<sup>34</sup> 7 C.F.R. § 275.1(b) (2007).

the expense of other functions, such as increasing assistance to families or improving the quality of services. Further, states may be encouraged to adopt a draconian approach to the fulfillment of bureaucratic requirements by the families they serve, without sensitivity to how these burdens may interfere with their continued employment.

The use of state error rate reports for the construction of national error rates raises additional concerns. It will not be appropriate to compare an individual state's error rates to national error rates as indicators of performance since the variety in eligibility requirements across states means that the difficulty of accuracy varies from state to state as well. This variability in eligibility criteria is also reason to review the instructions to the states to ensure that they do not suggest requirements beyond those stipulated in federal law. As it stands, certain examples incorporate state-specific rules, such as counting child support as income, without indicating that these are not federally mandated.<sup>35</sup> In addition, the detailed plan outlined in the instructions for information collection from the states does not provide a sound method for calculating national error rates during the first two years of implementation, or the change in these national error rates over time. As only 17 or 18 states will be sampled in each of the first two years,<sup>36</sup> any overall improper authorization rate reported for these states will not be representative of the national caseload. As structured,<sup>37</sup> the sampling for the first two years will create a rural bias that may impact the accuracy of the reported figures as national estimates. Therefore, accurate national error rates will not be available until the conclusion of the three-year initial reporting process. Thereafter, changes in the national error rates between one year and the next will only be an accurate reflection of changes in the states sampled in that year.

Finally, the Center is concerned by the manner in which the preamble addresses the disallowance and recovery of improper payments discovered through the error reporting process. The preamble stipulates that any improper payments identified may be subject to disallowance. However, as long as the case review is limited to improper authorizations, it would be incorrect to assume that an improper payment in the amount of the authorization resulted. To do so could result in states being unjustifiably penalized. As to recovery, the instructions require states to report on what share of the improper payments they expect to recover.<sup>38</sup> As noted above, this fails to acknowledge that a significant portion of the reported improper payments, the underpayments, will by definition be unrecoverable.

## Recommendations

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<sup>35</sup> See, e.g., Instructions, *supra* note 9, at 30, 24.

<sup>36</sup> NPRM, *supra* note 1, at 9493.

<sup>37</sup> Instructions, *supra* note 9, at 3-4.

<sup>38</sup> *Id.* at 64.

In light of the foregoing concerns, the Center recommends the following actions be taken to ensure that the error rate reporting process be implemented in a fair and clear manner:

- Limit the scope of the regulation to reporting administrative errors in client eligibility determinations that resulted in improper authorizations, the reporting system analyzed in the pilot study. If expanded reporting is considered, a pilot study similar to the one conducted for this regulation should be undertaken and a new rule then proposed. The comment period on the new rule would allow for a thorough analysis of the impact of an expanded assessment.
- Do not require states to report the percentage of cases with an error.
- Require states to report separate figures for under-authorizations and over-authorizations along with a combined figure.
- Clarify the regulation to stipulate that changes in circumstances that do not need to be reported by clients will not be counted against the states as administrative error.
- Amend the case review examples in the instructions to reflect only federal eligibility requirements so as to eliminate confusion.
- Do not base disallowances on “improper payments” reported through this process, as what is required to be reported are improper authorizations rather than payments, and under-authorizations as well as over-authorizations.
- Refrain from reporting national error rates until all three years of the initial reporting process have been completed and all states have had an opportunity to report. Do not use national error rates as a point of comparison to individual state error rates.
- Provide ample technical assistance to the states to help them implement the review process in accordance with the accelerated timeline, which requires some states to begin reporting in 2008.

The Center appreciates this opportunity to comment. If you have questions or if we can otherwise be of assistance, please contact Joan Entmacher, Vice President, Family Economic Security, at (202) 588-5180 or [jentmacher@nwlc.org](mailto:jentmacher@nwlc.org).