

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

45 CFR Parts 98 and 99

RIN 0970-AB74

Child Care and Development Fund

AGENCY: Administration for Children and Families (ACF), HHS

ACTION: Final rule.

SUMMARY: This final rule implements the child care provisions of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996 (Pub. L. 104-193) and incorporates technical corrections to PRWORA made by the Balanced Budget Act of 1997 (Pub.L. 105-33). PRWORA appropriates new entitlement child care funds under section 418 of the Social Security Act and requires that these new Federal child care funds be subject to the Child Care and Development Block Grant (CCDBG) Act. The CCDBG program which was created under the original CCDBG Act is a discretionary fund program. PRWORA also reauthorized the CCDBG Act. As PRWORA requires that these child care funds be administered as a unified program, the Administration for Children and Families has named the combined funds the Child Care and Development Fund (CCDF). Parts 98 and 99 are the official regulations for the Child Care and Development Fund.

EFFECTIVE DATE: August 24, 1998.

FOR FURTHER INFORMATION CONTACT: Barbara Binker, Director, Policy Division, Child Care Bureau, Hubert Humphrey Building, Room 320F, 200 Independence Avenue, SW, Washington, DC 20201, telephone (202) 401-5145. Deaf and hearing-impaired individuals may call the Federal Dual Party Relay Service at 1-800-877-8339 between 8 a.m. and 7 p.m. Eastern time.

SUPPLEMENTARY INFORMATION:

Background

Section 103(c) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) repealed the child care programs authorized under title IV-A of the Social Security Act—AFDC Child Care, Transitional Child Care and At-Risk Child Care. In addition, PRWORA amended section 418 of the Social Security Act to provide new entitlement Federal child care funds and transferred them to the Lead Agency under the amended Child Care and Development Block Grant Act. The funding under

section 418 is now subject to the CCDBG Act. PRWORA also amended the CCDBG Act.

The new statutory provisions, therefore, unified what was a fragmented child care subsidy system. The combined and increased funding becomes part of a holistic and streamlined system for child care. The integrated entitlement and discretionary child care funding has a single, unified purpose. The Department of Health and Human Services has named the combined funds the Child Care and Development Fund (CCDF), to reflect this integration of multiple funding sources. The Department uses the CCDF terminology when corresponding with grantees and the child care field.

Goals and Purpose of the Rule

The primary goals of this rule are to:

- Amend the CCDBG regulations in light of the child care amendments under title VI of PRWORA,
- achieve a balance between program flexibility and accountability,
- assure the health and safety of children in child care,
- recognize that child care is a key support for work, as envisioned in TANF, and
- clarify, streamline, simplify, and unify the Federal child care program.

The major regulatory decisions were made to assure States have adequate information upon which to base their child care payments; promote public involvement in the Plan process; strengthen health and safety in child care by requiring children receiving CCDF subsidies to be age-appropriately immunized; require coordination between child care Lead Agencies and agencies administering TANF, health, education and employment programs; streamline the CCDF application and Plan; and provide clarifications based on experience operating both the CCDBG program and the now-repealed title IV-A programs.

We received relatively few comments during the comment period—only some 160 organizations and individuals made approximately 500 comments, many of which were duplicative. The content of the comments lead us to believe that we achieved our goal of reaching balance among viewpoints. We made only a few changes as a result of comments to adjust the balance among goals. Of the substantive changes made, we require the Lead Agency to make available to the public, in advance of the public hearing, the plan it proposes to submit to the Secretary. We require the Lead Agency to provide consumer education information to parents and the general public about health and safety

requirements and about the full range of providers available to families. We clarified that an independent audit of a Lead Agency shall be conducted by a State agency that meets the generally accepted government auditing standards or by a public accountant who meets the independence standards contained therein. We added provisions regarding tribal consortia in § 98.83. We also added or revised provisions regarding tribal construction at § 98.84 including a requirement regarding the amount a tribe new to the CCDF may spend on construction and a provision regarding treatment of construction planning costs.

We made other changes to conform to the technical amendments to PRWORA by Pub. L. 105-33, The Balanced Budget Act of 1997, primarily in § 98.70 and 98.71. Based on comments, we also made other minor changes to clarify proposed language or codify policy contained in the preamble of the proposed rule.

Statutory Authority

Section 658E of the Child Care and Development Block Grant Act of 1990 requires that the Secretary shall by rule establish the information needed in the Block Grant Plan.

Regulatory Impact Analysis

This rule has been reviewed by the Office of Management and Budget (OMB) pursuant to Executive Order 12866. Executive Order 12866 requires that regulations be reviewed to ensure that they are consistent with the priorities and principles set forth in the Executive Order. The Department has determined that this rule is consistent with these priorities and principles. An assessment of the costs and benefits of available regulatory alternatives (including not regulating) demonstrated that the approach taken is the most cost-effective and least burdensome while still achieving the regulatory objectives.

For the most part, the regulations implement specific requirements under PRWORA.

We are requiring that children be age-appropriately immunized in order to receive services under the Child Care and Development Fund. As most States already include immunizations in their child care standards and provide religious and medical exemptions from immunizations, we do not anticipate that this rule will have a significant negative impact on either grantees or families, since grantees will not be required to provide immunizations directly. The Vaccines for Children Program, an important component of the Childhood Immunization Initiative (CII),

provides immunizations to eligible children, including those without insurance coverage, those eligible for Medicaid, and American Indians and Alaska Natives. In addition, every State receives grant funds for immunization activities, including hiring nurses, expanding clinic hours, assessing coverage levels, and conducting outreach. Immunization levels of children 19–35 months of age are measured by the National Immunization Survey, the most recent survey conducted throughout the U.S. that provides comparable State vaccination coverage estimates.

The immunization provision was considered the most cost-effective and least burdensome approach because: (1) It helps ensure that vulnerable young children are age-appropriately immunized; (2) immunization of such children is highly cost-effective; and (3) it provides flexibility to grantees in determining how to implement the provision.

Regulatory Flexibility Analysis

The Regulatory Flexibility Act (Pub. L. 96–354) requires the Federal government to anticipate and reduce the impact of rules and paperwork requirements on small businesses and other small entities. The primary impact of this regulation is on State, tribal and territorial governments. To a lesser extent the regulation could affect individuals and small businesses. However, the number of small businesses affected should be limited, and the expected economic impact on these businesses would not be so significant that a full regulatory flexibility analysis is indicated.

The rule contains a number of provisions that could result in some decrease in the regulatory and economic burdens on providers that are small businesses. Because States will be required to operate their programs under a more consistent set of program rules, participating providers will face a simpler and more streamlined set of Federal regulatory requirements.

The providers who would potentially be most affected by this rule are in-home providers. These providers are generally not operating as small businesses, but as domestic employees;

thus, any impact on them need not be specifically addressed under this Act.

State, local and tribal governments already have authority to set general regulatory requirements and health and safety standards for child care providers. If States (or other grantees) believe that there is a substantial need for additional requirements (to protect the well-being of children in care), we expect them to act under this general authority.

While States generally have immunization requirements for children in child care, the proposed immunization provision might result in some additional children being subject to immunization requirements or stronger requirements for some children. However, States have flexibility in deciding how immunization requirements are to be implemented. Our rule does not dictate that States impose requirements on providers; rather, States can choose to impose them on eligible families. Thus, the immunization provision in this rule does not necessarily affect small businesses. Further, where States do choose to impose additional requirements on providers related to the immunization provision, such requirements would be basically administrative in nature (e.g., documentation); we expect the costs of immunization to be covered through other funding sources. Thus, this provision would not have a significant economic impact on providers.

For these reasons, we certify that this rule will not have a significant economic effect on a substantial number of small entities, and that a Regulatory Flexibility Analysis is not required.

Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995 requires that a covered agency prepare a budgetary impact statement before promulgating a rule that includes any Federal mandate that may result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year.

We have determined that this final rule will not impose a mandate that will

result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year. Accordingly, we have not prepared a budgetary impact statement, specifically addressed the regulatory alternatives considered, or prepared a plan for informing and advising any significantly or uniquely impacted small governments.

Congressional Review of Regulations

This final rule is not a “major” rule as defined in Chapter 8 of 5 U.S.C.

Paperwork Reduction Act

Sections 98.16 and 98.81 contain the Lead Agency Plan information requirements of the ACF–118 and ACF–118–A respectively. Sections 98.70 and 98.71 contain the information required by both the ACF–800 and ACF–801 child care data collections. As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the Administration for Children and Families submitted these sections to the Office of Management and Budget (OMB) for its review. The Pre-Prints, ACF–118 and ACF–118–A, have been approved by OMB—OMB Number 0970–0114, expires 5/31/2000. The OMB also approved both data collection forms, the ACF–800 (OMB Number 0970–0150, expires 3/31/2000) and the ACF–801 (OMB Number 0970–0167, expires 11/30/2000).

Title: State/Territorial Plan Pre-Print (ACF–118) and Tribal Plan Pre-print (ACF–118–A) for the Child Care and Development Fund (Child Care and Development Block Grant).

Description: These legislatively-mandated plans serve as the agreement between the Lead Agency and the Federal Government as to how CCDF programs will be administered in conformance with legislative requirements, pertinent Federal regulations, and other applicable instructions and guidelines issued by ACF. This information will be used for Federal oversight of the Child Care and Development Fund.

Respondents: State governments and territories, Tribal organizations.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
ACF–118	56	.5	30	840
ACF–118a	243	.5	30	3,645

Estimated Total Annual Burden Hours: 4,485.

Title: Child Care Annual Aggregate Report—ACF-800.

Description: This legislatively mandated report collects program and participant data on all children and families receiving direct CCDF services. Aggregate data will be collected and will be used to determine the scope, type, and methods of child care delivery, and to provide a report to Congress.

Respondents: States, the District of Columbia, American Samoa, Guam, Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
ACF-800	56	1	40	2,240

Estimated Total Annual Burden Hours: 2,240.

Title: Child Care Quarterly Case Level Report, ACF-801.

Description: This legislatively-mandated report collects program and participant data on children and families receiving direct CCDF services. Disaggregate data will be collected and will be used to determine the participant and program characteristics as well as cost and level of child care services. The data will be used to provide a report to Congress. Form ACF 801 represents the data elements to be collected and reported to ACF.

Respondents will be asked to sample the population of families receiving benefits on a monthly basis and submit the three most current monthly samples to ACF quarterly. States are allowed to submit the data monthly if they choose to do so. Each monthly sample is drawn independent of the other samples and retained for submission within a quarterly report. ACF is not issuing specifications on how respondents compile overall database(s) from which samples are drawn. ACF provided respondents sampling specifications which specify a minimum sample size of approximately 200 cases. States are allowed to submit their total monthly population.

Respondents: States, the District of Columbia, American Samoa, Guam, Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
ACF-801	56	4	20	4,360

Estimated Total Annual Burden Hours: 4,360.

The Administration for Children and Families considered comments by the public on evaluating whether the proposed collections are necessary for the proper performance of the functions of ACF, including whether the information will have practical utility. Comments regarding specific items are discussed in the preamble. The quality, usefulness and clarity of the information to be collected will be enhanced by the technical assistance provided and the regional meetings that ACF has convened.

Amended Regulations, 45 CFR Part 98

We have chosen to present 45 CFR Part 98 as an amended whole. We believe that the publication of the whole text of Part 98 will facilitate understanding of the impact of the

amendments on the regulations that are retained. In addition, we made a number of other minor editorial changes throughout the regulations to enhance clarity, to reflect the change of program name from the Child Care and Development Block Grant (CCDBG) to the Child Care and Development Fund (CCDF), and to reflect the change from "Grantee" to "Lead Agency" for reasons explained in this preamble at § 98.2.

We have made the following changes to the regulations.

Title/heading: Part 98.

Subparts—A, E and F.

Sections—98.1, 98.13, 98.15, 98.43, 98.45, 98.51, 98.52, 98.53, 98.61, 98.62, 98.63, 98.64, 98.65, 98.70, 98.71, and 98.81.

Definitions: § 98.2 is now an alphabetical listing.

Removed: (e), (f), (n), (o), (s), (gg) and (nn).

Added: Child Care and Development Fund (CCDF), Construction, Discretionary Fund, Facility, Major Renovation, Mandatory Funds, Matching Funds, Modular unit, Real property, and Tribal Mandatory Funds.

Assurances and Certifications: § 98.15 has been reorganized to reflect the statute intent that states "assure" they meet certain requirements and "certify" that they meet others.

Tribes: We have consolidated tribal regulations from §§ 98.16(b), 98.17(b) and 98.60(g) into Subpart I.

The following distribution table summarizes what has been added, removed, revised and redesignated.

Existing section	Action	New section
98.1(a) and (b)	Added	98.1(a)
98.1(b)(7)	Redesignated	98.1(b) and (c).
98.1(b)(8)	Removed.	
98.2(a), (j), (q), (mm)	Redesignated	98.1(c)(7).
98.10(b) and (e)	Revised	98.2—Alphabetical.
	Revised	98.10(b) and (e).

Existing section	Action	New section
98.11(a) and (b)(8)	Revised	98.11(a) and (b)(8).
98.12(a) and (c)	Revised	98.12(a) and (c).
	Added	Introductory.
98.13(a)	Revised	98.13(a) and (b).
98.13(b) and (c)	Removed.	
98.13(a)(10)	Redesignated	98.13(c).
98.13(a)(11)	Redesignated	98.13(d).
98.14(a-c)	Revised	98.14(a-c).
98.15	See note above.	
98.16(a)	Redesignated	Introductory.
98.16(a)(1-12)	Revised	98.16(a-l).
98.16(a)(13-16)	Removed.	
	Added	98.16(m-q).
98.16(a)(17)	Redesignated	98.16(r).
98.17(a)	Revised	98.17(a).
98.17(c)	Redesignated	98.17(b).
98.20(a)	Revised	98.20(a).
98.21	Removed.	
	Added	98.30(c)(3).
98.30(c)(3-5)	Redesignated	98.30(c)(4-6).
98.30(d)	Removed.	
98.30(e-g)	Redesignated	98.30(d-f).
98.31	Revised	98.31.
98.32	Revised	98.32.
	Added	98.32(c).
98.33	Revised	98.33.
98.40(a)	Revised	98.40(a).
98.41(a)(1)	Revised	98.41(a)(1).
98.41(c) and (d)	Removed.	
98.41(e-g)	Redesignated	98.41(c-e).
98.42(d)	Removed.	
98.43(a) and (b)	Revised	98.43(a) and (b).
	Added	98.43(c).
98.43(c) and (d)	Redesignated	98.43(d) and (e).
98.43(e) and (f)	Removed.	
98.45	Revised	98.45.
98.50(a) and (c)	Revised	98.50(a) and (c).
98.50(d)	Removed.	
	Added	98.50(d-f).
98.51(a) and (b)	Revised	98.51(a).
98.51(c-f)	Removed.	
98.51(g)	Redesignated	98.51(b).
	Added	98.51(c).
98.52(a) and (b)	Revised	98.52(a).
98.52(c)	Revised	98.52(c).
98.53	Revised	98.53.
98.54(a)	Revised	98.54(a).
	Added	98.54(b)(3).
98.60(a), (d) and (f)	Revised	98.60(a), (c) and (e).
98.60(b)	Removed.	
98.60(c-f)	Redesignated	98.60(b-e).
98.60(h)	Redesignated, Revised	98.60(g).
98.60(i-j)	Redesignated	98.60(h-i).
98.61(a) and (b)	Revised	98.61(a).
98.62(a-c)	Redesignated	98.61(b-d).
	Added	98.61(e).
	Added	98.62(a) and (b).
98.63(a) and (b)	Redesignated, Revised	98.64(b).
	Added	98.63(a-c).
98.64(a-d)	Removed.	
	Added	98.64(a), (c) and (d).
98.65(a)	Revised	98.65(a).
	Added	98.65(f) and (g).
98.67(c)	Revised	98.67(c).
98.70	Revised	98.70.
98.71	Revised	98.71.
98.80 Introductory	Revised	98.80.
98.80(b) and (f)	Revised	98.80(b) and (f).
98.81(a)	Revised	98.81(a).
	Added	98.81(b).
98.81(b)	Redesignated	98.81(c).
98.82 Introductory	Revised	98.82 Introductory.
98.83(c-f)	Revised	98.83(c-f).
98.83(g) and (h)	Removed.	

Existing section	Action	New section
98.83(i)	Redesignated, Revised	98.83(g).
	Added	98.83(h).
	Added	98.84.
98.90(e)	Revised	98.90(e).
98.92(a)	Revised	98.92(a).
98.92(b)	Removed.	
98.92(c)	Revised	98.92(b).
98.92(d) and (e)	Redesignated	98.92(c) and (d).
	Added	98.92(e).

Subpart A—Goals, Purposes and Definitions

Goals and Purposes (Section 98.1)

This section of the regulations includes at § 98.1(a) the goals for the Child Care and Development Fund (CCDF) contained in section 658A of the amended CCDBG Act.

Comment: Two commenters suggested the goals include a requirement for parental choice rather than the reference to a promotion of parental choice.

Response: The goal at § 98.1(a)(2) uses the language of section 658A of the amended CCDBG Act which is “to promote parental choice.” This goal is operationalized by other requirements. Lead Agencies which opt to provide care through grants and contracts in the state child care program are also required to provide certificates to parents seeking child care. Additionally, Lead Agencies are to include in their programs a broad range of child care providers, including center-based care, family child care, in-home care, care provided by relatives and sectarian child care providers.

Comment: Two commenters suggested goal one include a reference to planning functions as well as program and policy functions.

Response: Goal one is stated in the statute as “to allow each State maximum flexibility in developing child care programs and policies that best suit the needs of children and parents within such State.” Although we agree with the commenter on the importance of planning, we believe the goal at § 98.1(c)(4) of this regulation already discusses planning for delivery of services. Furthermore, the discussion at § 98.14 reflects our belief in the importance of the planning function in the administration of the CCDF within a State.

Comment: One commenter suggested goal five be altered to reflect that health, safety, licensing and regulations standards are established by state law and regulations.

Response: Goal five of the statute already states “to assist States in implementing the health, safety,

licensing and registration standards established in State regulations.”

Comment: One commenter cited one of the stated purposes of the CCDF is to increase quality of child care services. This commenter believed this term should be defined through reference to specific standards of quality, such as the National Association for the Education of Young Children (NAEYC) accreditation standards.

Response: We have chosen to not define quality child care in these regulations beyond the language found in section 658G of the Act.

Definitions (Section 98.2)

We adopted the following changes for this section: an updated definition of the Child Care and Development Block Grant Act; an amended definition of a child care certificate reflecting its use as a required deposit for child care services; and an amended definition of relative child care provider which includes great grandparents and siblings (if living in a separate residence) as relative providers.

We substituted the term “Child Care and Development Fund (CCDF)” for “Block Grant” and also defined the constituent parts of the CCDF: Mandatory Funds, Matching Funds, Discretionary Funds, and Tribal Mandatory Funds.

In light of the new section 6580(c)(6) of the Act which allows Tribes to use CCDF funds for construction and renovation of child care facilities, we also adopted these terms: construction, facility, major renovation, modular unit, and real property.

As proposed, we have replaced separate terms for “Grantee” and “Lead Agency” with the single term “Lead Agency.” We did this for a number of reasons. First, there was not a meaningful difference between those terms. Second, we wished to remove any ambiguity that could result from the use of two different terms. Third, we wanted to emphasize the streamlined administration of all child care programs in a State that resulted from PRWORA. We believe that use of the term “Lead Agency” conveyed that

sense of unified and expanded responsibility better than the term “Grantee.” Lastly, we wanted to avoid any confusion that could arise when the State uses subgrantees in implementing the CCDF. We have replaced the specific term “Grantee,” as formerly defined, with “Lead Agency” throughout these regulations, although there remain some instances where the word “grantee” appears in its common usage. In these final regulations, we also corrected the definition of Lead Agency to include all parts of the definition of grantee which were inadvertently omitted in the proposed rule.

Comment: Some commenters on this section questioned definitions for which no changes had been proposed. For example, commenters questioned the distinction between a “child care provider that receives assistance” and an “eligible child care provider” as well as why the definitions for various providers were based on the location of the care provided (e.g., in-home care) rather than the nature of the care (e.g., formal vs. informal), or was based on the number of providers present (e.g., group home child care provider).

Response: Because no changes were proposed for the terms questioned by the commenters, we refer them to the preamble discussion for those terms in the final rule of August 4, 1992. We believe that explanation, found at 57 FR 34359, adequately addresses their specific concerns. Our position, like the definitions themselves, remains unchanged.

Comment: One commenter wanted us to clarify that minor remodeling, within the limits set forth in the Act, does not fall under the definition of major renovation.

Response: Section 98.54(b)(1) provides that States and others may use CCDF funds for minor remodeling. But, rather than create a separate definition for minor remodeling, State Lead Agencies may assume that an improvement or upgrade to a facility which is not specified under the definition of major renovation adopted in this rule may, by default, be considered a minor renovation and,

therefore, is allowable under the Act. Lead Agencies are cautioned of the distinctions at § 98.54(b)(1) and § 98.54(b)(2) between minor renovations that are permissible for sectarian organizations and those that are permissible for others.

Comment: Another commenter wanted us to define "deposit" as used in the definition of child care certificate and suggested several components of a definition.

Response: Our definition mirrors the language of the Act. We believe that the phrase "if * * * required of other children" is sufficiently limiting of the common usage of the word "deposit" as to make the other definitions suggested by the commenter unnecessary.

Comment: One commenter asked that we expand the definition of certificate to include electronic transfers using an ATM machine, for example, suggesting that recordkeeping could be simplified and payments to providers made more promptly.

Response: It is not necessary to change the definition as suggested. The definition already recognizes that a certificate need not be a check, but could be an unspecified "other disbursement". Electronic transfers may be considered child care certificates if they meet the requirements of § 98.30(c), i.e., issued directly to the parent, of a value commensurate with the subsidy value of other child care services offered by the Lead Agency, etc.

Comment: A commenter asked that the definition of a certificate be broadened to include a check issued in the name of both the parent and the provider, regardless of whether it is sent directly to the parent or provider.

Response: It is unclear why this change was suggested. A check (or other disbursement) issued in the name of both the parent and the provider would meet the existing definition. The critical element is that parents can use such a disbursement with any child care provider they choose. If the commenter is suggesting that the parent be limited to only the named provider(s), which the parent may not have chosen, then it is not a "certificate" within the meaning of the Act.

Comment: One commenter observed that we had not proposed a definition of "special needs child".

Response: The Lead Agency has complete flexibility to define this term. It should be noted that the Lead Agency may define the term differently for purposes of prioritizing under § 98.44(b) from the definition it uses for purposes of payment rates as discussed at § 98.43. The use of the term is unchanged since the 1992 rule and we are unaware of the

need to regulate a definition for "special needs child" now.

Comment: One commenter thought that our definitions somehow limited "informal" care to only that care provided in the child's own home (i.e., in-home care) and that this reduced needed Lead Agency flexibility as well as limited a family's options.

Response: We assume that the commenter understood the regulations to allow unregulated care only if it is provided in the child's own home. There is no such restriction in these regulations, nor has there been such a restriction in the past. Any child care that is legal in a jurisdiction, including care that the jurisdiction chooses not to regulate, is an option available under the Act, provided the requirements designed to protect the health and safety of the child are also met.

Comment: One commenter observed that the definition of relative is too narrow and that it would exclude some relatives as defined in some Native American cultures, for example, the "hanai" system in Hawaii, where family is informally "adopted" or related.

Response: Any relative who meets applicable state and local requirements, if any, may provide care, not just those listed in our definition. The definition is statutory and is provided solely for the purpose of identifying those relatives who may be exempted—but, only if the Lead Agency chooses to exempt them—from the health and safety requirements at § 98.41. The definition was not created to limit who may provide care.

Comment: Finally, a commenter noted that a definition for "tribal organization" was no longer included in this section.

Response: The PRWORA amendments broadened the definition of "tribal organization" to include the following "other organizations": (1) A Native Hawaiian organization; and (2) a private nonprofit organization established for the purpose of serving youth who are Indian or Native Hawaiian. However, the "other organizations" may only receive Discretionary Funds. Therefore, since not all tribal "organizations" are eligible to receive both parts of the CCDF (Discretionary Funds and Tribal Mandatory Funds), we initially decided to omit this definition entirely from this section and specifically define the new terms for "other tribal organizations" in the Preamble at § 98.61(c). The definition for tribal organization has been placed back in this section. This is the same definition used in the prior final rule (57 FR 34415, August 4, 1992). Since the "other tribal organizations" may only be funded with Discretionary

Funds, they are defined and discussed in the Preamble at Subpart G, Section 98.61(c).

Subpart B—General Application Procedures

Lead Agency Responsibilities (Section 98.10)

The new statute did not change the responsibilities of the Lead Agency. The amended statute at section 658D(b)(1)(A), however, expands the CCDF Lead Agency's ability to administer the CCDF program through other agencies. This change broadens the ability of the Lead Agency to administer the CCDF program through governmental or non-governmental entities, not just "other State agencies" as provided in the original CCDBG Act. These entities could include local governmental agencies and private organizations. The new statute and the Conference Agreement report (H.R. Rep. No. 725, 104th Cong., 2d Sess. (1996)) are silent regarding whether the non-governmental agencies cited in this statutory change must be non-profit organizations, so ACF has not regulated on the characteristics of the agencies through which the Lead Agency may administer the program.

Comment: One Lead Agency asked whether the ability to administer the program through other non-governmental agencies meant that the State child care advisory council could have a stronger role in setting standards.

Response: The regulations have never limited Lead Agencies from including others in the creation of child care policy or the setting of State standards for child care. However, § 98.11(b)(2) and (8) provide that the Lead Agency shall continue to promulgate rules and regulations governing the overall administration of the program and that all agencies and contractors that determine individual eligibility shall do so according to the rules established by the Lead Agency.

The change in the regulation is to allow entities other than the Lead Agency to administer the day-to-day operation of the program.

Comment: Another Lead Agency asked us to delete the requirement at § 98.10(c) which requires consultation with local governments. Barring that, they asked for definitions of "appropriate representative" and "local government".

Response: Congress created the requirement for the Lead Agency to "consult with appropriate representatives of units of general purpose local government" at section 658D of the Act, and hence it can not

be deleted. As States and localities differ greatly in their governmental structures, we believe it is inappropriate to attempt to offer all-encompassing definitions for these terms. A Lead Agency may wish to consult its legal counsel if it is unable to determine whom it should consult with to meet this statutory requirement.

Administration Under Contracts and Agreements (Section 98.11)

Under the latest statutory amendments, the Lead Agency remains the single point of contact and retains overall responsibility for the administration of the CCDF program. We have amended this section, however, to reflect the statutory change discussed at § 98.10 regarding the Lead Agency's additional flexibility to administer the program through other governmental or non-governmental agencies.

Further, since we made revisions corresponding to the added administrative flexibility granted to the Lead Agency, we also wanted to align the wording of this section more closely with the statute concerning the overall, lead responsibility of the Lead Agency. Thus, we have re-worded the paragraphs in this section that suggested that the Lead Agency "shares" administration of the program with other entities, because the relationship between the Lead Agency and other entities through which it administers the CCDF is not co-equal.

Comment: One commenter wanted us to delete the requirement at § 98.11(b)(2) requiring the Lead Agency to "Promulgate all rules and regulations governing overall administration of the Plan" contending that when the CCDF is administered through other entities it should be up to the other agency to promulgate the rules for that part which it is administering.

Response: We do not agree that this provision should be deleted. The Lead Agency is ultimately responsible for the program irrespective of who administers the day-to-day operations. And, it is the Lead Agency against whom penalties will be assessed even if caused by actions of a subgrantee. It is because we hold the Lead Agency accountable that the provisions in § 98.11 exist.

The requirement for the Lead Agency to promulgate rules does not preclude subgrantees from suggesting, or even creating the policy and procedures by which the program or a part of the program operates. However, those policies and procedures must be issued under the auspices (i.e., promulgated) of the Lead Agency to ensure that they conform with the requirements of the

Act and regulations, and the program described by the Lead Agency in the Plan it submits to ACF.

Coordination and Consultation (Section 98.12)

Section 658D(b)(1)(D) of the Act requires the Lead Agency to coordinate the provision of CCDF child care services with other Federal, State, and local child care and early childhood development programs. Coordination is crucial to the successful implementation of child care programs and quality improvement activities. The regulation at § 98.12(a) also requires the Lead Agency to coordinate its child care services with the specific entities required at § 98.14(a) to be involved in the CCDF Plan development process: Temporary Assistance for Needy Families (TANF), public health, employment services, and public education.

The statutory changes under PRWORA significantly heighten the need for enhanced coordination between TANF and child care. TANF imposes increased work requirements both regarding the number of TANF families participating in work and the number of hours they must work. At the same time, the guarantee of child care for families who are in work or approved education and training and guaranteed Transitional Child Care assistance were eliminated when PRWORA repealed the title IV-A child care programs.

Moreover, PRWORA provides new child care funding. It gives the CCDF Lead Agency administrative oversight over both the new funds and the funds authorized under the amended Child Care and Development Block Grant Act. The law requires that States dedicate 70 percent of these new funds to the child care needs of families that receive assistance under a State program under Part A of title IV of the Social Security Act, families that attempt through work activities to transition from such assistance, and families that are at risk of becoming eligible for such assistance. Under the new law, Tribes also receive additional child care funds and have the option to operate TANF programs. Tribes that operated tribal programs under the now-repealed Job Opportunities and Basic Skills Training (JOBS) program, may continue to operate work programs under the newly created Native Employment Works program (NEWP). Considered together, these changes present both an opportunity and a challenge for Lead Agencies to serve the child care needs of TANF families.

It is extremely important that children and their families are linked to a system of continuous and accessible health care services. An ongoing Departmental initiative encourages the linkage between child care and health care. In May 1995, Secretary Shalala initiated the Healthy Child Care America Campaign, which encourages States and localities to forge linkages between the health and child care communities. Recognizing the mutually beneficial roles, we require that the Lead Agency, as part of its health and safety provisions, assure that children in subsidized care be age-appropriately immunized. We believe that children will benefit substantially from this enhanced linkage between child care and health services.

Employment is the goal for most TANF families and employment services are critical to the low-income working families served by the CCDF. Therefore, it is only prudent that the Lead Agency coordinate with those State agencies that are responsible for providing employment and employment-related services. But child care is also emerging as an important workforce development issue for the entire population. As such, we believe that Lead Agencies should undertake policies that support and encourage public-private partnerships that promote high quality child care.

Linkages with education agencies are crucial to leverage additional services and enhance child development. One important aspect of this linkage is the role played by public schools as a critical on-site resource for child care. Although PRWORA repealed section 658H of the Child Care and Development Block Grant Act, which directly addressed before- and after-school child care, in the budget for fiscal years 1997 and 1998 Congress nevertheless set aside \$19 million specifically to use for before- and after-school child care activities and child care resource and referral. We, therefore, believe that the repeal of section 658H should not result in a lessening of coordination with before- and after-school programs. We have included requirements to coordinate with public education agencies, both for the purpose of child care planning and development, as well as for more general coordination initiatives.

Aside from requiring Lead Agency coordination with specific entities discussed above, we also strongly encourage coordination with other agencies with potential impact on child care, including: Head Start collaborative offices, child support, child protective services (especially when the Lead

Agency chooses to include children receiving protective services among the families eligible for CCDF subsidies), transportation, National Service, and housing.

The Head Start comprehensive model of health, parent involvement, family support and education, when linked with child care, can provide parents and children with quality comprehensive full day/full year services. Promising models that fund Head Start-eligible children in community-based child care provided in child care centers and homes are emerging across the country. We encourage Lead Agencies to explore and support such efforts.

Partnerships with National Service programs present promising opportunities for collaborations that can expand and enhance child care for both young children and school-aged children. National Service programs have developed several effective and replicable models for providing the tools and skills necessary to build the capacity and sustainability of local child care programs, involving parents and community volunteers in child care activities, and enlisting private sector participation in meeting community needs, including child care.

The availability of transportation is key to enabling families to access child care services and, ultimately, work. Coordination with transportation agencies and planning groups can ensure that child care facilities are located near major transportation nodes for easier access and that systems of public transportation support travel patterns of low-income workers. Alleviating transportation difficulties for child care cuts down on travel time and stress, and allows parents to focus on achieving self-sufficiency through work and education.

Child care and child support enforcement programs serve many of the same families and have a shared mission—to promote self-sufficiency of families and the well-being of children. As a result, we encourage collaborative outreach initiatives between these programs. For example, child care programs can disseminate information to parents about paternity establishment and child support enforcement. We also encourage the two programs to coordinate on policy issues. For example, the programs have a common interest in assuring that the State guidelines used to calculate child support awards adequately consider the cost of child care.

Coordinating with housing agencies is crucial for the millions of TANF recipients and low-income workers who receive child care subsidies and reside

in public housing. Locating child care facilities in or near public housing makes services more accessible, and can provide parents with a more stable and familiar environment for their children's care. Lead Agencies can work with public housing authorities to identify opportunities where co-located housing and child care can serve as an employment or entrepreneurial strategy, and a support service for residents.

We also wish to highlight that the regulation at § 98.12(c), which requires States to coordinate, to the maximum extent feasible, with any Indian Tribes that receive CCDF funds has new meaning in the context of the changes made by PRWORA. As we have noted above, Tribes are eligible to directly receive additional child care funding, and to operate TANF as well as continue to operate work programs (NEWP)—if the Tribe operated a JOBS program in 1994. Nonetheless, the new law did not amend section 6580(c)(5), which specifically provides tribal children with dual eligibility for both tribal and State child care programs funded under CCDF. A broad range of options for implementing and designing programs is available to both States and Tribes. States and Tribes, therefore, have a mutual responsibility to undertake meaningful coordination in designing child care services for Indian families.

Comment: A few commenters thought that our coordination requirement was statutorily unfounded or unnecessary because it may fail to include the most critical partnerships.

Response: It seems unlikely that a CCDF program could successfully meet two of the goals of the Act—providing child care to parents trying to achieve independence from public assistance, and assisting States in implementing State health, safety and licensing standards—without involving, at a minimum, the additional agencies added at § 98.14 in this rule. In fact, since the inception of the program, we have been told by Lead Agencies and the public that coordination with Federal, State, and local child care and early childhood development programs, and the four additional agencies listed is critical to the ongoing successful delivery of quality child care in a State. This requirement recognizes that the coordinative process helps maximize existing resources and avoid duplicative efforts which can result in more positive outcomes for the families and children served by all of the programs involved.

Comment: A number of commenters suggested other agencies with which the Lead Agency should be required to coordinate, for example, representatives

of the American Academy of Pediatrics, the National Association for the Education of Young Children, the State special education preschool program administrator, the early intervention lead agency, and the child welfare agency, among others.

Response: Many Lead Agencies already collaborate with some or all of the agencies suggested and we encourage others to do so as well. However, we do not believe it is prudent to expand the coordination requirement at § 98.14 to include those entities with whom many Lead Agencies are already voluntarily collaborating. We kept our required list to a critical core of agencies. This is not intended to diminish the importance of other collaboration efforts. It would not be reasonable to create an all-inclusive list of potential collaborative agencies. We have confined the regulations to the core required collaboration.

Comment: Several commenters asked if our intention was to limit coordination only to governmental entities. In this regard, others asked that the reference to the public education agency be expanded to specifically include private and sectarian schools and early education programs.

Response: Our requirement recognizes that the impact for the greatest number of families is likely achieved by coordination at the State level. The regulation attempts to maximize the coordination by including those agencies whose activities impact most of the eligible or potentially eligible families in a State. It is not our intention, however, to limit coordination to only governmental entities. And, we encourage Lead Agencies to coordinate with private and sectarian schools and early education programs, especially since such institutions and programs are already utilized by many families.

Comment: One commenter thought that use of the phrase “at a minimum” in § 98.14(a) weakens the intent of broader coordination with additional entities.

Response: We agree and have reworded the regulation.

Applying for Funds (Section 98.13)

The requirements for Tribes applying for funds have been moved to Subpart I and are discussed there. We have separated the tribal requirements in order that the discussion of tribal requirements may be more focused and coherent.

We simplified the application process for States and Territories in order to reduce the administrative burdens of duplicative information requests and to

provide budget information in the CCDF Plan, which is a public document. Heretofore, the regulations required an annual "application," separate from the Plan. This separate application indicated the amount of funds requested, broken down by proposed use (e.g., direct services, administration, quality activities, etc.). A Plan that describes the entire child care program in detail is also required, but only once every two years. In the past, the Plan did not provide a "fiscal context" for the program, since it does not include budgetary information.

In the past, the separate application requested extensive budget information, largely due to the requirements related to the now-discontinued 25 percent setaside of funds for quality and supply building. Because we knew that the budget data was preliminary, we had not required its inclusion in the Plan or made it subject to the compliance process. More importantly, the budget information was not subject to the public hearing process.

We believe that the Lead Agency, in setting the goals and objectives of the program and in determining how to achieve them, must consider the allocation of funds, as well as the program and administrative activities that will be undertaken. We also believe that public knowledge of how funds might be allocated among activities and eligible populations is critical to the planning process. Therefore, we are requiring the Lead Agency to include in its Plan an estimate of the percent or amount of funds that it will allocate to direct services, quality activities, and administration. These estimates are for the public's consideration in the hearing process; they will not be used to award funds. At § 98.13(a) we have retained the requirement that the Lead Agency apply for funds. The ACF-696 is the formal vehicle for providing estimates to ACF for the purpose of awarding funds. We intend to use the financial form ACF-696 to fulfill this requirement, so that the need for a separate application is obviated.

The Plan estimates will be macro-level estimates. That is, the Plan will reflect an estimated amount (or percentage) of funds that the Lead Agency proposes to use for: all direct services, for all quality activities and for administration. We will not ask that these estimates be broken down into subcategories as we had in the separate application.

Comment: One commenter objected to the use of estimates thinking that the form for formally requesting funds from DHHS, which replaces the application

process, was at least two years from being utilized.

Response: That form, the ACF-696, was under OMB review when the proposed rule was published and has since been approved and is already in use.

Comment: Although our proposal to restructure the application process received almost universal support, some commenters wanted assurances that States would not be held accountable if estimates are incorrect as a result of future policy or budget changes. Another commenter wanted us to require that future Plans include a comparison between the amounts estimated in prior Plans with the actual expenditures for those periods.

Response: As we said in the proposed rule, we recognize that these are estimates and, as such, will not be subject to compliance actions. Similarly, approval of a Plan will not be withheld based on the Lead Agency's allocation of funds among activities, unless the Plan indicates that the requirements for administrative cost or quality expenditures will be violated.

We considered the suggested requirement to compare past estimates with actual expenditures for the same period but rejected it for a number of reasons. First, such a requirement would call into question our assertion that the estimates supplied in the Plan are, in fact, estimates and that ACF will not take compliance actions based on them. Second, because expenditure periods for funds overlap Plan periods a full statement of actual expenditures would not be forthcoming until several years after the original estimate, when the persons responsible for the estimates may no longer be in a position to be "accountable" to the public for those estimates. Lastly, interested parties can always request that the Lead Agency make public its spending on various activities. In any event, the Lead Agency is already required to provide information on the actual use and distribution of funds to ACF, pursuant to section 658K of the Act.

We continue to request the various certifications and assurances that are required by other statutes or regulations and that apply to all applicants for Federal financial assistance, specifically:

- Pursuant to 45 CFR part 93, Standard Form LLL (SF-LLL), which assures that the funds will not be used for lobbying purposes. (Tribal applicants are not required to submit this form.)
- Pursuant to 45 CFR 76.600, an assurance (including any required

forms) that the grantee provides a drug-free workplace.

- Pursuant to 45 CFR 76.500, certification that no principals have been debarred.

- Assurances that the grantee will comply with the applicable provisions regarding nondiscrimination at 45 CFR part 80 (implementing title VI of the Civil Rights Act of 1964, as amended), 45 CFR part 84 (implementing section 504 of the Rehabilitation Act of 1973, as amended), 45 CFR part 86 (implementing title IX of the Education Amendments of 1972, as amended) and 45 CFR part 91 (implementing the Age Discrimination Act of 1975, as amended).

Section 98.13 requires the Lead Agency, not the Chief Executive Officer, to supply the requested information. Since the Chief Executive Officer designates the Lead Agency, we feel that it is unnecessary for the Chief Executive Officer to thereafter apply for funding each year. This change gives grantees the flexibility to simplify the application process further.

In summary, the CCDF application process for States and Territories consists of the two-year CCDF Plan as required in § 98.17 and such other information as may be specified by the Secretary. For the second year of the Plan, the Lead Agency uses the ACF-696 to provide ACF with its estimates of funds needed quarterly—there is no longer a separate "application" needed from States and Territories in the second year of the Plan period.

Comment: One commenter objected to discontinuing the separate application because it contained information on the mix of certificates and grants/contracts which could be used to monitor a Lead Agency's compliance with Section 658(c)(2)(A) of the Act concerning the availability of certificates.

Response: The regulations at § 98.13 never required that the Lead Agency's application provide information on the use of certificates. In the past, policy Program Instructions requested such information to ensure that Lead Agencies met the statutory requirement to provide certificates. This was necessary because some Lead Agencies had never provided certificates prior to the CCDBG Act and the Act required all Lead Agencies to have a certificate program in place by October 1, 1992. ACF looked to the information in the application as a indication of the Lead Agency's compliance with this requirement.

In the years since that deadline, certificates have become an integral part of every Lead Agency's program, in fact many State programs are totally

certificate-based. We are satisfied that all Lead Agencies are in conformity with this provision of the Act. It should be noted that Lead Agencies are required to report to ACF the actual numbers of children receiving certificates per § 98.71(b)(2).

Plan Process (Section 98.14)

Section 658D(b) of the Act requires the Lead Agency in developing the Plan to: (1) Coordinate the provision of services with Federal, State and local child care and early childhood development programs; (2) consult with appropriate representatives of local governments; and (3) hold at least one hearing in the State with sufficient time and statewide notification to provide an opportunity for the public to comment on the provision of child care services.

In amending the CCDBG Act to require that the Lead Agency provide "sufficient time and Statewide distribution" of the notice of hearing, Congress established a higher standard for public comment than previously existed in the Act. Affording the public a meaningful opportunity to comment on the provision of child care services advances public participation, Lead Agency accountability and the overall goals of welfare reform. Accordingly, we have established a minimum 20-day notice-of-hearing requirement at § 98.14(c). That is, the Lead Agency must allow a minimum of 20 days from the date of the statewide distribution of the notice of the hearing before holding the hearing. Many Lead Agencies have ongoing planning processes with broad community involvement that convene regularly during the year. We applaud such broad participatory approaches as they are especially responsive to changing needs and these approaches may fulfil the requirements of § 98.14.

Comment: Some commenters preferred the previous requirement for "adequate notice" for public hearings and were unaware of problems or inadequacies of that process. Others argued for a longer notice period and a requirement for additional hearings in a State.

Response: Congress clearly envisioned something different from the existing "adequate notice" process when it amended the Act to require "sufficient time and statewide distribution" of the public hearing notice. We also have received reports that some Lead Agencies provide such short notice of hearings as to effectively preclude broad public participation.

In the interest of State flexibility, we have established only a minimum amount of time—20 days—that the public should be notified of the hearing.

However, we encourage Lead Agencies to consider providing longer lead times that would allow the public more time to prepare for hearings, especially when only a single hearing is held in the State. Although the Act requires the Lead Agency to hold only one public hearing, the Lead Agency may, of course, hold additional public hearings. Because of technological changes which might allow for public comment via the Internet or linking sites across a State via satellite, we have not regulated an additional number of hearings that must be held since Lead Agencies may find other approaches for public input that are equally effective and less costly than additional hearings.

As stated in the proposed rule, we considered establishing regulations around the newly added statutory language that requires "statewide distribution of the notice of hearing." Clearly, the expanded Child Care and Development Fund potentially impacts a much wider segment of the population than may have been the case under the CCDBG. In light of the stronger statutory language about public hearings, we considered, for example, a regulation to require the Lead Agency to employ specific media in publicizing its hearing or to ensure that specific portions of the population be potentially exposed to the hearing notice.

We rejected these and other alternatives as restricting State flexibility. Nevertheless, we remain concerned that some Lead Agencies may not respond to the heightened statutory requirement. We, therefore, require the Lead Agency to describe how it achieved statewide distribution of the notice of hearing in its description of the hearing process required in the Plan by § 98.16(e). We received no comments on this proposal.

Similarly, we have not established a specific requirement concerning written comments from the public as suggested by some commenters. We believe, however, that a meaningful public comment process must consider written comments from persons or organizations, especially those who are unable to attend a hearing.

At § 98.14(c)(2) we require that the public hearing be held before the Plan is submitted to ACF, but no earlier than nine months prior to the effective date of a Plan. We recognize that States may have established public comment mechanisms that coincide with their budgetary cycle but not within our usual time frames for public hearings and Plan submittal. Therefore, we wish to clarify our intention in this area.

ACF does not believe that the public hearing is held for the purposes of

"approving" the Plan as it will be submitted, but rather to solicit public comment and input into the services that will be provided through the CCDF. For this reason, we have created a flexible process that does not create an undue burden on Lead Agencies, yet insures that the statutorily required public input is obtained.

The Plan that is submitted to ACF must reflect the program that will be conducted and must incorporate any changes to the program that the Lead Agency chooses to adopt as a result of the input received during the public hearing. We advise the Lead Agency to retain a copy of the draft Plan that it made available for public comment in fulfillment of this requirement. We also remind Lead Agencies that substantive changes in their programs, after their Plans are submitted to ACF, must be reflected by amending the Plan per § 98.18(b).

Comment: A few commenters suggested that the Lead Agency be required to specifically respond to comments raised at the public hearing or at least to those comments on the Plan that are submitted in writing, others suggested that the Lead Agency be required to provide a summary of all comments received on the Plan.

Response: We decline to require Lead Agencies to summarize or respond to comments received during the public hearing process. The Act does not suggest such a requirement and it is unclear what would result from it. We also believe that this would be an especially resource-intensive activity for the Lead Agency which would not necessarily further the goals of the Act.

Comment: Some commenters objected to any regulation around public input stating that they had ongoing mechanisms for coordination or input, such as quarterly child care steering committee meetings, others felt that a State legislative or budget hearing would fulfill the requirement. Still others argued that the public hearings are poorly attended or not helpful.

Response: At section 658D(b)(2) of the Act, Congress clearly ties together the hearing and the State Plan with the expectation that the public be afforded an opportunity to comment on the content of that Plan. The Act requires a hearing "to provide the public an opportunity to comment on the provision of child care services under the State plan."

Ongoing mechanisms, such as those suggested by the commenters may, in fact, meet the requirements of the Act when they allow for the public to comment on the provision of services under the State Plan. Some legislative

oversight or budget hearings, in contrast, may not meet this statutory requirement if they do not allow for public comment (i.e., the public is not afforded an opportunity to comment as when only the State Administrator or legislators are allowed as witnesses). Similarly, a single state budget hearing held for the purpose of discussing the entire State budget may not afford any opportunity to specifically address child care services in the State, especially in the detail set forth in the Plan, as required by the Act. It is not the auspices under which the hearing is held that is important, but whether the hearing allows for the necessary public input required by the Act.

Regarding attendance or participation at public hearings in the past, we believe that public hearings, designed for broad public participation and held with sufficient notification can nevertheless become meaningful forums for State child care policy discussions, especially in future years.

Comment: A few commenters objected to the requirement that the hearing be held no earlier than 9 months prior to submission of the Plan to ACF as unnecessarily prescriptive.

Response: We maintain that the requirement that hearings be held no earlier than 9 months before the Plan is submitted to ACF is a balanced approach which allows the Lead Agency to conduct its hearing up to a full year in advance of the effective date of the Plan. Allowing complete latitude in setting the date for the public hearing might make the hearing requirement less meaningful and creates a disconnect—the further from the effective date of the Plan that the hearing is held.

Comment: A number of commenters argued that the child care Plan must be made available before the public hearing is held for there to be meaningful public input. They suggested various timeframes and formats for making Plans available.

Response: We agree that meaningful public comment on the “provision of child care services under the State plan” as required by the Act is hampered, if not impossible, without knowledge of the contents of that Plan. For example, the Act now requires the Lead Agency to provide “detailed descriptions” of various child care policies such as parental access, parental complaints, and payment rates among others. In order to meaningfully comment, the public must know what those policies are. We believe this can only be accomplished by providing the public with the Plan that the Lead Agency proposes to submit to ACF. Therefore, at

§ 98.14(c)(3) we are requiring that the Lead Agency make the Plan available in advance of the required hearing.

We decline to regulate on the timeframes or formats for making the Plan available to the public but remind Lead Agencies of their obligations under the Americans with Disabilities Act for accessibility of public information.

Comment: One commenter asked for flexibility in the format of the Plan that is to be submitted to the public in advance of the hearing suggesting that various topics such as parent fees, eligibility and payments rates be presented, but not necessarily in the format of the preprint that ACF requires.

Response: We agree that the Plan that is presented in advance of the public hearing need not be in the format of the preprint. However, as a practical matter, this may be the easiest format for the Lead Agency to use. That is because the Act requires comments on child care services under the “State plan”—the requirements for which are outlined at § 98.16. As long as all of the elements of the Plan as described at § 98.16 are provided in advance of the hearing, then the requirement is satisfied. We note that many of the Plan elements, such as most of the newly statutorily-required “detailed descriptions” probably will not change from Plan to Plan, hence the preprint format may not be as burdensome as the commenter imagines.

Comment: A number of commenters opposed having amendments to the Plan subject to the public hearing. They also objected to applying the hearing requirement to those Plans which were to become effective on October 1, 1997.

Response: The proposed rule neither required nor suggested that Plan amendments are subject to a public hearing. As has been the policy since the inception of the program, this final rule also does not require a public hearing for amendments to approved CCDF Plans. Although an amendment to the Plan is not subject to the Federal regulatory hearing requirement, we recognize that State rules or Lead Agency practice may, nevertheless, require a hearing or public comment period or both.

The preamble to the proposed rule provided that the new CCDF Plans due to ACF in 1997 were subject to the statutory requirements—not the proposed regulatory requirements—for a hearing i.e., at least one hearing with sufficient time and statewide distribution of the notice. Although that issue is now moot we wish to reiterate that both the public hearing and the coordination and consultation processes must be undertaken each time the entire

Plan is required to be submitted. The regulations provide that the entire Plan is only required to be submitted at the beginning of each Plan biennium.

As discussed above at § 98.12, we believe that ongoing coordination and consultation processes are vital to the design of a successful program. Therefore, at § 98.14(a) we have included a minimum list of State agencies with which the Lead Agency must coordinate the provision of services under the CCDF.

The requirement to coordinate with specific agencies includes a provision that the Lead Agency describe the “results” of the coordination. In the proposed rule, we did not elaborate on this requirement as we thought it self-evident. Because we did not give context to this requirement, some commenters ascribed purposes or expectations that we did not intend. Therefore, we wish to elaborate on this part of the coordination requirement.

Prior to this rule Lead Agencies were required to provide a “description” of the coordination and collaborative processes they engaged in during the preparation of the State Plan. This description in the Plans, however, was frequently merely a list of agencies with which the Lead Agency had met. Often these descriptions did not change over long periods, or the dates of the meetings listed remained unchanged from Plan to Plan. The “description” gave the impression that there was little progress resulting from the coordinative efforts of the Lead Agencies—that little was happening. We knew this to be an inaccurate picture.

The Plan is not just a public document describing the State’s approach to child care for the purpose of its hearing process. It also serves as a guide for other Lead Agencies about promising practices, different approaches to common problems and can be an indicator of issues that others may face in the future. Because of the multiple uses of the State Plan, we wanted the “description” of the coordinative effort to more accurately reflect what we knew was the reality in the States. No other purpose is contemplated or intended in asking that the Plan reflect the “results” of the coordination activities.

We recognize that coordination may not have quantifiable results, especially in the short term. Because coordination is an ongoing process, an explanation of the intended outcomes of a Lead Agency’s current and planned coordination activities would be an appropriate “results”. Similarly, a compilation of the useful lessons learned from the coordination activities

would meet our intent in asking that the "results" be described in the State Plan.

Additional comments relating to the coordination and consultation requirement and processes are addressed in the discussion at § 98.12

Assurances and Certifications (Section 98.15)

The PRWORA amendments made a number of changes to the assurances under the CCDBG. In several instances the term "assure" was replaced by the term "certify." Also, as described below, the amendments changed the content of two of the former assurances and some assurances were eliminated.

While ACF believes that there is no practical difference between an assurance or certification, when both are given in writing, we have grouped the assurances together at § 98.15(a) and the certifications together at § 98.15(b).

Regarding specific substantive changes, the new section 658E(c)(2)(D) of the Act replaces the former assurance regarding consumer education. The corresponding regulatory amendment at § 98.15(b)(3) uses the statutory language requiring the Lead Agency to certify it "will collect and disseminate to parents of eligible children and the general public, consumer education information that will promote informed child care choices."

The new section 658E(c)(2)(E) does not contain prior language requiring Lead Agencies to have in place a registration process for unregulated care providers that provided care to children receiving subsidized care under the CCDBG Act. We, therefore, removed the assurance formerly found at § 98.15(i). We note, however, that the Lead Agency has the flexibility to continue to maintain a registration process for providers if it chooses. This process has enabled States to maintain an efficient payment system. In addition it has provided a means to transmit relevant information, such as health and safety requirements and training opportunities, to providers who might otherwise be difficult to reach.

The Act also revises the requirement that providers meet all licensing and regulatory requirements applicable under State and local law. The revised requirement at § 98.15(b)(4) mirrors the new statutory language that there be "in effect licensing requirements applicable to child care services provided within the State."

For tribal programs, the amendments specifically provide that, "in lieu of any licensing and regulatory requirements applicable under State and local law, the Secretary, in consultation with Indian tribes and tribal organizations,

shall develop minimum child care standards (that appropriately reflect tribal needs and available resources) that shall be applicable to Indian tribes and tribal organizations receiving assistance under this subchapter" (section 658E(c)(2)(E)(ii)). ACF is in the process of arranging those consultations.

The PRWORA deleted requirements formerly found in the statute at section 658E(c)(2)(H), (I), and (J). These provisions, which related to reporting reductions in standards, reviewing State licensing and regulatory requirements, and non-supplantation were deleted.

Finally, § 98.15(a)(6) requires that States provide an assurance that they have not reduced their level of effort in full-day/full-year child care services if they use pre-Kindergarten (pre-K) expenditures to meet the MOE requirement. Comments relating to this assurance, and the use of pre-K in the CCDF in general, are discussed further at § 98.53.

Comment: One commenter suggested strengthening the certification at § 98.15(b)(3) by requiring that the consumer education be provided through community-based organizations. The commenter also wanted us to clarify that such consumer education be made available to the general public throughout the State.

Response: We agree that community-based organizations may, in fact, be the best way of providing consumer education as discussed at § 98.33. However, in the interests of State flexibility, we decline to limit the Lead Agency's options so narrowly. We note that the certification already requires dissemination of consumer education materials "to the general public" and it is our expectation that such materials are widely made available and not limited just to families applying for or receiving CCDF subsidies.

Comment: Another commenter asked that the certification at § 98.15(b)(7) be clarified to define equal access as also meaning timely payment of the provider by the State. The commenter wanted a certification that payments to providers would be processed within a state-established timeframe, claiming that lengthy delays in payment made providers reluctant or unwilling to accept subsidized children, thereby effecting equal access.

Response: We agree that the Lead Agency should establish timely payment processing standards for the reasons stated by the commenter. However, there is no statutory basis for requiring such standards and we decline to change the regulation.

Comment: One commenter noted that § 98.15(a)(5) contained an incorrect citation.

Response: We have corrected the citation to read, "pursuant to § 98.30(f)." Plan Provisions (Section 98.16)

We have amended § 98.16 to reflect changes in the Plan resulting from PRWORA. For example, we have deleted the language on registration and the calculation of base-year level-of-effort previously found at § 98.16(a)(13), (14) and (16). We substituted for them the statutory requirements for the Lead Agency to provide detailed descriptions of its parental complaints process at § 98.16(m) and its procedures for parental access at § 98.16(n). Similarly, we have modified some language to reflect new statutory language. For example, § 98.16(h) now discusses the additional purposes for which funds may be used, and § 98.16(l) now requests the summary of facts upon which payment rates were determined, including the conduct of a market rate survey. Section 98.16(c) has been expanded to identify the entity designated to receive private donated funds pursuant to § 98.53(f). We have also modified the language at § 98.16(g)(2) to reflect broader flexibility concerning the use of in-home care. We received many comments on these provisions. Those comments are more appropriately discussed in the related sections that follow.

We take this opportunity to correct the wording of § 98.16(j), formerly § 98.16(a)(10), concerning health and safety requirements. We have removed the word "minimum" here since the legislation contains no such qualification, nor do our regulations limit the flexibility to establish such requirements. We note that § 98.41 remains unaffected by this correction since that section did not include the use of the word "minimum."

We have also required at § 98.16(p) that the Lead Agency include in the CCDF Plan the definitions or criteria used to implement the exception to TANF work requirement penalties that applies when a single custodial parent with a child under age six has demonstrated an inability to locate needed child care. Among others, the definitions or criteria would include "appropriate child care," and "affordable child care arrangements." We elaborate on this requirement, and the many comments received about it, in the discussion of consumer education at § 98.33.

Finally, § 98.16(q)(1) provides that the Lead Agency describe State efforts to ensure that pre-K programs, for which

any Federal matching funds are claimed, meet the needs of working parents. At § 98.16(q)(2) we codified the provision found in the preamble of the proposed rule at § 95.53. This section provides that, should the Lead Agency use public pre-K funds to meet more than 10% of either the MOE or the Matching requirements, the Plan will reflect this. The Plan must also describe how the State will coordinate its pre-K and child care services to expand the availability of child care when the Lead Agency uses public pre-K funds to meet more than 10% of either the MOE or the Matching requirements. These requirements are discussed at § 98.53.

The Administration on Children will issue appropriate amendments to the State CCDF plan preprint (ACF-118) and the Tribal CCDF plan preprint (ACF-118A) in Program Instructions, which will also provide guidance on when Lead Agencies would be required to submit amendments. The Program Instructions will take into consideration appropriate lead times for implementation.

Comment: One commenter objected to including TANF definitions in the State child care Plan because then the child care Plan would have to be amended every time TANF changed its definitions.

Response: Including TANF definitions in the child care Plan is not burdensome because those TANF definitions are unlikely to change frequently over the two-year life of the Plan. In any event, changes to the TANF definitions would not appear to be a "substantial change" in the CCDF program. Hence, an amendment to the Plan would not be required as discussed in the preamble to the 1992 rule at 57 FR 34367. We repeat that the purpose of this provision is for public education about the requirements upon, and options available to, low-income working parents as discussed in the preamble at § 98.33.

Comment: Another commenter felt that States should not have to "justify" limits on in-home care in the Plan. She suggested that a listing of the limits on in-home care and the policy reasons for those limits should be sufficient.

Response: We agree. It was not our intent to make States justify the limits they place on in-home care. Rather, we want the Plan to reflect their basis for doing so, in order for the public and ACF to better understand the State's policy. We have accordingly changed the wording of the regulation. The preamble discussion at § 98.30 remains essentially the same as we did not use the word "justify" in that discussion of

in-home care, from which the Plan requirement is derived.

Comment: A commenter observed that the statute does not require that the Lead Agency itself maintain the records of substantiated parental complaints, but rather requires the State to maintain such records.

Response: We agree and have changed the wording of § 98.16(m) to reflect the requirement as discussed at § 98.32.

Period Covered by Plan (Section 98.17)

The statute was amended at section 658E(b) to eliminate the three-year initial period for State Plans. The rule provides that all Lead Agencies for States, Territories, and Tribes must submit new Plans every two years beginning with the Plans for Federal Fiscal Years 1998 and 1999.

Comment: One commenter observed that two years is too short a period for meaningful comprehensive planning and that such a period may not coincide with State legislative sessions. The commenter asked for the ability to prepare longer range plans, such as 3 to 5 year plans, with provision for annual updates.

Response: We agree that a longer plan period might better suit some Lead Agencies' planning cycles. However, this requirement is statutory.

Subpart C—Eligibility for Services

A Child's Eligibility for Child Care Services (Section 98.20)

General eligibility. The amended statute at 658P(4)(B) expands the definition of "eligible child" to include families whose income does not exceed 85 percent of the State median income for a family of the same size. Therefore, § 98.20(a)(2) reflects that change.

We retained the State flexibility at § 98.20(a)(1)(ii) regarding the option to serve dependent children age 13 and over who are physically or mentally incapacitated or under court supervision. States may elect to serve children age 13 or older who are physically or mentally incapacitated or under court supervision up to age 19, if they include the age limit in their CCDF Plan.

Foster care and protective services. Grantees have the flexibility to include foster care in their definition of protective services in their CCDF Plan, pursuant to § 98.16(f)(7), and thus provide child care services to children in foster care in the same manner in which they provide services to children in protective services.

A child in a family that is receiving, or needs to receive, protective intervention is eligible for child care

subsidies if he or she remains in his or her own home even if the parent is not working, in education or in training. In these instances, child care serves the child's needs as much or more than the parent's needs. Likewise, child care services may also be necessary when a child is placed in foster care. Therefore, if Lead Agencies do not include foster care in their definition of protective services, they must tie eligibility for CCDF child care of children in foster care to the status of the foster parent's work, education or training.

Comment: One commenter suggested that the option to include foster care within the definition of protective services should be included in the regulatory section.

Response: We agree. Therefore, we amended § 98.20(a)(3)(ii) and § 98.16(f)(7) to ensure that States carefully consider inclusion of this option when developing and implementing their CCDF Plan.

Comment: Most commenters were pleased that children in foster care could be eligible for child care services since many States do not differentiate between foster care and child protective services. However, some commenters felt that we should include foster care in the regulatory definition of eligible child so that all children in foster care would be eligible.

Response: The statute did not specifically provide for foster care as an eligibility criteria. As states have varying policies regarding services for children in foster care and protective services, we have not included foster care in the regulatory definition. Rather we will allow States flexibility in determining if, and how, they will serve children in foster care and protective services. Therefore, a State must indicate its intention of providing child care services to children in foster care—on the same basis as children in protective services—by including foster care in their definition of protective services in the CCDF Plan.

Comment: Several commenters believed that the child's eligibility for child care services should not be based on the income of the foster parents.

Response: States continue to have the flexibility to consider a child in foster care as a family of one, for purposes of determining income eligibility under § 98.20, on a case-by-case basis.

Respite care. We further clarified that respite child care is allowable for only brief, occasional periods in excess of the normal "less than 24 hour period" in instances where parent(s) of children in protective services—including foster parents where the Lead Agency has defined families in protective services to

include foster care families—need relief from caretaking responsibilities. For example, a child care arrangement by someone other than the custodial parent for one weekend a month to give relief to the custodial parent(s) of children in protective services is acceptable. We believe that this kind of respite child care, if necessary for support to families with children in protective services, would be an acceptable use of CCDF funds.

If a State or Tribe uses CCDF funds to provide respite child care service, i.e., for more than 24 consecutive hours, to families receiving protective services (including foster care families when defined as protective services families), the CCDF Plan must include a statement to that effect in the definition of protective services. We note this definition of “respite child care” may differ from how States or Tribes define it for other purposes (e.g., child welfare). Thus, respite child care must be specified in the Lead Agency’s Plan if it is to be considered an allowable expenditure under CCDF.

Comment: Several commenters felt that States should be required to provide respite care for children with disabilities.

Response: Since respite care is provided to give parents time off from parenting, rather than care to allow the parent to participate in work or in education or training, the CCDF cannot be used for respite care for children with disabilities unless the child also needs or is receiving protective services.

Subpart D—Program Operations (Child Care Services)—Parental Rights and Responsibilities

Parental Choice (Section 98.30)

Cash as a certificate. Since welfare reform has raised issues about methods of paying for child care, we wish to provide clarification with respect to child care certificates provided in the form of cash. In defining the term “certificate,” the statute at 658P(2) says, “The term ‘child care certificate’ means a certificate (that may be a check or other disbursement) that is issued by a State or local government * * * directly to a parent who may use such certificate only as payment for child care services or as a deposit for child care services if such a deposit is required of other children being cared for by the provider.”

With a certificate or two-party check, the Lead Agency can ensure that money is paid to a provider who meets applicable health and safety requirements. This is not the case when a Lead Agency provides cash to a

parent. We strongly discourage a cash system, because providers must meet health and safety standards, and we believe that the use of cash can severely curtail the Lead Agency’s ability to conform with this statutory requirement.

If, nevertheless, a Lead Agency chooses to provide cash, it must be able to demonstrate that: (1) CCDF funds provided to parents are spent in conformity with the goals of the child care program as stated at section 658A of the Act, i.e., that the money is used for child care; and (2) that child care providers meet all applicable licensing and health and safety standards, as required by section 658E(c)(2) (E) and (F) of the Act. Lead Agencies, therefore, may wish to consider having parents who receive cash attest that the funds were used for child care and to identify the provider. Such a statement would help assure that the funds were expended as intended by the statute and lessen the possibilities for fraud. Finally, Lead Agencies are reminded that they must establish procedures to ensure that all providers, including those receiving cash payments from parents, meet applicable health and safety standards.

Comment: One commenter was concerned that we “strongly discourage” the use of cash. She felt that this stifled State innovation in piloting new service delivery systems and ran counter to the purposes of PRWORA in instilling personal responsibility. In recognizing that providing cash can only be successful with intense parent and provider education, the commenter argued for State flexibility to experiment without sanctions from ACF.

Response: We appreciate the commenter’s thoughtful approach to the question of providing cash. Like the commenter, we believe that without appropriate safeguards, such as intense consumer education and the provisions discussed above, the provision of cash may not fulfill the goals of either PRWORA or the CCDBG Act. While we continue to discourage the use of cash, we recognize that the Lead Agency retains the flexibility to use it.

Availability of certificates. We received an unexpectedly large number of comments on our proposed clarification concerning the availability of certificates; many with strongly argued positions. Some comments favored the clarification, but most opposed it.

Even though we proposed no changes to the regulatory language at this Part, the comments revealed a fundamental belief that we were proposing to lessen the emphasis on parental choice. That is

not the case. However, because of the depth of reaction around this topic, we have decided to withdraw the proposed clarification rather than try to explain it again in different words. Therefore, concerning the availability of certificates, the preamble to the 1992 Final Rule continues to apply and the regulatory language remains unchanged.

In-home care. Child care administrators have faced a number of special challenges in monitoring the quality of care and the appropriateness of payments to in-home providers. For that reason, we give Lead Agencies complete latitude to impose conditions and restrictions on in-home care. We have revised § 98.16(g)(2) to require that Lead Agencies, in their CCDF Plans, specify any limitations on in-home care and the reasons for those limitations.

The Lead Agency must continue to allow parents to choose in-home child care. However, since this care is provided in the child’s own home it has unique characteristics that deserve special attention. In-home care is affected by interaction with other laws and regulations. For example, in-home providers are classified as domestic service workers under the Fair Labor Standards Act (FLSA) (29 U.S.C. Section 206(a)) and are therefore covered under minimum wage. As employees, in-home child care providers are also subject to tax requirements. In highlighting these special considerations, we also note that whenever the FLSA and other worker protections apply, ACF is committed to maintaining the integrity of these protections. A strong commitment to work, and therefore to worker protections, is critical to welfare reform.

We are mindful that in-home care plays a valid and important role in meeting the needs of working parents, and that many participants in subsidized care programs rely on such care to meet their family needs. Access to care that meets the needs of individual families is critically important to parents and children, to schools and the workplace, and to other community institutions that interface with the family. While in-home care represents only a small proportion of all available care in most communities, it may be the best or only option for some families and may prove valuable, necessary and cost-effective when compared to other options. There are a number of situations in which in-home care may be the most practical solution to a family’s child care needs. For example, the child’s own home may be the only practical setting in rural areas or in areas where transportation is particularly difficult. Employees who work nights, swing shifts, rotating shifts,

weekends or other non-standard hours may experience considerable difficulty in locating and maintaining satisfactory center-based or family day care arrangements. Part-time employees often find it more difficult to make child care arrangements than do those who work full-time. Similarly, families with more than one child or children of very different ages might be faced with multiple child care arrangements if in-home care were unavailable. Many families also believe that very young children are often best served in their own homes. Given the general scarcity of school-age child care in many communities, in-home care may enable some families to avoid latchkey situations before school, after school, and when school is not in session. For many families, in-home care by relatives also reflects important cultural values and may promote stability, cohesion and self-sufficiency in nuclear and extended families.

We urge child care administrators to consider the capacity of local child care markets to meet existing demand and the role that in-home care may play in the ability of parents to manage work and family life. Although in-home care does not represent a large share of the national supply, it fills an important niche in the structure and functioning of local child care markets by extending the ability of parents to care for children within their own families, closing gaps in the supply of community facilities, and creating a bridge between adult care and self- or sibling-care as children near adolescence.

Some Lead Agencies may choose to limit in-home care because of cost factors. For example, a State might determine that minimum wage requirements result in payments for in-home care serving only one or two children that are much higher than the payments for other categories of care. Therefore, the Lead Agency could elect to limit in-home care to families in which three or more children require care. The payment to the in-home provider would then be similar to the payment for care of the three children in other settings. This ability to limit in-home care allows Lead Agencies to recognize the same cost restraints that families whose care is unsubsidized must face.

However, since in-home care has proven to be an important resource, we expect Lead Agencies to consider family and community circumstances carefully before limiting its availability. For that reason, CCDF Plans must specify any limitations placed on in-home care and the reasons for those limitations.

ACF recognizes that giving Lead Agencies complete latitude to impose conditions and restrictions on in-home care may affect parents' ability to make satisfactory child care arrangements and thus their ability to participate in work, education or training. We also recognize the challenges of implementing health and safety requirements in the child's own home, monitoring in-home providers, and complying with Federal wage and tax laws governing domestic workers.

Comment: Several commenters thought we were interpreting the FLSA and, therefore, wanted the discussion about it deleted. Others wanted us to say that in-home child care providers were independent business contractors and not domestic employees.

Response: We have not interpreted the FLSA; we have simply restated the FLSA's characterization of in-home child care providers as domestic service workers. ACF cannot determine that in-home child care providers are to be considered independent business contractors.

Interpreting the FLSA, and other wage and tax laws, is the responsibility of other Federal agencies, such as the Department of Labor, the Department of the Treasury and the Social Security Administration, as noted by several of the commenters. While we have not regulated that the minimum wage must be paid to in-home providers, as some commenters thought, we would be extremely remiss in not alerting Lead Agencies to the existence and possible applicability of other laws. Nor can we ignore violations of those laws simply because their enforcement is the purview of another Federal agency.

We continue to work with the responsible Federal agencies to help clarify issues around the use of in-home child care providers and will work with the other appropriate Federal agencies to provide guidance to Lead Agencies. We also recognize that there have been instances where the Federal or State agency responsible for determining the applicability of the FLSA and the minimum wage requirements have reached very different conclusions in seemingly similar cases. Therefore, we encourage Lead Agencies to work with the appropriate local representatives of the other Federal agencies to resolve or clarify the State-specific questions they may have regarding the applicability of other laws and regulations.

Comment: One tribe wanted us to exempt tribes from paying the minimum wage to in-home providers.

Response: As discussed above, ACF does not determine the applicability of

the FLSA and cannot make exceptions to it.

Comment: One commenter wanted us to define in-home child care providers as any legally-exempt provider who is otherwise not regulated but who is specially authorized to provide care in the child's home or in the provider's home.

Response: It is unclear why it would be useful to define in-home care in this way. As discussed above, the unique characteristic of in-home is its location, not the regulatory status of the care.

Comment: One commenter wanted us to require that in-home providers meet health and safety requirements. Another commenter wanted us to state that Federal law does not require that CCDF subsidies be given to parents or providers known to be operating inconsistently with applicable laws and regulations. In this vein, the commenter suggested that we encourage Lead Agencies to require provider documentation of compliance with applicable laws, such as worker compensation, unemployment compensation, income tax withholding for employees.

Response: In-home care must meet the requirements established by the Lead Agency for protecting the health and safety of children pursuant to § 98.41. In-home care, as a category of care, is not exempt from health and safety standards. And, relatives who provide in-home care are not exempt from health and safety requirements unless the Lead Agency specifically chooses to exempt them, as provided for at § 98.41(a)(1)(ii)(A).

The regulations at § 98.54(a)(2) require that CCDF funds "shall be expended in accordance with applicable State and local laws." Payments made to parents or providers who are not in compliance with applicable laws are subject to disallowance in accordance with § 98.66.

Comment: Several commenters stated that the Lead Agency should have the ability to define limits and regulate the use of in-home care as they see fit and that no further requirements, beyond the description of the limits, should be imposed.

Response: This comment mirrors our policy. The Lead Agency has complete flexibility to define the limits and regulate the use of in-home care. As a point of clarification, while the Lead Agency may impose limits on the use of in-home care, it cannot flatly prohibit the use of in-home care. In-home care remains an option that must be offered to parents, pursuant to § 98.30(e), subject to the limits established by the Lead Agency.

Parental Access (Section 98.31)

We have amended the regulations at §§ 98.31 and 98.16(n) to reflect the new statutory requirement at section 658E(c)(2)(B) that Lead Agencies have in effect procedures to ensure unlimited parental access and to provide a detailed description of those procedures. We have also amended § 98.15(b)(1) to reflect the statutory change to certify, rather than assure, that procedures are in effect to ensure unlimited access.

Comment: One commenter asked that we clarify this requirement as it relates to parents who have limited contact or custody rights as a result of a court order. The commenter suggested that Lead Agency procedures may restrict access to only those persons identified in the provider's records as authorized to remove the child(ren) from the facility.

Response: We agree that the Lead Agency should address these situations and should establish their procedures in light of court ordered restricted parental contact or custody. However, we do not believe that it is necessary to revise the wording of the regulation nor do we believe that Congress intended that we create such a detailed Federal requirement on the Lead Agency.

Parental Complaints (Section 98.32)

We have added paragraph (c) to the regulations at § 98.32 and amended § 98.16 by adding paragraph (m) to reflect the new statutory requirements at 658E(c)(2)(C) on parental complaints. Under the changes, Lead Agencies must provide a detailed description of how a record of substantiated parental complaints is maintained and made available to the public on request. We have also amended the regulation at § 98.15(b)(2) to reflect the requirement of the statute at 658E(c)(2)(C) that a Lead Agency "certify" rather than "assure" that it will maintain a record of substantiated parental complaints.

Comment: Some commenters questioned whether the Lead Agency had to maintain the record of substantiated complaints, since this function may occur at another part of State government.

Response: We corrected the language of this section to reflect that it is the State, but not necessarily the Lead Agency, that must maintain the record of substantiated complaints and make information regarding such parental complaints available to the public on request. However, in the Plan, the Lead Agency must, nevertheless, provide the detailed description of how such a record is maintained and made available.

Comment: One commenter, in supporting the requirement, recommended that any substantiated complaint, whether submitted by a parent or by someone else, be included.

Response: We agree that informed parental decisions would be enhanced by making all complaints, irrespective of their source, available to the public. And, we encourage the Lead Agency to make all substantiated complaints available to the public on request. However, the Act requires only that a record of substantiated parental complaints must be maintained. Parental complaints may include substantiated complaints which originate with persons acting in loco parentis, for example a foster parent or other guardian, not just a biological or adoptive parent.

Comment: Another commenter was concerned about the release of confidential, libelous and/or inappropriate material in the fulfillment of this requirement. The commenter voiced the expectation that we would ensure that the State created very structured procedures for maintaining and guaranteeing that only substantiated complaints are released to the public.

Response: The requirement clearly states that only substantiated complaints are to be released. As we stated above, we do not believe that Congress intended for us to create detailed Federal requirements here. States have the flexibility to create their own procedures in this area, provided the required statutory outcome is achieved.

Consumer Education (Section 98.33)

We have amended the regulation at §§ 98.33 and 98.15(b)(3) to reflect the statutory requirement at section 658E(c)(2)(D) that the Lead Agency "certify" that it "will collect and disseminate to parents of eligible children and the general public, consumer education information that will promote informed child care choices." It is important to emphasize that the use of the words "collect and disseminate" is more proactive and forceful than the former requirement that consumer education "be made available" to parents and the public. We also believe that by changing the wording, Congress wished to emphasize the importance of consumer education as a service to be provided by Lead Agencies. This emphasis is also stressed by the third goal of the CCDF, listed at section 658A(b) of the amended CCDBG statute, "to encourage States to provide consumer education information to help parents make informed choices about child care." Moreover, the amendment

to the reporting requirements at section 658K(a)(2)(D)—reflected in the revised regulations at § 98.71(b)(3)—requires Lead Agencies to report annually on the manner in which consumer education information was provided to parents and the number of parents that received such information.

The statute previously specified the type of consumer education information that the Lead Agency had to provide: "licensing and regulatory requirements, complaint procedures, and policies and practices relative to child care services within the State." The statute now is less prescriptive. Consumer education information is defined as that which "will promote informed child care choices." Thus, the statute leaves it up to the Lead Agency to determine the type of information that will help the public and parents make informed child care choices.

In the comments to the proposed rule, however, we received numerous comments advising us to strengthen the consumer education requirement. Two themes arose from the comments. One frequently voiced comment was that parents need to be informed that the full range of providers is available to them, especially when they receive certificates. Included in the full range of providers are sectarian and religious providers, and we take this opportunity to remind Lead Agencies that such providers must be available to parents. The second theme we heard was that parents need to be aware of the importance of health and safety standards, and the extent to which various categories of care or types of providers provide health and safety protections for children.

Additionally, in a report issued in February 1998 by the Office of Inspector General of the Department of Health and Human Services, it was noted, "Good consumer education is critical to making the child care market function properly. If parents are not able to make informed choices, their access to the market is limited. Further, if parents demand safe and quality care, providers are more likely to supply it." The study report, "States' Child Care Certificate Programs: an Early Assessment of Vulnerabilities and Barriers" (OEI-05-97-00320), which makes note of Congress' strengthening of the consumer education requirements in the CCDBG Act, has recommended that ACF take steps to help States improve their consumer education efforts.

We weighed these comments and the new Inspector General report against comments we received which generally opposed any regulations at all on any of the provisions we proposed and those

that wanted consumer education provisions in addition to the two addressed above. We believe that informed parental choice—which is the reason for the consumer education provisions—is supported by the information suggested by these two comments. We have, therefore, reworded the regulation at § 98.33(a). That section now specifies that Lead Agencies must certify that consumer education information given to parents so they can exercise their right to choose the type of care that best meets their needs must, at a minimum, include information about the full range of providers available and on health and safety requirements. States have discretion in developing the content of the consumer information materials in these two areas; the regulations only require that they be addressed.

While Lead Agencies have flexibility in providing consumer education, ACF strongly encourages Lead Agencies to promote informed child care choices by offering information about: the various categories of care; the Lead Agency's certificate system; the rates for the various categories of care; the sliding fee scale; a checklist of what to look for in choosing quality care; providers with whom the Lead Agency has contracts for care; the licensing regulations that some providers must meet; the State's policy regarding substantiated complaints by parents that is available upon request as required by § 98.32; and local resource and referral agencies that can assist parents in choosing appropriate child care.

The best child care arrangements are developed in one-on-one consultation with trained or experienced counselors. Professional help with locating child care is time- and cost-efficient for both families and Lead Agencies. Thus, it may be in the Lead Agency's interest to invest in strategies such as co-location of child care resource and referral counselors in work development offices or agencies. Economists make the argument that good consumer information is critical to making the child care market function more like other markets. Moreover, experience has shown that printed materials alone may not always be a sufficient information source, particularly if parents have low literacy skills.

Comment: Several commenters wanted us to require that consumer education specifically include information about the availability of sectarian providers and that parents may use certificates with religious providers.

Response: It was partly in response to these comments that we expanded the

requirement for consumer education to now include information about the full range of providers available to parents. As the "full range of providers" includes sectarian and religious providers, we do not believe it is necessary to specify them—or other types of providers—in regulation. Since certificates, by definition, may be used with any provider, including sectarian providers, it seems unnecessary to be more prescriptive.

Exception to individual penalties in the TANF work requirement. Title I of the PRWORA amends Title IV-A of the Social Security Act and replaces the Aid to Dependent Children (AFDC) with a new block grant program entitled Temporary Assistance for Needy Families, or TANF. The new section 407(e)(2) addresses an exception to the work requirement in the TANF program and provides that a State may not reduce or terminate TANF assistance to a single custodial parent who refuses to work when she demonstrates an inability to obtain needed child care for a child under six, because of one or more of the following reasons:

- (1) Unavailability of appropriate child care within a reasonable distance from the individual's home or work site;
- (2) Unavailability or unsuitability of informal child care by a relative or under other arrangements;
- (3) Unavailability of appropriate and affordable formal child care arrangements.

The TANF penalty exception underscores the pivotal role of child care in supporting work and also recognizes that the unavailability of appropriate, affordable child care can create unacceptable hardships on children and families. Since Congress provided that the new Mandatory and Matching child care funding be transferred to the Lead Agency under the CCDF and also provided that at least 70 percent of the new funding must be spent on families receiving temporary assistance, in transition from public assistance, or at risk of becoming eligible for public assistance, the Lead Agencies will be playing a critical role in providing the child care necessary to support the strong work provisions found in TANF. It is therefore critical that CCDF Lead Agencies help disseminate information about the TANF exception. Knowledge of this exception, at least on the part of parents who receive TANF, will be very important in promoting informed child care choices.

Therefore, we require that Lead Agencies include information about it in the consumer education information they provide to TANF recipients. This

responsibility entails informing parents that: (1) TANF benefits cannot be reduced or terminated for parents who meet the conditions as specified in the statute and as defined by the TANF agency; and (2) assistance received during the time an eligible parent receives the exception will count toward the time limit on Federal benefits stipulated by the statute at section 408(a)(7).

In order for a Lead Agency to comply with this requirement, it will need to understand how the TANF agency defines and applies the terms of the statute to determine that the parent has a demonstrated inability to obtain needed child care. The elements that require definition consist of: "appropriate child care," "reasonable distance," "unsuitability of informal care," and "affordable child care arrangements."

In our pre-regulatory consultations, some groups urged us not only to ensure that the CCDF agency disseminates information about the TANF penalty exception but to regulate the content of the definitions or criteria used to determine if a family is unable to obtain needed child care. The approach we have taken in this rule provides flexibility and strikes an appropriate balance between the roles of the CCDF and TANF agencies. We recognize the authority and flexibility of the TANF program to define the terms established by the statute. However, we strongly encourage TANF agencies to define "appropriate care," at a minimum, as care that meets the health and safety standards of the CCDF program, specified at § 98.41.

We are requiring, under § 98.12 of the regulations, that Lead Agencies coordinate with TANF programs to ensure, pursuant to § 98.33(b), that TANF families with young children will be informed of their right not to be sanctioned if they meet the criteria set forth in the statute and Plan. As part of this coordination, at § 98.16(p) we are requiring that the Lead Agency include in its Plan the definitions or criteria the TANF program has adopted in implementing this exception to the work requirement.

The new section 409(a)(11) of the SSA specifies that if the TANF program sanctions parents who are eligible for this exception to the individual penalties associated with the TANF work requirements, it may incur a penalty of up to five percent of its grant. Therefore, coordination between the Lead Agency and the TANF program in this matter serves the best interests both of the recipients of TANF benefits and the service agencies themselves. ACF

issued proposed rules on the TANF penalty provisions on November 20, 1997.

Comment: We received few comments in support of our proposal to require Lead Agencies to provide information regarding the TANF penalty provisions. Most commenters observed that this was a TANF, not a child care issue, and that the notice was an administrative notice, not consumer education. Others suggested that, in singling out TANF families, this provision merely continues the stigma associated with welfare.

Response: We respect the commenters' views. And, we have changed the requirement so that the information on the penalty provision need only be given to TANF families—not all families. We have also amended the regulation to recognize that other agencies, not necessarily the Lead Agency, may provide the information.

In light of the pressures of work participation requirements on the TANF agency, and ultimately on TANF families, we believe that TANF families need strong reinforcement of their right to safe, affordable and appropriate care. Informed consumer education means that parents must not feel that they must accept any child care, especially care that they believe threatens the well-being of their child.

Comment: Some commenters suggested that Lead Agencies should be required to provide consumer education only through child care resource and referral (CCR&R) agencies.

Response: While CCR&Rs may be the best providers of consumer education information, there is no statutory basis for limiting State flexibility in this way.

Comment: Several commenters objected to including the TANF penalty definitions or criteria in the CCDF Plan, arguing that these belonged more appropriately in the TANF Plan.

Response: A State's definition of "appropriate child care," "reasonable distance," etc., is germane to the provision of child care in a State. And, it is the overall provision of child care in a State that the CCDF Plan is intended to present to the public. Because there is no fixed format for a TANF plan, the definitions may not be included there and thus may not be part of the TANF 45 day notice process. Therefore, these definitions and criteria may not become publicly known. We do not believe that the requirement is either burdensome or excessive since the TANF agency must develop the criteria and definitions in order to implement that program.

Subpart E—Program Operations (Child Care Services)—Lead Agency and Provider Requirements

Compliance With Applicable State and Local Regulatory Requirements (Section 98.40)

We have amended the regulations at § 98.40(a) to reflect a change in Section 658E(c)(2)(E)(i) of the Act. The amendment requires Lead Agencies to certify that they have in effect licensing requirements applicable to child care services, and to provide a detailed description of those requirements and of how they are effectively enforced. This change is also reflected in §§ 98.15 and 98.16. The statute notes, however, that these licensing requirements need not be applied to specific types of providers of child care services.

Because amendments to section 658P(5)(B) have eliminated the requirement for registration of unlicensed providers serving families receiving subsidized child care, we have deleted the former regulation § 98.40(a)(2) requiring registration. This change, however, does not prevent Lead Agencies from continuing to register unlicensed or unregulated providers, and we encourage them to do so. Those Lead Agencies that choose not to have a registration process will be required to maintain a list of providers. We discuss this in more detail at § 98.45.

Health and Safety Requirements (Section 98.41)

Section 658E(c)(2)(F) of the Act requires a Lead Agency to certify that there are in effect within the State, under State and local law, requirements, designed to protect the health and safety of children, that are applicable to providers serving children receiving CCDF assistance. The applicable requirements set forth in the Act include "the prevention and control of infectious diseases (including immunizations)."

Section 658E(c)(2)(F) further provides, however, that nothing in the health and safety requirements shall be construed to require the establishment of additional health and safety requirements for child care providers that are subject on the date of enactment of the Act, under State and local law, to health and safety requirements in the categories described in the Act. The regulations at § 98.41(a) reflect the prohibition against establishing additional requirements if existing requirements comply with the Act.

As proposed originally on May 11, 1994 (59 FR 24510) and again in 1997 on July 23, 1997 (62 FR 39647), we amended the regulation at § 98.41(a)(1)

to require that States and Territories include as part of their health and safety provisions for the control and prevention of infectious diseases (by reference or otherwise) the latest recommendations for childhood immunizations of their respective State or territorial public health agency.

Based on comments received on the most recent proposed rule, however, we modified the final rule at § 98.41(a) to delete language that, unintentionally, could have caused some commenters to believe that ACF was exceeding the Act. Specifically, we deleted language that related to establishing immunization requirements. Based on another comment, we also revised the rule to clarify that immunizations are not the only focus of the statutory requirement on the prevention and control of infectious diseases.

The immunization regulation at § 98.41(a)(1) applies only to States and Territories. Consistent with the amended Act, which requires the Secretary to consult with Tribes and tribal organizations to develop minimum child care standards that are applicable to Tribes and tribal organizations that receive CCDF funds, we have not extended the immunization requirement to Tribes and tribal organizations due to the anticipated development of tribal health and safety standards.

Until tribal health and safety standards are issued, however, Lead Agencies for Tribes and tribal organization must meet the three basic health and safety requirements specified in the Act and these amended regulations, including the basic regulation on the prevention and control of infectious diseases (including immunizations). They do not, however, have to meet the specific immunization requirement that applies to States and Territories under these final rules. We anticipate that tribal immunization requirements will be considered in the consultation on the development of the minimum child care standards with Indian Tribes and tribal organizations.

While many State and territorial public health agencies adopt the recommendations of the Advisory Committee on Immunization Practices (ACIP) of the Centers for Disease Control and Prevention (CDC), we wish to emphasize that this amendment to the regulations does not impose Federal standards for immunization. Rather, it allows the individual State or Territory to apply its own immunization recommendations or standards to children receiving CCDF services. All States and Territories have recommendations or standards

regarding immunization of individual children.

The immunization provision at § 98.41(a)(1) is intended to ensure that States address the statutory provision on immunization as part of the statutorily-mandated CCDF health and safety standards.

Currently 22 percent of children in the U.S. under the age of two are not age-appropriately immunized. Since a large percentage of children receiving child care assistance are under five years of age, we believe that the immunization requirement will have a positive impact in reducing the incidence of infectious diseases among preschool age children. Surveys of licensed child care facilities indicate that the majority of States require some proof of immunizations for children enrolled in licensed or regulated child care centers and family day care homes. However, individual States differ in their specific requirements and regulatory approaches, and requirements for the immunization of children in child care settings that are exempt from licensure or other regulatory provisions vary widely.

Vaccines are the most cost-effective way to prevent childhood diseases. Nationally, approximately \$13.00 is saved in direct medical costs for every dollar spent on the measles/mumps/rubella (MMR) vaccine, \$29.00 is saved for every dollar spent on the diphtheria/tetanus/pertussis (DTP) vaccine, and \$6.00 is saved for every dollar spent on the oral polio vaccine (OPV).

In requiring children to be age-appropriately immunized, we considered that parents may not always be able to access immunizations easily. However, a number of national initiatives are under way to promote immunizations for all children. In response to disturbing gaps in the immunization rates for young children in America, a comprehensive Childhood Immunization Initiative (CII) was developed. CII addresses five areas:

- Improving immunization services for needy families, especially in public health clinics;
- Reducing vaccine costs for lower-income and uninsured families, especially for vaccines provided in private physician offices;
- Building community networks to reach out to families and ensure that young children are vaccinated as needed;
- Improving systems for monitoring diseases and vaccinations; and
- Improving vaccines and vaccine use.

The CDC and its partners in the public and private sectors are working

to build a comprehensive vaccination delivery system. The goals of the CII are to ensure that at least 90 percent of all two-year-olds receive each of the initial and most critical doses, to reduce diseases preventable by childhood vaccination to zero, and put in place a system to sustain high immunization coverage. Since 1994, the National Immunization Survey (NIS) has been used to provide immunization coverage estimates for all 50 States and 28 large urban areas.

As part of the efforts in the CII, immunization programs on the State and local level are collaborating with WIC programs (Special Supplemental Food Program for Women, Infants, and Children) to focus on children's immunization. For example, local WIC clinics check the immunization records of WIC participants, assist families to find a primary health care provider, and provide immunization information. On-site immunization services are sometimes also provided at local WIC clinics.

On September 30, 1996, the CDC awarded funds ranging from \$130,000 to \$250,000, to education agencies in four States (New York, South Dakota, West Virginia, and Wisconsin) to deliver immunization services to preschool-aged children in health centers at elementary schools. Over the past four years, welfare reform waivers were granted to 18 States to allow them to require parents to immunize their children as a condition of receiving assistance.

Lead Agencies for the CCDF have the flexibility to determine the method they will use to implement the immunization component of these regulations. For example, they may require parents to provide proof of immunization as part of the initial eligibility determination and again at redetermination, or they may require child care providers to maintain proof of immunization for children enrolled in their care. Lead Agencies have the option to exempt the following groups:

- Children who are cared for by relatives (defined as grandparents, great grandparents, siblings—if living in a separate residence—aunts and uncles);
- Children who receive care in their own homes;
- Children whose parents object on religious grounds; and
- Children whose medical condition contraindicates immunization.

While families are taking the necessary actions to comply with the immunization requirements, Lead Agencies shall establish a grace period during which children can continue to receive child care services—unless, in

keeping with the statutory provisions applicable to the CCDF, existing State or local law regarding immunizations required for the particular child care setting would not allow for such a period.

Finally, we encourage all Lead Agencies to consider requirements that provide for documenting regular updates of a child's immunizations.

Section 98.30(f)(2) and (3) prohibit any health and safety requirements from having the effect of limiting parental access or choice of providers, or of excluding a significant number of providers. We do not think these new immunization requirements will have such an effect. Rather, we are convinced that, when applied to all providers, they will have the effect of enhancing parental choice of providers, since all providers will have the same requirements. More importantly, however, the requirements will promote better health for children, their families, and the public.

Pursuant to section 658P(5)(B) of the amended Act, we have added "great grandparents, and siblings (if such providers live in a separate residence)" to the list of relatives who, at State option, may be exempted from the health and safety requirements at § 98.41(e) and to the definition of "eligible child care provider" at § 98.2.

We received many comments on the revised health and safety provisions from all types of commenters who made a wide variety of observations. Several commenters, including three Lead Agencies, expressed their unqualified support for the immunization provision. A number of States who wrote to comment on other provisions in the proposed rule were silent regarding the proposal, as were a couple of State organizations. Other States expressed support of the principle of assuring that very young children are age-appropriately immunized. They, however, had various concerns about the proposed amendments to the rule concerning health and safety provisions as noted in the comments below. Some States and State organizations supported an alternate approach as noted below. A number of children's organizations supported the provision, but asked for it to be strengthened as noted below.

Comment: Some commenters said that the proposed rule exceeded the authority granted to the Secretary under PRWORA and did not respect congressional intent regarding the Act. The commenters did not identify which statutory provisions they believed were exceeded. Additionally, however, they pointed to the proposed State options for exempting children receiving CCDF

services as evidence that ACF, not the State, was establishing a health and safety standard.

Response: The statutory language regarding the establishment of health and safety requirements for children served by the CCDF essentially was unchanged by PRWORA. The statute clearly requires the State to establish health and safety standards in three areas. One of those areas, the control and prevention of infectious diseases, specifically includes immunizations in health and safety requirements for child care. We think that the commenters may have focused on the provision at 658E(c)(2)(F) that states, "Nothing in this [provision] shall be construed to require the establishment of additional health and safety requirements for child care providers that are subject to health and safety requirements in the categories described [in the Act] on the date of enactment of this subchapter under State or local law."

The rule we adopted does not violate this caveat to the health and safety requirements of the Act. ACF is not requiring States to establish additional standards regarding immunization for children receiving CCDF services where those standards exist for all children (CCDF-subsidized or not) in a category of care. Rather, we are ensuring that States follow the statutorily-mandated requirement, which specifically includes immunizations. The statute requires immunizations in the case of all care available to children receiving CCDF services—not just to those caregivers who are subject to existing State requirements regarding immunization of children in child care settings. The regulation clarifies that immunizations must be part of the health and safety standards for all providers.

We revised the final rule to delete the phrase that might inadvertently have led some to conclude that the regulation exceeded the statute by seeming to require new State immunization standards. The provision now indicates that Lead Agencies shall assure that the State's existing immunization standards apply to all children receiving services under the CCDF.

Further, the exemption options should not be considered as evidence that ACF is requiring specific health and safety standards. Rather, the options reflect recognition of the State's authority to determine the content of health and safety standards and to exempt statutorily specified relatives from the health and safety requirement generally.

Comment: Several commenters suggested that ACF adopt an alternate

approach to the immunization requirement. Specifically, they suggested that instead ACF adopt a provision requiring a State to describe in its CCDF Plan its efforts to increase immunization rates in relationship to their child care programs and with respect to outreach to children in informal care.

Response: The alternative proposed does not serve the objective of assuring that the statutory provision is met.

Comment: Several States opposed the CCDF rule regarding immunizations on the grounds that they already have requirements regarding immunizations in child care settings.

Response: As explained in the response to the first comment in this section, where a State has rules for immunization of children in child care settings, these rules do not impose additional or different requirements. These rules apply in instances where a State has not established the statutorily required health and safety immunization requirements for a particular child care setting.

Comment: Two commenters noted that the requirement for a grace period for families to have their children receiving CCDF services age-appropriately immunized could conflict with existing State rules regarding children entering child care. They asked for the rule to take into account instances where States have existing immunization standards for child care settings that do not allow for a grace period.

Response: In the 1994 proposed rule, when we only encouraged States to have a grace period and recommended that Head Start guidelines for an immunization grace period of 90 days be considered, we received a significant number of comments asking that we incorporate a grace period into the CCDF rule on immunization. In 1994, an overwhelming majority of comments opposed tying the immunization requirement to initial eligibility. The view was that requiring immunizations to be up to date before the child care could start would be a barrier to working. Commenters at that time voiced concern that many low-income parents might not immediately be able to acquire the necessary immunizations and could therefore lose access to crucial child care services.

A significant number of commenters in 1994 recommended that we strengthen the language to require Grantees to establish a grace period as part of the immunization requirement. With welfare reform's stronger emphasis on work, we believe that the grace period is even more critical than we

envisioned in 1994. We, therefore, retained the provision on the grace period. States should understand, however, that the provision at Section 658E(c)(3)(F), which is reflected at § 98.41(a) of these regulations, would apply. That provision prohibits the establishment of new or additional standards if they exist for a particular child care setting. We believe that the complete regulation at § 98.41(a) adequately conveys the principle, so that no special modification of the rule regarding the grace period is needed.

Comment: Some States commented that the issue of immunizations is a much larger issue than just for children receiving CCDF subsidies. Some of these commenters observed that in care settings that States do not regulate there could be children who are not required to be immunized because they are not receiving CCDF services and not subject to other rules regarding immunization. One commenter specifically noted that the CCDF provision fragments efforts of States that are seeking to develop a comprehensive immunization plan.

Response: The fact that the immunization issue is a bigger issue than just within the CCDF should not argue against using the CCDBG statutory requirements in order to assist with the need for very young children to be age-appropriately immunized. We do not believe that this rule will conflict with any other State initiative to immunize young children. We encourage all States to coordinate all child care and public health services in order to foster an importance linkage to fulfilling immunization needs.

Comment: Some States commented that they saw difficulties in administering, tracking, or monitoring the immunization requirement. There were comments indicating that assumptions were being made that a cumbersome verification process would be required of Lead Agencies.

Response: As we indicated in the preamble to the proposed rule and in the preamble above, we have not imposed implementation requirements for this provision. States have the flexibility to implement the provision in a manner that is not burdensome. Lead Agencies are not required to provide immunizations directly to children receiving child care services. Nor are Lead Agencies required to cover the cost of the vaccines.

We anticipate that Lead Agencies would incur most of the administrative burden during the initial child care application process when follow-up is needed on children whose immunizations are not current. However, this burden should be greatly

reduced as a result of the Childhood Immunization Initiative. Under this initiative, States will receive funds that can be used to develop statewide information systems which remind parents when immunizations are due. Lead Agencies for the CCDF should work with their State immunization program to develop comprehensive immunization registries that will assist in the implementation of the child care immunization requirement.

To help ease the burden during the initial application process, Lead Agencies could consider: incorporating tracking and follow-up into existing redetermination procedures; flagging the files of children who are not yet immunized and allowing parents to submit documentation by mail; or including proof-of-immunization information in the periodic report that providers are already required to submit to the Lead Agency. These processes could be considered for both regulated and unregulated providers.

States may also find that providing parents with educational materials on the importance of immunization can play a key role in reducing administrative burdens. While many parents are aware that immunizations are needed by school age, they may not realize that children should receive most vaccines before their second birthday.

Comment: One commenter stated that adding more specificity to only the immunization part of the CCDF health and safety standard on prevention and control of infectious diseases could send an unintended message that having immunization provisions alone would fulfill that statutory provision. The commenter suggested that to ensure a balance there should be more rules regarding the scope and structure of the statutory standard. Another commenter suggested that ACF require or encourage criminal background checks of providers of CCDF services.

Response: We agree with the commenter that the statutory provision encompasses more than immunizations. The law says that the State's standards in this area shall include immunizations. The law would not be understood to consist only of the aspect of immunization in the prevention and control of infectious diseases. Not all diseases can be prevented by immunizations. However, there is a specific mention of immunization in that provision in the Act that in our experience has not been addressed by all States in implementing the provision, while other "prevention and control" issues were addressed in at least some minimal way in State Plans.

Based on the comment, we reviewed the regulatory language and revised the regulation to make it less likely to be interpreted as the commenter did but did not further regulate the statutory language.

With respect to criminal background checks, ACF considers such checks to fall under the building and physical premises safety standard in the statute. Unlike the statutory requirement on prevention and control of infectious diseases, which specifically mentions immunizations, the statute does not specify any particular component that would be part of the provision on building and physical premises safety. Therefore, we do not propose to further regulate that health and safety provision. We would agree with the commenter that it is appropriate to encourage States to adopt criminal background checks as part of their effort to meet CCDF health and safety standards.

Comment: Some commenters stated that there should be no exemption option to requiring immunizations for children receiving relative and in-home care. Several recommended that the requirement be implemented without any possible exemptions.

Response: The Act and regulations allow Lead Agencies the option to exempt grandparents, great grandparents, siblings (if the sibling lives in a residence other than the child's home), aunts and uncles from health and safety requirements. Although this exemption is allowable by statute, the statute does not require States to make the exemption; States may choose to require relative caregivers to meet the same immunization requirements as established for other providers.

In allowing an exemption for in-home care, we considered that these children are not cared for in a communicable group setting but in the privacy of their own home, and therefore would be at a more limited risk of contracting diseases or spreading diseases than they would be if in a group care setting with children from different families. We therefore think the in-home exemption option is an appropriate reflection of the statutory scope of the health and safety requirement.

Finally, the regulation reflects the basic exemption provisions (religious and medical reasons) that States apply to child care settings and school settings where States have set immunization standards. The regulation allows the State similar flexibility in implementing the statutorily-mandated CCDF health and safety requirements where it does not have existing immunization

requirements for all children in a care setting. States have the flexibility to determine which of the optional exemptions to allow. However, they may not expand the exemptions beyond the categories outlined in the preamble and regulation.

Comment: One commenter from an Indian Tribe said that when a child is in foster care, the foster care home should be considered the child's home for the purpose of the exemption option regarding in-home care.

Response: We agree with the commenter. A foster care home would be considered the foster child's home for the purpose of the CCDF immunization exemption option regarding in-home care. The State may choose to include in-home care in a foster home in the exemption for in-home care, or it may choose to not include it. Tribes and tribal organizations are reminded that the rule on immunizations does not apply to tribal child care, however, since ACF is collaborating with Tribes to develop tribal-specific health and safety standards.

Comment: One commenter said that ACF should require States to follow the immunization recommendations of the CDC, not the requirements of their own State health agency, with respect to these regulations.

Response: As we stated in this section, while many State and territorial public health agencies adopt the recommendations of the Advisory Committee on Immunization Practices (ACIP) of the CDC, we wish to emphasize that this regulation does not impose Federal standards for immunization. Rather, it allows the individual State or Territory to apply its own immunization recommendations or standards to children receiving CCDF services.

Comment: A few commenters said they thought that the immunization regulation does not reach children in "informal care arrangements." One of them observed that black children would be disproportionately underserved by the requirement, because black families tend to use a disproportionate amount of informal care. One of the commenters said that the rule would not reach children where the provider does not receive direct payment.

Response: With the exception of the four optional exceptions that the regulation gives States the flexibility to adopt independently of each other, the immunization component of the CCDF health and safety requirements must be followed. To the extent relative or in-home care is considered to be

“informal” and a State exercises its option to exempt those settings from the immunization regulation, a child in those settings would not be required to be age-appropriately immunized under the CCDF. ACF strongly encourages States to take full advantage of the requirement to see to it that the immunization needs of very young children are met. Unless a State chooses to exempt care in one of the specified settings from CCDF immunization provisions, however, it must have a mechanism for carrying out the provision, no matter how its payment system is organized.

Comment: A number of commenters stated with varying emphases their perception that the immunization rule places burdens on parents or providers and could be a deterrent to parents or providers using or participating in CCDF services.

Response: As explained above, there is an array of resources and approaches available to States to ensure access to immunizations by parents as well as State flexibility to design a process for implementation of the rule that is not burdensome on providers. To meet the needs of individual States to design the most appropriate method of meeting the rule, ACF intentionally left flexibility in the regulation. We encourage States to ensure that the requirement is met in a manner that both fulfills the statute and the rule as well as places minimum burdens on families or the supply of all categories and types of care.

Comment: Two commenters raised issues relating to the possible adverse side effects of immunizations. They requested that States exempt children receiving CCDF services from immunization after parents have received information about the risks and choose not to immunize their children.

Response: All immunization providers are required to inform parents of potential side effects. Only a very minute fraction of children receiving immunizations experience harmful side effects attributable to immunizations, and the National Vaccine Injury Compensation Program (NVICP) is available to assist families whose children have been harmed. Information on the NVICP is available on 1-800-338-2382. On balance, families that do not appropriately immunize their children place them in greater harm than the immunizations do. Therefore, we do not agree with the recommendation to allow another exemption to the immunization regulation for children receiving CCDF services.

Comment: A few commenters noted that for effective implementation of the

rule, States should be required to provide information—to parents of CCDF-eligible children and to unregulated providers of services to children receiving CCDF subsidies—about both the necessity for immunizations and how to access free immunizations. One commenter offered the idea of mandating linkages between the child care subsidy system and public health clinics and other health professionals. One commenter asked that States be required to coordinate with their State public health agency.

Response: We concur that effective implementation would require States to ensure parents and unregulated providers have access to the kind of information described by the commenter. In keeping with the overall objective of these revised rules to achieve a balance between flexibility and accountability, ACF believes that regulation on this point is not necessary. It is inherent for meeting the rule. Moreover, nearly all States participate in the Secretary’s successful Healthy Child Care America campaign. This campaign has a goal of linking child care providers with the health community and is one of the many venues for coordination between the child care community and the health community.

Additionally, this final rule includes two requirements that will enhance coordination and informational activities concerning immunization under the CCDF. First, with respect to State-level coordination, the final rule at § 98.14(a) requires that CCDF Lead Agencies shall coordinate with the State agency responsible for public health, including the agency responsible for immunizations. Second, based on a large number of comments on consumer education, we adopted at § 98.33 a specific requirement that the Lead Agency will collect and disseminate consumer education information that will promote informed child care choices, including information about health and safety. We consider immunization information to be an important part of such health and safety information.

Further, developing partnerships between the child care and health community will help facilitate the immunization process and ensure that the health needs of children and families are being met. We encourage States to utilize existing service delivery systems and networks to assist parents in meeting immunization requirements.

The President’s Childhood Immunization Initiative recognizes the important role of States and local organizations in identifying their

particular needs. In 1992, the Federal government began helping States design individually tailored Immunization Action Plans. Outreach consultants in each region assist States, local organizations, and health professionals in enhancing and expanding partnerships with public and private organizations. For more information on partnerships with State and local immunization programs, contact the State Health Department or the CDC’s National Immunization Program, Program Operations Branch at 404-639-8215.

Comment: One commenter said States should be required to certify that effective procedures are in place to ensure that child care providers comply with immunization requirements.

Response: We believe that the regulation at § 98.41(d) suffices. It requires Lead Agencies to certify that procedures are in effect to ensure that child care providers of services for which assistance is provided under the CCDF comply with all applicable health and safety standards described in § 98.41(a). We think that the provision does not require modification to cover immunizations, to the extent that a Lead Agency, in implementing the immunization requirement at § 98.41(a) places requirements on providers. We remind commenters that the immunization rule gives Lead Agencies implementation flexibility.

Comment: One commenter stated that the categories of relatives who are exempt from CCDF health and safety standards should be left up to the Lead Agency.

Response: Our response remains as stated in the Final Rule of August 4, 1992, that the intent of the statute was to give grantees the option to exempt certain relatives from the health and safety requirements that all other CCDF child care providers must meet. The amended statute extends this exemption to great grandparents and siblings (if living in a separate residence) and we have amended the regulations accordingly. There is no statutory authority to extend this exemption to other types or categories of providers.

Sliding Fee Scales (Section 98.42)

For a further discussion of copayments, see Section 98.43.

Equal Access (Section 98.43)

The Act requires Lead Agencies to certify that payment rates are sufficient to provide access to child care services for eligible families that are comparable to those provided to families that do not receive subsidies. Section 658E(c)(4)(A) requires the Lead Agency to provide a

summary of the facts relied on to determine that its payment rates are sufficient to ensure equal access.

The regulation at § 98.43(b) requires a Lead Agency to show that it considered the following three key elements in determining that its child care program provides equal access for eligible families to child care services:

1. Choice of the full range of categories and types of providers, e.g., the categories of center-based, group, family, in-home care, and types of providers such as for-profit and non-profit providers, sectarian providers, and relative providers as already required by § 98.30.

2. Adequate payment rates, based on a local market survey conducted no earlier than two years prior to the effective date of the current Plan; and

3. Affordable copayments.

These elements must be addressed in the summary of facts submitted in a Lead Agency's biennial Plan, pursuant to § 98.16(l).

Comment: Some commenters felt that Lead Agencies should simply be required to summarize the facts they relied on in setting payment rates, without addressing the three key elements mentioned above.

Response: Lead Agencies are free to include additional facts they used in determining rates that ensure equal access. As discussed below, we are convinced that a Lead Agency cannot establish rates that ensure equal access without reference to the three required elements.

1. *Full range of providers.* All working parents, regardless of income, need the full range of categories of care and types of providers from which they may choose their child care services. This is because child care needs vary considerably according to the child's age and special needs, the parents' work schedule, provider proximity, cultural values and expectations. Therefore, we believe that the statutory requirement of equal access means that low-income working parents receiving CCDF-subsidized care must have a full range of the categories and types of providers from which to choose care that they believe best meets their needs and those of their children. This element helps secure the parental choice requirements at § 98.30 which already require that parents who receive certificates be afforded such variety.

2. *Adequate payment rates.* PRWORA eliminated the requirement that, in establishing payment rates, the Lead Agency take into account variations in the cost of providing care in different categories of care, to different age groups, and to children with special

needs. While eliminating the requirement for different payment rates for different categories of care, Congress added a requirement that Lead Agencies provide "a summary of the facts relied on by the State to determine that such rates are sufficient to ensure such [equal] access."

The statute indicates that if families receiving child care subsidies under the CCDF are to have equal access to child care, the payment rates established by a Lead Agency should be comparable to those paid by families who are not eligible for subsidies. In other words, the payment rates should reflect the child care market. Although the requirement for specified rate categories has changed, the reality remains that the market reflects differences along several dimensions, and we do not believe that Congress expected Lead Agencies to establish a single payment rate for all types of child care and all children irrespective of age.

The focus of PRWORA on work further highlights the need for CCDF Lead Agencies, which now are required by statute to administer the new Mandatory and Matching Funds, to establish payment rates that support work. Child care is often the major factor which determines whether families are able to work—and access to a variety of child care arrangements is necessary both to support today's increasingly diverse workforce and workplace demands, and to ensure that the healthy development of children is not compromised.

The major variable in the charges for child care is the age of the child, especially the added expense of caring for infants and very young children. And, payments that do not realistically reflect the charges of caring for very young children will frustrate the ability of families to work. Under PRWORA, many more families with infants and pre-school-aged children will be required to participate in work activities for longer hours per week. In providing the exception to the individual penalties under TANF for single custodial parents with a child under age six who cannot obtain needed child care, Congress recognized the special difficulties of locating affordable care for young children.

We anticipate that market rate surveys will also show variations in rates among categories of care, and we expect any significant variations to be reflected in the Lead Agency's payments.

A system of child care payments that does not reflect the realities of the market makes it economically infeasible for many providers to serve low-income children—undermining the statutory

and regulatory requirements of equal access and parental choice. Experience with the now repealed title IV-A child care programs and the CCDBG suggests that providers limited their enrollment of children with subsidies because the subsidy payments were too low. Similarly, failing to compensate providers timely or not reimbursing them for days when children are absent also causes providers to refuse care to children with subsidies.

Section 98.43(c) prohibits different payment rates based on a family's eligibility status or circumstances. This provision means that the Lead Agency may not establish payments for TANF families that differ from the payments for child care for the working poor, or for families in education or training, for example. We believe that use of different payment rates, based on an eligibility status, precludes the statutorily-required equal access to child care for families receiving CCDF subsidies. Additionally, different payment rates would frustrate one of the main intents in amending the Act in 1996—to have a unified child care system with a single set of rules. This purpose would be undercut if different payment rates based on eligibility criterion were permitted.

If payments for child care are to be sufficient to provide equal access to child care services in the open market, then the payments must be established in the context of market conditions. We are convinced that a survey of market rates is essentially the only methodologically sound way for Lead Agencies to ascertain whether the payment rates they establish provide equal access.

A market survey must be conducted in the context of reasonably current market conditions to ensure that the payment rates continue to provide equal access. Therefore, the regulations at §§ 98.43(b)(2) and 98.16(l) require a biennial market rate survey conducted no earlier than two years prior to the effective date of the currently approved Plan.

Surveys should not be a burden on States, which were required to conduct market surveys in the past. States have had a number of years' experience with the survey process. States have complete flexibility to design such surveys; we have not proposed a survey methodology. We note, however, that surveys may not be appropriate for establishing payments for children with special needs due to their need for services on a highly individualized basis and the effect of the Americans with Disabilities Act on providers' charges.

In establishing payment rates we suggest a benchmark for States to consider. Payments established at least at the 75th percentile of the market would be regarded as providing equal access. States have already recognized that rates set at the 75th percentile—the payment level formerly required in the title IV–A child care programs—provide equal access. Comparisons of past State CCDBG and IV–A child care plans revealed that the majority of States used the same payment rate—the 75th percentile IV–A rate—for both program even though there was not a requirement to pay at the 75th percentile for CCDBG-funded care, only the requirement that CCDBG rates provide equal access. This same requirement continues unchanged in these regulations for the CCDF.

Comment: We received many comments about the requirement for a market survey; more comments favored the requirement than opposed it. Most of those favoring it wanted an annual survey or additional requirements around the timing of the survey or implementation of the survey results.

Response: While we concur with the commenters that it would be ideal to conduct surveys more frequently, we believe that a biennial survey balances several considerations: that the rates reasonably reflect the state of the market, that Lead Agencies have flexibility in designing and implementing the survey to establish rates, and that the administrative burden and expense of conducting the survey should be minimized. The Lead Agency may conduct a complete survey more frequently; it may also conduct targeted subsamples in specific areas as frequently as it deems necessary. However, we choose not to require more than a biennial survey.

Comment: Those commenters who opposed the requirement maintained that ACF had no authority to require a survey; that the statute's only requirement is for "the facts relied on by the State to determine" that rates are sufficient to ensure equal access.

Response: An executive branch agency charged with administering a statutory program has general authority to interpret the statutory provisions as needed in its administration of the program. As discussed above, we are convinced that a survey of market rates is the only methodologically sound way for Lead Agencies to ascertain whether the rates established are realistic, thus providing the statutorily required access.

Comment: A number of those opposing the survey requirement said it stifled State initiative in setting rates.

For example, one commenter said that relying on frequent reports from resource and referral agencies or the State licensing bureau of provider shortages and making quick adjustments to rates to develop more capacity in effected areas would be a better, more responsive alternative to biennial surveys. Another commenter suggested using computer modeling in lieu of a survey.

Response: A survey, in that it reflects market realities, is an essential and critical factor—but not the only factor—that must be considered when the Lead Agency establishes rates. It is because survey findings are so central to understanding and gauging what level of payment might provide equal access that we have made the requirement.

However, we are concerned that commenters may have assumed restrictions we did not intend, and have not created, in requiring a survey. And, we caution Lead Agencies, providers, and others against narrowly interpreting our survey requirement. For example, as suggested, up-to-the-minute vacancy data from CCR&Rs or licensing bureaus could be used in conjunction with market rate survey information to make quick and frequent adjustments to the payments to providers. In setting or adjusting rates, we remind Lead Agencies of the general principle that Federal subsidy funds can not pay more for services than is charged to the general public for the same service.

Computer modeling or simulation still needs to be based on some parameters reflective of market realities if it is to produce rates that provide equal access. Although many commenters who opposed the survey requirement seemed to imply that the realities of the market could be ignored in setting rates that provide equal access, no plausible alternatives to the survey were offered.

Nevertheless, we will remain open to alternative methodologies to surveys and revisit this regulation in light of advancing technologies. At this time, however, we believe that a survey is an essential part of the "facts" upon which payment rates are established.

Comment: A few commenters observed that surveys may not produce rates where there are few, if any, providers of certain care, such as in non-traditional hours.

Response: As discussed above, the survey is not the only determinant of rates, it is just one of the many "facts" to be considered. Clearly, States have the flexibility to establish rates for care that is needed.

Comment: One commenter suggested that a standard index, such as the rate of inflation, be used to adjust rates

gathered two, three, or four years in the past in lieu of a biennial survey.

Response: Use of a standard index alone, such as the Consumer Price Index (CPI) or other measures of inflation, is not an accurate indicator of actual provider charges in the child care market. The use of broad indices, such as the CPI could vastly underestimate changes in the child care market. For example, in a large urban area the demand for child care may drive up child care charges faster than the broad inflation indices would suggest. While States are free to use such adjustments in conjunction with surveys, especially in years when a survey is not conducted, they should be used with an understanding of their limitations.

Comment: One commenter observed that the 75th percentile is a term held over from days of IV–A child care (and as such was repealed by PRWORA). Another called the 75th percentile an arbitrary limit with no basis in fact or statute.

Response: We have used the 75th percentile as a reference point against which the Lead Agency can judge if its payment rates afford equal access. It must be presumed that a rate that provides access to at least three-quarters of all care does, in fact, provide equal access. We have not, however, required that payments be set at the 75th percentile, hence, it cannot be characterized as an arbitrary limit.

It should be noted, for example, that Lead Agencies have greater flexibility under these regulations to recognize and compensate higher quality child care facilities and providers, including those that have obtained nationally or locally recognized accreditation or special credentials, than they had under the title IV–A regulations that limited payments to the 75th percentile.

Comment: A number of commenters wanted it clarified in the preamble that Lead Agencies can pay rates higher than the 75th percentile.

Response: Lead Agencies may pay rates higher than the 75th percentile as we have not established the 75th percentile as the payment standard or limit. Rather, rates established at the 75th percentile would be considered to ensure equal access, although such rates may be too low to purchase some child care services, for example, where there are acute shortages during non-traditional hours.

Comment: Several commenters urged ACF to require that payment rates reflect variations for different categories of care.

Response: When establishing rates, we expect that the Lead Agency will take into account survey results

showing variations in charges for different categories of care. But, because there may be other facts that the Lead Agency considers, we believe such a prescriptive requirement would contradict the intent of the statute.

Comment: A number of commenters wanted us to clarify whether providers can charge amounts above the payment rates established by the Lead Agency; and if so, how this might deny equal access.

Similarly, a few commenters wanted a clarification of how a combination of low payment rates and high copayments can limit or deny equal access.

Response: A payment rate which provides for equal access does not necessarily provide access to every provider, irrespective of the provider's charge. There is no statutory basis for preventing a family from choosing a particular provider whose charges exceed the Lead Agency's payment rate. Nor is there an obligation on the part of the Lead Agency to pay an amount that is higher than the rate it determined is sufficient to provide equal access. In cases such as these, some States have created a contractual requirement that the provider will not charge the family the difference between its usual charge and the Lead Agency's rate. By offering the provider speedy, assured payments, the Lead Agency has been able to convince the providers to accept this stipulation.

The statute requires that the payment rate alone must "be sufficient to provide equal access." We separately discuss the question of copayments below.

Comment: One commenter said that market rates should reflect current market conditions on a sub-state basis, rather than on a statewide basis.

Response: We believe that surveys will reflect appreciable sub-state variations in rates, if any, which the State must then consider in establishing its rates.

Comment: One commenter wanted it clarified that children with disabilities would not be adversely affected by a Lead Agency's payment rates.

Response: Payments for child care services for children with disabilities must also provide for equal access.

3. Affordable copayments. The third essential element of equal access is that any copayment or fee paid by the parent is affordable for the family and sliding fee scales should not be designed in a way that limits parental choice. We wish to emphasize that Lead Agencies have flexibility in establishing their sliding fee scales. However, in our view, copayment scales that require a low-income family to pay no more than ten percent of its income for child care, no

matter how many children are in care, will help ensure equal access.

Recent reports by the Census Bureau indicate that families with income below the poverty level pay a disproportionate share of their income—18 percent—for child care; whereas families above the poverty level pay only seven percent of their income for child care. The size of the fee paid by a low-income working parent can be crucial in determining whether she and her family become, and remain, self-sufficient. When devising the fee scale Lead Agencies should try to ensure that small wage increases do not trigger large increases in copayments, lest continuation on the path to self-sufficiency be jeopardized for any family. The size of a fee increase is an especially important consideration because recent changes in the Food Stamp, housing assistance, Medicaid, SSI, and the Earned Income Credit programs may also affect the resources now available to a low-income working family.

Recent studies have shown that some child care providers are unwilling to accept children from families that receive subsidies for child care because the rates are too low. Faced with such a situation, a parent must seek care from a relative or other provider who perhaps accepts the child unwillingly and is unable to provide quality child care. Fifty-five percent of low-income parents use informal care arrangements, whereas only 21% of non-poor families do. The options to low-income families in selecting child care are limited to a higher degree by financial constraints than are the options for families with higher income. If, in addition to low rates, the family must pay a high fee from an already limited income, the family can hardly be said to be on the way to total self-support. And in such a situation, a family cannot be said to have equal access to child care. The limited access to providers for these low-income families also tends to promote unevenness of care, and this is an additional hazard to the child's development.

There is a relatively low supply of child care for infants, for children with disabilities and for children of parents who work during non-traditional hours. For families in these categories, a combination of low payments and high fees can limit the choice to an even greater extent, because they encourage parents to choose less expensive and lower quality child care, or even not to accept the subsidy at all.

Sliding fee scales must continue to be based on family size and income, as § 98.42(b) has not changed. We note that

this regulation provides Lead Agencies with the flexibility to take additional elements into consideration when designing their fee scales, such as the number of children in care. However, as was stated in the preamble to the regulations published on August 4, 1992, basing fees on the cost or category of care is not allowed (57 FR 34380). Similarly, multiple fee scales based on factors such as a family's eligibility status would be precluded.

Comment: A number of States indicated that there is no statutory basis for limiting the fee to ten percent of a family's income, or that such a limit is unnecessarily prescriptive.

Response: We would agree with the comments if the regulations, in fact, established a limit on copayments. They do not.

Lead agencies have the flexibility to set the copayment. We have suggested, not required, that a family's fee be no more than ten percent of its income. This benchmark is offered as a reference point for Lead Agencies to consider when designing fee structures for affordable care.

Comment: A few commenters felt that ten percent should be the upper limit charged as a fee or observed that any fee, however low, can be a deterrent to self-sufficiency to families below the poverty level. Others thought that the reference to a ten percent copay seemed to conflict with the Lead Agency's right to waive the fee.

Response: As indicated above, the ten percent of family income is offered as a benchmark, not a limit on the Lead Agency.

A family is required by the statute at section 658E(c)(5) to share in the cost of subsidized child care, unless the Lead Agency waives the fee pursuant to § 98.42(c) and § 98.20(a)(3)(ii). Those sections allow copayments to be waived for those whose income is at or below the poverty level and for children in protective services on a case-by-case basis. The State has flexibility in deciding the amount of the fee charged and whether to waive the fee.

Comment: One State commented that a State should be allowed to categorically waive the fee if a family receives TANF.

Response: The fee can be waived, at a State's option, only if a TANF family's income is at or below the poverty level. If TANF families' incomes are always at or below poverty, then the State can categorically waive the fee. In contrast, fees may be waived for child care in protective services cases only on a case-by-case basis.

Comment: One commenter thought the preamble should define "affordable."

Response: As in 1992, we decline to establish a regulatory standard for "affordability." However, as discussed above, we feel that a fee that is no more than 10 percent of a family's income would generally be considered to be an affordable copayment.

We decided, again, not to prescribe a definition for "affordable" because we felt that any definition would unnecessarily undermine a Lead Agency's ability to establish service priorities, be administratively difficult to monitor and enforce, and preclude the variation that is inherent in the nature of block grants.

Comment: Several commenters asked that the Lead Agency have the authority to categorically waive the fee for protective services and foster care, and not just on a case-by-case basis.

Response: We do not believe that it is consistent with the intent of the statute to categorically waive the fee for protective services or foster care cases. However, we recognize that the nature of protective service cases can be different, and that in an individual case it might further the purpose of the statute to increase the availability of child care. Therefore, § 98.20(a)(3)(ii) gives Lead Agencies the authority to waive income eligibility and fees for children in protective custody on a case-by-case basis, or after consultation with an appropriate protective services worker.

As discussed in the preamble to the regulations published on August 4, 1992, there is a basic distinction between protective services cases and foster care cases. However, as discussed in the preamble to § 98.20 in the 1992 regulations, Lead Agencies have the flexibility to treat foster care cases as a family of one and thus effectively reduce or eliminate the fee in most foster care cases (57 FR 34369), but not categorically.

Comment: Several commenters believed there is a contradiction between the ten percent benchmark and the regulation that gives Lead Agencies the flexibility to waive copayments on a case-by-case basis for families at or below the poverty level or for children in protective services.

Response: These policies are not contradictory, nor are we implying that a fee of ten percent of a family's income is appropriate for every very low-income family, since such a fee might effectively prevent many low-income families from taking advantage of the child care subsidy. We view ten percent as the appropriate upper limit for co-

payments; and as stipulated in the regulations, a Lead Agency can waive the co-payment for families at or below the poverty level (§ 98.42(c)), or for children in protective services (§ 98.20(a)(3)(ii)).

Priority for Child Care Services (Section 98.44)

Although we proposed no changes to this section, we received a number of comments regarding serving children with disabilities which indicated a need to provide some clarification about priority for children with "special needs."

As we stated in the 1992 preamble, for the purpose of prioritizing services, States have the flexibility to define children with "special needs" in the CCDF Plan. "Special needs" can mean groups other than children with physical or mental disabilities. States can and do prioritize services for children of teen parents, homeless children and other groups by providing definitions in the CCDF Plan. Refer to 57 FR 34382 for a detailed discussion of the three contexts in which the term "special needs" is used in these regulations.

List of Providers (Section 98.45)

Any Lead Agency not having a registration process must maintain a list of the names and addresses of all unregulated providers. It is essential that Lead Agencies have some simple, standardized system to record the names and addresses of unlicensed providers in order to pay them and to provide them with pertinent information about health and safety regulations and training.

The regulations no longer specifically require Lead Agencies to have a registration process for providers not licensed or regulated under State or local law before paying them for child care services. However, Lead Agencies should note that they may continue such a system, and we strongly encourage them to do so.

Comment: A number of commenters opposed requiring States to maintain a list of providers and felt States should be given options.

Response: We know that States have developed various processes for registering unregulated providers and that maintaining a list of these providers is essential to effectively managing their child care program. We do not expect States to set up a separate list if their current system provides the means to identify and communicate with unregulated providers.

Comment: Other commenters wanted the regulation strengthened to require

the State to make the list of providers available to all parents as a means of providing them with more possibilities for care.

Response: Many unregulated providers are providing care for friends or relatives, and may not be providing child care services to the public. Some unregulated providers who are in the child care business, but exempt from State licensing, may want their names included on a list given to families. However, others may not. These are State and local government decisions. We will not regulate further regarding the list of providers.

Subpart F—Use of Block Grant Funds

Child Care Services (Section 98.50)

The 70 percent requirement. Section 418(b)(2) of the PRWORA specifically requires the State to ensure that not less than 70 percent of the funds received by the State under this section of the statute are used to provide child care assistance to families who are receiving assistance under a State program under Part A of title IV of the Social Security Act, families who are attempting through work activities to transition off of such assistance program and families that are at risk of becoming dependent on such assistance program. By statute, the 70 percent requirement applies only to the Mandatory and Matching Funds. Further, the amended statute at 658E(c)(2)(H) requires the State to demonstrate in its CCDF Plan the manner in which the State will meet the specific child care needs of these families. These statutory provisions are found in these regulations at § 98.50(e) and (f).

Comment: Several commenters noted that in the Plan provisions we ask the Lead Agency to "describe" how it will meet the child care needs of the families specified at § 98.50(e), whereas at § 98.50(f) we require the Lead Agency to "specify" how they will meet those needs.

Response: We do not believe the terms are inconsistent. The statute asks that States "demonstrate the manner in which the State will meet the specific child care needs" of those families. We believe that a description would provide States the opportunity to present specific information which would demonstrate how they are serving this population.

Serving other low-income working families. Section 658E(c)(3)(D) directs the State to ensure that a "substantial portion" of the amounts available (after a State has complied with the 70 percent requirement discussed above) is used to provide assistance to low-

income working families other than those who are receiving assistance, transitioning off assistance or at risk of becoming dependent on assistance under Part A of title IV of the Social Security Act. The amounts in question include the remaining Mandatory and Matching Funds (provided under Section 418) as well as the Discretionary Funds.

Since the income level for eligible families is increased in the statute to 85 percent of the State median income, it is clear that Congress intended for child care assistance to be available to more low-income working families than were previously eligible. We believe, however, that families whose income is less than 85 percent of the State median income may well be at risk of becoming dependent on assistance. Thus the two populations overlap.

The regulation at § 98.50(e) provides the statutory description of the families who are to be served under the 70 percent provision. In addition § 98.50(f) requires the State, pursuant to the statute, to describe in its Plan how the State will meet the needs of these families. We believe, based on our consultations, that the circumstances of low-income working families (whose income is below 85 percent of the State median income) are generally no different than the families specifically mentioned in these regulations and thus would expect that they would be treated similarly. If a State elects to have a specific description of at-risk families, it could, for example, be included when defining very low income or in providing additional terminology related to conditions of eligibility or priority in the CCDF Plan.

Comment: Some commenters related the "substantial portion" requirement to the 70% requirement and are concerned that there is very little funding for low-income working families.

Response: As noted above, the 70% requirement applies only to the Mandatory and Matching Funds. States must then use a "substantial portion" of any remaining Mandatory and Matching funds as well as a "substantial portion" of Discretionary funds to serve families whose incomes are below 85% of SMI.

Comment: Several commenters noted that § 98.50(d) was inconsistent with § 98.52(a) in that it addressed funds that were awarded rather than expended.

Response: We have corrected § 98.50(d) to be consistent with our intent that the administrative costs be based on amounts expended. Refer to Administrative Costs (§ 98.52) for a more detailed discussion of this issue.

Activities to Improve the Quality of Child Care (Section 98.51)

Not less than four percent. Section 658G of the CCDBG Act directs that a State that receives CCDF funds shall use not less than four percent of the amount of such funds for activities that are designed to provide comprehensive consumer education to parents and the public, activities to increase parental choice, and activities designed to improve the quality of child care and availability of child care (such as resource and referral services). We refer to this requirement collectively as "Activities to Improve the Quality of Child Care." Section 98.51(a) provides that the not less than four percent requirement for quality applies to the aggregate amount of expenditures (i.e., Discretionary, Mandatory, and both the Federal and State share of Matching funds); it need not be applied individually to each of the component funds. Section 98.51(a) also provides that the four percent requirement applies to the funds expended, rather than the total of funds that are available but not used. Lead Agencies, however, have the flexibility to spend more than four percent on quality activities. Section 98.51(c) provides that the quality expenditure requirement does not apply to the maintenance-of-effort expenditures required by § 98.53(c) in order to claim from the Matching Fund.

The regulations at § 98.51(a)(1) are based on the broad statutory language, while § 98.51(a)(2) keeps, as examples, the options for specific activities formerly contained in the Act. Resource and referral programs, grants or loans to assist in meeting state and local standards, monitoring of compliance with licensing and regulatory requirements, training, and compensation are allowable quality activities under this minimum four percent requirement. We will continue to collect, in the Plan, descriptions of activities to improve the quality of child care services. We encourage Lead Agencies to evaluate the success of their efforts to improve quality and we will disseminate promising practices.

Comment: Some commenters wanted us to remove from § 98.51(a)(2)(i) the words "operating directly" as they felt that resource and referral can be done most effectively at the community level rather than by state government.

Response: We agree that local resource and referral activities are important to child care services. However, by removing the words "operating directly," we would be reducing the options available to the State. Therefore we have retained the

wording in the regulation in order to ensure State flexibility in delivering those services.

Administrative Costs (Section 98.52)

Section 658E(c)(3)(C) of the amended Act limits the amount of funds available for the administrative costs of the CCDF program to "not more than five percent of the aggregate amount of funds available to the State." Section 98.52(a) provides that the five percent limitation on administrative costs applies to the funds expended, rather than to the total of funds that are available but not granted or used. Thus, Lead Agencies may not use five percent of the total funds available to them for administrative costs unless they use all the available funds including Matching Funds.

This provision also makes clear that the five percent limitation applies to the total Child Care and Development Fund. The five percent limitation need not be applied individually to each of the component funds—the Discretionary, Mandatory, and Matching (including the State share) Funds. We believe this flexibility will streamline the overall administration of the Fund. The limitation does not apply to the maintenance-of-effort expenditures required by § 98.53(c) in order to claim from the Matching Fund.

Section 98.52(a) lists administrative activities and is derived from the prior regulations as modified by the PRWORA amendments and the Conference Agreement (H.R. Rep. 104-725 at 411). While the statute does not define administrative costs, it does preclude "the costs of providing direct services" from any definition of administrative costs.

The Conference Agreement specifies that the following activities "should not be considered administrative costs":

- (1) Eligibility determination and redetermination;
- (2) Preparation and participation in judicial hearings;
- (3) Child care placement;
- (4) The recruitment, licensing, inspection, reviews and supervision of child care placements;
- (5) Rate setting;
- (6) Resource and referral services;
- (7) Training [of child care staff]; and
- (8) The establishment and maintenance of computerized child care information systems.

The regulation's list of administrative activities at § 98.52(a) omits the following three activities that were listed as administrative costs in the 1992 CCDBG rule: determining eligibility, establishing and operating a certificate program, and developing

systems. "Establishing and operating a certificate program" was not specifically listed by Congress as a non-administrative cost. However, we omitted this activity because the components of a certificate program would not be considered to be administrative costs under the Conference Agreement exclusions. For example, certificate programs must determine and redetermine eligibility, provide the public with information about the program, develop and maintain computer systems, place children, offer resource and referral services, etc.—all items which the Conference Agreement lists as not administrative costs. All costs, then, of these three activities: determining eligibility, establishing and operating a certificate program, and developing systems, are now considered non-administrative costs.

While these regulations reflect the Conference Agreement language, we are nevertheless concerned that States will misinterpret the intent of the change and re-direct a disproportionate amount of expenditures on these redesignated activities rather than on direct services to children. We wish to emphasize that services to children is the purpose for which the CCDF was created. Therefore, we would not expect a large increase in costs to activities that are not direct services to children. We will closely monitor such expenditures to determine if States are overspending for such activities at the expense of services. As one method of monitoring, the required CCDF financial reporting form, the ACF-696, separately collects the amounts that are expended on determining eligibility, establishing and operating a certificate program, and developing systems. If we determine that there are problems, we reserve the right to re-visit the policy and regulate in the future.

Lastly, we clarify in § 98.52(c) that the non-Federal expenditures required of the State in order to meet its maintenance-of-effort threshold for receiving matching funds are not subject to the five percent limitation on administrative costs. Nevertheless, audits of State reports of maintenance-of-effort expenditures should indicate that administrative expenditures included in those MOE amounts are reasonable, necessary for carrying out the services provided, and consistent with other provisions of law.

Comment: Many commenters objected to applying the five percent administrative limitation to the amounts expended, rather than to the amounts allocated to the State, saying that administrative costs might be incurred

in one year for expenditures that occur in another.

Response: We have clarified § 98.52(a) to reflect that the limit applies to the amounts expended from the total allocated, not to the amounts expended in a single fiscal year. We understand that it might be necessary to use more funds for administration during the initial start-up of an activity, or that the period when administrative costs are incurred may not coincide with when the funds are actually liquidated. And, the provision was not intended to limit Lead Agency flexibility in the short term.

The choice of the word "expend" in the regulation, rather than "available" as in the statute or "allocated" as in the comment, is meant to address only one situation. Section 98.52(a) is meant to ensure that when a State that does not expend—within the applicable timeframes provided for at § 98.60—the full amounts allocated to it, the State does not receive a windfall in administrative cost allowances. For example, two States are each allocated a total of \$100 million in the CCDF. At the end of the expenditure periods, State A has spent \$50 million while State B has expended all \$100 million. It would be unfair to allow both States to receive \$5 million in administrative allowances since State B's program (in terms of dollars expended) is twice the size of State A's.

Comment: Some felt that the tone of this section was threatening. They objected to the suggestion of further regulations in this area if Lead Agency reports indicate disproportionate expenditures on the activities that had been redesignated as non-administrative costs, i.e., determining eligibility, establishing and operating a certificate program, and developing systems.

Response: We did not intend to threaten Lead Agencies. The preamble discussion is intended to reflect our obligations to taxpayers for prudent management of the resources Congress has allotted for the purpose of providing child care services.

Comment: One commenter observed that there was no definition of "implementation" in § 98.52(a)(1) and was concerned that some might make judgments about when implementation began or ended.

Response: Implementation in this context refers to the ongoing conduct or execution of the program and does not imply a fixed period or a process with a beginning and/or ending date. It would be incorrect, for example, for an auditor to determine that implementation of an activity had ended.

Comment: One commenter, noting that the regulations clearly provide that the 5% administrative cap did not apply to State MOE, stated that the preamble then clouded the issue by suggesting that ACF would monitor MOE reports in relation to administrative expenditures.

Response: In the preamble to the proposed rule, we did not propose specifically to monitor MOE expenditures. Rather, we did express the expectation that audits of the CCDF program should indicate that administrative expenditures contained in MOE amounts would be reasonable, necessary for carrying out the services provided, and consistent with other provisions of law.

Administrative costs for Tribes. We have specifically noted at § 98.52(b) that the five percent cap on administrative costs does not apply to Tribes, and tribal organizations; it applies only to the entities defined as "States." Tribes, however, are subject to the requirements at § 98.83(g) regarding limits on administrative expenditures.

Matching Fund Requirements (Section 98.53)

Terminology and general requirements. In this section we have used the phrase "expenditures in the State" to encompass not only local expenditures on child care but also private, donated funds that meet the requirements at § 98.53(e)(2), as explained below. Whenever the term "State funds," "State expenditures" or "non-Federal expenditures" is used it should be understood to include State, local or permissible private donated funds that meet these requirements and are expended for allowable child care purposes. And, the language of § 98.53(e) reflects this.

Section 418(a)(2)(C) of the Social Security Act creates a two-part matching requirement. First, a State must expend an amount that at least equals its allowable expenditures for the title IV-A child care programs during 1994 or 1995, whichever is greater. We refer to this amount as the "maintenance-of-effort" (MOE) threshold.

Changes to PRWORA contained in P.L. 105-33 provide that for fiscal years 1998 and after, a State's expenditures in excess of its MOE threshold, up to a maximum determined by the statute, are matched at the applicable year's Federal medical assistance percentage (FMAP) rate. (For FY 1997, state expenditures were matched at the 1995 FMAP rate.) The total amount that can be matched rises each year and is equal to the sum appropriated for that year, less the amounts of the Mandatory Fund, the tribal allocation and the allocation for

technical assistance. The maximum to be matched for each State is its share of that total based upon the proportion of the State's children under age 13 to the national total of children under age 13, based on the best data available to the Secretary for the second preceding year.

Section 98.53(c) lists the requirements that States must meet if they wish to claim Federal Matching Funds. In summary, this section requires that the State obligate all of its Mandatory Funds by the end of the fiscal year (FY) they are granted. Mandatory Funds need not be obligated before Matching Funds are claimed, provided that all Mandatory Funds will be obligated by the end of that FY. Second, they must expend State-only dollars in an amount that equals the State's MOE threshold described at § 98.53(c)(1). And third, they must obligate the Federal and State share of the Matching Fund by the end of the FY.

Comment: Some commenters thought that there was a point beyond which Matching funds would no longer be available to them and wanted us to clarify that as long as the State meets the statutory requirements that the Matching funds would be available throughout the fiscal year.

Response: Matching funds are available throughout the fiscal year, and disbursements to the State are based on the ACF-696s submitted by the Lead Agency. Those non-Federal expenditures (exceeding the MOE threshold) for which the State wishes to claim monies from the Matching Fund must be obligated before the end of the fiscal year.

State expenditures allowable for MOE and Federal Matching funds. State expenditures on any activity or service that meets the goals of the CCDBG Act and that is described in the approved CCDF Plan, if appropriate, may be used to meet the MOE requirement or may be claimed for Federal Matching funds (§ 98.53(b) and (c)(2)). For MOE, these regulations offer greater flexibility than we offered in our interim guidance provided in our Program Instruction, ACYF-PI-CC-96-17, dated October 30, 1996. However, as provided at § 98.53(d), the same expenditure still may not be counted for both MOE and match purposes.

Under these regulations, States will have flexibility to define child care services, so long as those services meet the requirements of the statute. For example, State expenditures for child care for those populations previously served by the title IV-A or CCDBG child care programs would be eligible for Federal match. Similarly, State investments in child care through the

use of State funds to expand Head Start programs or to otherwise enhance the quality or comprehensiveness of full-day/full-year child care would also be eligible for Federal Matching funds since these activities meet the goals of the Act.

Sections 98.53(e) and (f) contain additional qualifications on what constitutes an expenditure in the State for purposes of this Part. These qualifications are the same that generally apply to Federal programs that provide for matching State expenditures, with two important clarifications.

First, § 98.53(e)(1)(i) allows a public agency, other than the Lead Agency, to certify its expenditures as eligible for Federal match. This provision allows States, for example, to use pre-K expenditures to meet the MOE requirement (when the regulatory provisions for use of pre-K funds are met) and/or receive Federal Matching funds. The second clarification, at § 98.53(f), concerns the treatment of private donated funds. It provides greater flexibility than previously offered as interim guidance under ACF Program Instruction, ACYF-PI-CC-96-17, dated October 30, 1996.

Regarding the MOE requirements, the same State expenditure may be used to meet both the CCDF and TANF MOE requirements provided the expenditure meets the requirements of both programs. However, the amount of State CCDF MOE expenditures that may count for TANF MOE purposes is limited to the amount of the State's share of expenditures for the programs described at section 418(a)(1)(A) of the Social Security Act (i.e., the now repealed title IV-A child care programs) for FY 1994 or FY 1995, whichever is greater.) Section 409(a)(7)(B)(iv)(IV) specifically provides that State expenditures used to meet the CCDF MOE requirement—and/or for which CCDF Matching funds were received—may be included in meeting the TANF MOE requirement up to the amount set at section 418(a). Any additional State expenditures for child care in excess of the amount of the CCDF MOE requirement, and for which CCDF Matching funds are not claimed, may also be counted in meeting the TANF MOE requirement when the expenditures meet the requirements of TANF.

In addition, pursuant to section 409(a)(7)(B)(iv)(I) of PRWORA, State expenditures for child care may not be included as part of the State MOE for TANF if the funds originated with the Federal government. Hence, Federal funds transferred from TANF to the

CCDF would not count towards the TANF MOE. Further, those funds could not be used to receive CCDF Matching funds under the general rule Federal funds may not be used as a match without statutory authority.

Comment: Several commenters objected to the prohibition on using in-kind expenditures for State match, contending that this runs counter to the regulations for the pre-TANF title IV-A programs on which much of the CCDF funding is now based.

Response: The pre-TANF title IV-A programs did not allow for the unlimited use of in-kind match as the comments suggest. Only a small part of the total JOBS funding (that part equal to the State's WIN or WIN Demonstration allotment for fiscal year 1987) could be matched with in-kind contributions. The match rate for these funds was 90%; meaning the State's share was only 10%. The Social Security Act, at section 403(l)(1)(B), specifically provided for in-kind contributions in this limited instance only.

There is no indication that Congress contemplated the use of in-kind match, either in the CCDBG Act or the child care provisions in PRWORA. In fact, in specifying that the Secretary shall reimburse expenditures, the provision precludes the claiming of in-kind match.

Comment: One commenter asked whether State expenditures for Kindergarten services could be counted in meeting the MOE requirement or claimed for match.

Response: Compulsory State education services cannot be used to meet the MOE requirement or to claim matching funds. Non-compulsory services are subject to the limits at § 98.53(h).

Comment: One commenter asked for clarification of the relationship between child care expenditures used to meet the TANF MOE requirement and used to claim CCDF matching funds. The commenter observed that Section 409(a)(7)(B)(iv) of the Act precluded using the same State expenditure for claiming CCDF Matching funds and for meeting the TANF MOE requirement.

Response: That section in the Act was amended by the Balanced Budget Act of 1997 to allow certain State expenditures to be used to claim CCDF Matching funds and be used to meet the TANF MOE requirement. We updated the above discussion to reflect those changes. Use of the same expenditure for both purposes is subject to certain qualifications discussed above.

Use of a private agency to receive donated funds. Historically, private

donations to State-level programs have been very limited; locally controlled donations have been somewhat more prevalent. Frequently cited reasons for this lack of public support for seemingly worthwhile programs have included suspicion of government, in general, especially government outside the immediate community, coupled with regulations that appeared to limit the State's ability to assure the donor that the donated funds will be used in a specific area or for the donor's intended purpose.

At a time when child care programs face increased demands, and State budgets face constraints, we have reexamined prior ACF policies on donated funds. We have tried to respond to the issues that we were told have inhibited private donations in the past by including in the definition of State expenditures donated funds that meet the qualifications at § 98.53(e)(2), even though such funds are not under direct State control. The regulations at § 98.53(f) provide that private donated funds need not be transferred to or under the administrative control of the Lead Agency to be eligible for Federal match. Instead they may be donated to the entity designated by the State to receive donated funds. Both the Lead Agency and the entity designated by the State to receive donated funds must, however, certify that the donated funds are available and eligible for Federal match. In addition to this dual certification requirement, we want to ensure Lead Agency accountability for funds that may not be under its direct control. Therefore, the fiscal reporting form, the ACF 696, requires that the Lead Agency separately report the amount of private donated funds it uses as match. And finally, Lead Agencies should be aware that private donated funds used as match are also subject to the audit requirements at § 98.65.

This rule will allow Lead Agencies to cooperate more closely with various organizations, foundations, and associations that already support high quality child care and related activities. It will also allow the Lead Agency to leverage private funds in order to serve more families, while working within State and Federal budget restrictions.

We also take this opportunity to clarify the regulation at § 98.53(e)(2)(i) which requires that private funds be donated without restriction on their use for a specified individual, organization, facility or institution. Under this clarification a donor could designate a specific geographic location for the receipt of funds. Such a geographic specification can be broad, such as within the limits of a specific city, or

extremely narrow, such as a single neighborhood. Such geographic specification is possible whenever funds are donated, whether the funds are donated to the Lead Agency or to an entity specially designated to receive private donations.

Lead Agencies will be asked to identify the entity that is designated to receive private donated funds and the purposes for which those donated funds are expended in their Plan, pursuant to § 98.16(c)(2).

Comment: Several commenters wanted us to limit the use of pre-K and or donated funds to only those States that had used such funding prior to FY 1997.

Response: It is not clear why the commenters proposed such a limitation. The regulation is designed to give Lead Agencies additional flexibility in maximizing child care funding while ensuring ongoing commitments to existing programs. We see no benefit to limiting the use of pre-K or donated funds as suggested.

Comment: The same commenters wanted us to require that States submit quarterly reports listing the entities receiving donated funds and the uses of those funds.

Response: We have required that the Lead Agency identify in its Plan the single entity designated to receive donated funds and the allowable child care services for which the funds will be used. We believe that additional requirements, such as those proposed would be burdensome for the Lead Agency and serve no useful purpose in light of the policy that provides for a single entity to receive donated funds.

Comment: Several commenters suggested that individual programs or providers would be accepting donated funds.

Response: We want to clarify that the regulation provides for the designation of a single entity in each State to receive donated funds. We settled on this for a number of reasons. First, it would be burdensome for the Lead Agency to have to deal with hundreds of individual providers or programs all claiming to have receive donated funds which are allowable. Since the Lead Agency is ultimately responsible for the allowability of the donated funds we did not want to create such a burden on them. More importantly, we did not want to create a mechanism wherein individual programs, providers or jurisdictions might be forced to compete with each other for donated funds. Nor did we want to create a situation wherein the Lead Agency might tie the availability of certificates, grants or contracts to a jurisdiction, provider or

program's ability to attract donated funds. We believe that allowing for the designation of only a single entity to receive donated funds, at least initially, is a reasonable policy choice.

Claims for pre-K expenditures for MOE and match purposes. Many States fund pre-K programs for young children. These are important early childhood services that contribute to school readiness. Expenditures for State-funded public pre-K services to children from families who meet the CCDF eligibility criteria (as outlined in the Plan) may meet the requirements for allowable child care services expenditures for MOE and match purposes. The pre-K program must meet each of the following four conditions:

- Attendance in the pre-K program must not be mandatory.
- The pre-K program must meet applicable standards of State, local or tribal law.
- The pre-K program must allow parental access.
- The pre-K program must not be Federally funded (unless funded with "exempt" Federal funds for matching purposes), and its State funding may not be used as basis for claiming other Federal funding.

In addition, pre-K expenditures claimed may be only for those families who are at or below 85 percent of the State median income (SMI) (or lower SMI established as the CCDF eligibility criterion by the Lead Agency) and who meet other State eligibility criteria.

During our consultations we heard the full range of issues around allowing States to use their pre-K expenditures to meet the matching and MOE requirements of the CCDF. We came away from those consultations with some reservations about the use of pre-K expenditures, but we also came away with increased respect for the importance of these programs.

A chief concern to working parents is that many pre-K services are only part-day and or part-year and such programs may not serve the family's real needs. Some have expressed concerns that an excessively broad approach to counting pre-K expenditures might result in a real reduction in full-day child care services to potentially eligible working families. The potential exists for a State with a sufficiently large pre-K program to divert all state funds away from other child care programs and fulfill its MOE and Matching requirements solely through pre-K expenditures. On the other hand, allowing pre-K expenditures to be counted toward MOE or match could provide a critical incentive for States to more closely link their pre-K and child care systems. This could

result in a coordinated system that would better meet the needs of working families for full-day/full-year services that prepare children to enter school ready to learn. We struggled with these issues and considered various alternative approaches to counting pre-K expenditures in the CCDF.

In the end, we decided on a policy that attempts to balance concerns about the use of pre-K expenditures in meeting CCDF requirements. At § 98.53(h)(3) and (4) we have addressed our concerns about balance by establishing a maximum amount of State expenditures for pre-K services that can be claimed for match or MOE. Expenditures for pre-K programs may constitute no more than 20% of the State's expenditures which are matched. Similarly, expenditures for pre-K programs may constitute no more than 20% of the State's expenditures counted in fulfilling the MOE requirement. However, if a State intends to fulfill more than 10% of either its MOE or matching requirements with pre-K expenditures, its CCDF Plan must reflect that intent. Additionally, if a State intends to fulfill more than 10% of either the MOE or matching requirement with pre-K expenditures, the CCDF Plan must describe how the State will coordinate its pre-K and child care services to expand the availability of child care. We established the 20% limits because they approximate the proportion of pre-school age children nationwide currently receiving services under the CCDBG. (This level also approximates the average monthly proportion of pre-school age children of JOBS participants who received child care assistance in the past.)

States may count only those pre-K expenditures that meet the criteria as allowable child care services explained above (i.e., attendance is not mandatory, the program meets applicable standards, allows parental access, serves CCDF eligible families as provided in the Plan, etc.). The Lead Agency is required to separately report on the ACF-696 the amount of pre-K expenditures it claims as match or uses to meet the MOE requirement.

In addition, for MOE purposes, § 98.53(h)(1) provides that States cannot reduce their level of effort in full-day/full-year child care services if they use pre-K expenditures to meet the MOE requirement. And, States are required to provide an assurance of this, pursuant to § 98.15(a)(6). This requirement reflects the fact that although the statute eliminated the non-supplantation requirement formerly found at section 658E(c)(2)(J) of the CCDBG Act, another non-supplantation requirement was

created by section 418(a)(2)(C) of the Social Security Act. That non-supplantation requirement—the MOE requirement—requires States to continue to spend at least the same amount on child care services that they spent on the repealed title IV-A child care programs, in order to receive the new Matching Fund. Such a provision would be meaningless if States used MOE expenditures for services that were not responsive to the real child care needs of working families that the CCDF was intended to assist, i.e., the State “buys out” with pre-K expenditures the full-day/full-year child care services it previously provided under title IV-A. In the interest of State flexibility we have not otherwise regulated on the types of services that may be counted in meeting the MOE requirement and, as discussed below, have eased the burden on the State in calculating the amount of pre-K expenditures that may be used to meet the MOE and matching requirements.

In contrast, there is not a similar requirement if pre-K expenditures are claimed for match. Since the Matching Fund is “new money” it is not subject to the same requirements that expenditures used to meet a non-supplantation (MOE) requirement must meet. However, §§ 98.16(q) and 98.53(h)(2) require that States describe in their CCDF Plan any efforts they will undertake to ensure that pre-K programs meet the needs of working parents if pre-K expenditures are claimed for match. Our different treatment of pre-K expenditures in the MOE and matching requirements, then, reflects a balance between the principles of non-supplantation and state flexibility.

Furthermore, ACF will permit States to use a different method for calculating the amount of pre-K services claimed for both MOE and matching purposes than was required under the former title IV-A child care programs. Under the now repealed title IV-A child care programs, ACF required States wishing to claim Federal match for their pre-K expenditures to base their claim on the number of title IV-A-eligible (or potentially eligible) children who actually participated in the pre-K program. As many school districts did not have the information to identify whether pre-K participants were members of IV-A-eligible families, it was difficult for States to claim Federal matching funds for these programs. In fact, only a handful of States claimed Federal Match under title IV-A for their pre-K expenditures. In our consultations we were asked to loosen this child-by-child approach to counting pre-K expenditures.

In the interest of easing administrative burdens on the Lead Agency, we have adopted the following policy toward calculating pre-K expenditures for purposes of claiming MOE and Matching funds. For pre-K expenditures to be claimed, States must ensure that children receiving pre-K services meet the eligibility requirements established in the CCDF Plan. In cases where States do not have child specific information, however, they must develop a sound methodology for estimating the percentage of children served in the pre-K program who are also CCDF-eligible. Expenditure claims must reflect these estimates.

Although the methodology should be documented, we will not require that the methodology be submitted to ACF for prior review or approval. In documenting their methodology, Lead Agencies are reminded of the requirement at § 98.67(c), which provides that fiscal control and accounting procedures must be sufficient to permit the tracing of funds to a level of expenditure adequate to establish that such funds have not been used in violation of the Act or regulations.

Comment: Some commenters argued against any restriction on the amount of pre-K that could be used to satisfy the MOE requirement saying that States may lower or end investments in pre-K because of the limit. Others agreed with the 20% cap, while still others wanted a lower cap or the exclusion of pre-K from meeting the MOE requirement.

Response: We anticipated these reactions and specifically requested comments on the pre-K limit in the proposed rule. However, none of the commenters who argued for unrestricted use of pre-K addressed our concerns about “buying-out” existing child care services with pre-K programs. The argument that a State may limit pre-K is not convincing since States usually fund pre-K for a variety of programmatic reasons—not because it may be an allowable match for another program.

This regulation still gives States more flexibility than in the past and opens new sources of match not heretofore available. Accordingly, as a matter of balance, we have retained a reasonable limit on using State pre-K expenditures to meet the MOE requirement.

Comment: Some commenters objected to linking the use of pre-K to meet the MOE requirement with maintaining expenditures on full-day/full-year child care services. They felt that the increase in TANF recipients accepting part-time employment will affect the need for full day/full year care.

Response: We do not believe that true economic self-sufficiency is readily achievable through part-time employment. While part-time employment of families may have increased at the outset of TANF, the operation of time limits on those same families will require increased hours of employment just to maintain income levels when their TANF benefits cease. We believe, then, that it is prudent to retain this requirement at this time.

Comment: A commenter asked if we intended to limit pre-K programs to families at or below 85% of the State's median income (SMI).

Response: We did not intend to limit State's ability to provide pre-K to all families, regardless of their income. However, only expenditures for those services provided to families at or below 85% of the SMI (i.e., whatever limit the Lead Agency establishes as the eligibility criteria for CCDF-funded child care) may be counted in meeting the CCDF MOE requirement or to receive Matching funds. We have revised the discussion above to make this point more clearly.

Family fees and the matching fund. Section 98.53(g)(2) clarifies that family contributions to the cost of care as required by § 98.42 are not considered eligible State expenditures under this subpart. This policy is based on the fact that family fees are not State expenditures.

Restrictions on Use of Funds (Section 98.54)

Section 103(c) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) repealed the three title IV-A child care programs—the AFDC child care program, the Transitional Child Care program and the At-Risk Child Care program. However, in appropriating new child care funds under section 418 of the Social Security Act, the PRWORA provides that these funds must be spent in accordance with the provisions of the Child Care and Development Block Grant Act as amended. This requirement is incorporated into § 98.54(a). This section also provides that TANF funds that are transferred to the Lead Agency under the provision of the new section 404(d) of the Social Security Act are treated as Discretionary Funds for the purposes of § 98.60.

Other Federal funds expended for child care, unless transferred to the

Lead Agency, are not required to be spent in accordance with the amended CCDBG Act. This means, for example, that child care provided with title XX funds or TANF funds that are not transferred to the Lead Agency might be subject to different requirements.

However, ACF cautions States about the administrative and policy problems associated with operating a variety of Federally-funded child care programs, e.g., one program subject to CCDBG requirements and others not. The amendments to the CCDBG Act contained in the PRWORA are intended to create a single child care program with consistent standards and requirements and to counteract the fragmentation and conflicting requirements that had arisen under prior law.

We have also added a new section at § 98.54(b)(3) which clarifies the special provisions on use of funds for construction that apply to Tribes and tribal organizations under the PRWORA amendments.

Comment: One commenter felt that allowing expenditures for minor remodeling for non-sectarian providers, while limiting such expenditures for sectarian providers to only those instances where remodeling was needed to meet health and safety requirements, would increase the workload of the Lead Agency, in that it will be necessary to track the nature of an organization requesting funds for minor remodeling.

Response: We did not propose any change in this regulation which has been in effect since 1992. The regulation implements section 658F(b) which does require that Lead Agencies distinguish between sectarian and non-sectarian providers in providing CCDF funds for minor remodeling. Nevertheless, we are unaware that this provision has been burdensome on Lead Agencies.

Subpart G—Financial Management Availability of Funds (Section 98.60)

Section 418 of the Social Security Act, which was added by PRWORA, requires that all Federal child care funds appropriated therein be spent in accordance with the provisions of the amended Child Care and Development Block Grant. In consolidating the Federal child care programs under a single set of eligibility requirements, Congress nevertheless instituted three funding sources. We have chosen to

refer to the combined funding as the Child Care and Development Fund—CCDF. This term recognizes the different sources of Federal monies flowing into child care but the common purposes for which they may be expended.

Section 418 of the Social Security Act appropriates Federal funds for the 50 States, the District of Columbia and Indian Tribes in the form of formula grants which we refer to as the Mandatory Fund. A specified amount of Federal funds is also made available under a different formula to the 50 States and the District of Columbia to match their allowable child care expenditures. We refer to this amount as the Matching Fund. Section 658B of the Child Care and Development Block Grant (CCDBG) Act authorizes funds to States, Tribes and Territories according to a third formula. We refer to the funds authorized under the CCDBG Act as Discretionary Funds. The formulas for allocating each of the Funds and requirements unique to each Fund are discussed at §§ 98.61, 98.62 and 98.63.

Both the Mandatory and Discretionary Funds are 100 percent Federal Funds—no match is required to use these Funds. Section 418(a)(2)(C) of the Social Security Act, however, makes the availability of Matching Funds contingent on a State's child care expenditures.

We have deleted the regulation formerly at § 98.60(g) concerning start-up planning costs associated with the initial implementation of the CCDBG and have redesignated the remaining regulations. All of the States began operating a CCDBG program in FY 1991, therefore the regulation at § 98.60(g) is obsolete since the time frames for obligating and expending start-up funds have passed. We recognize that there still may be Tribes that wish to begin a CCDF program and for which the question of start-up funds still applies. Accordingly, we have addressed the availability of funds for planning purposes for new Tribal Lead Agencies at § 98.83(h) in subpart I.

We have also clarified the wording of § 98.60(f) to indicate that 31 CFR part 205 applies only to State Lead Agencies.

Obligation period/liquidation periods. The following table shows the obligation and liquidation periods for the various Funds and the maintenance-of-effort (MOE) requirements.

These funds	Must be OBLIGATED by the end of the	AND, must be LIQUIDATED by the end of the
Discretionary	2nd FY	3rd FY.
Mandatory (State)	1st FY—only if Matching is requested	NA, no limit.
Mandatory (Tribes)	2nd FY	3rd FY.

These funds	Must be OBLIGATED by the end of the	AND, must be LIQUIDATED by the end of the
Matching	1st FY	2nd FY.
MOE	1st FY, <i>and</i> expended in that FY	NA, must be liquidated in 1st FY.

The PRWORA amended the CCDBG Act to require States and Territories to obligate their Discretionary allotments in the fiscal year in which they are received, or in the succeeding fiscal year. These amendments return the statutory language to its status before the Juvenile Justice and Delinquency Prevention Amendments of 1992 (Pub. L. 102-586). Since the final regulations which would have incorporated the changes from the Juvenile Justice and Delinquency Prevention Amendments of 1992 were never published, no change is needed in the regulatory language.

The FY 1997 Health and Human Services appropriation (Pub. L. 104-208) changed the date that the CCDF Discretionary Funds will become available from September 30 of the fiscal year in which the funds are appropriated to October 1 of the following fiscal year. As a result, when existing regulatory language is applied, States and Territories have two full fiscal years to obligate their CCDF Discretionary Funds, instead of the year and a day which resulted under earlier appropriations. States and Territories continue to have until the end of the third fiscal year to liquidate these funds.

Section 418(b)(1) of the Social Security Act provides that the Mandatory Fund is available without fiscal year limitation. However, section 418(a)(2)(C) of the Social Security Act, which describes the conditions for receiving Matching Funds, indicates they are paid to a State for expenditures that exceed the State's Mandatory grant and MOE level, and are only available on an annual basis. Moreover, section 418(a)(2)(D) of the Social Security Act requires that Matching Funds that are not used in the fiscal year be made available for redistribution in the following fiscal year. Therefore, a State wishing to claim Matching Funds must obligate its Mandatory Funds before the end of the fiscal year for which the Mandatory Funds are awarded. States not wishing to claim Federal Matching Funds have no obligation or liquidation deadline for their Mandatory Funds.

Also, the amount of a State's MOE requirement must be obligated and liquidated before the end of the fiscal year for which Matching Funds are awarded. Non-Federal expenditures (exceeding the MOE threshold) for which the State wishes to claim monies

from the Matching Fund must also be obligated before the end of the fiscal year for which they are awarded.

The same obligation and liquidation periods that apply to the State Discretionary Funds apply to the tribal funds. While the FY 1997 appropriation changed the date Discretionary Funds become available, under the revision Tribes will continue to have two full years to obligate the child care funds they receive. Further, under these regulations, Tribes will receive an additional year to liquidate these Funds. Retaining the previous regulations would have had the consequence of providing three full years to obligate and liquidate tribal child care grants.

The amendments to the Discretionary Fund under PRWORA for the first time provide that tribal funds are subject to reallocation. The two-year approach to obligation will encourage Tribes to plan for the timely commitment of funds and, at the same time, make uncommitted funds available on a timely basis to those Tribes that are in need of additional child care monies.

Section 98.60(d)(3) lists the obligation and liquidation periods for States that receive Matching Funds. In order to accommodate the redistribution required by section 418(a)(2)(D) of the Social Security Act, the regulation requires that Matching Funds must be obligated in the fiscal year in which they are granted and liquidated within two years.

Returned Funds. As a result of the changes made by PRWORA and the change in the date of availability of the CCDF Discretionary Funds made by the FY 1997 HHS appropriation, § 98.60(g) requires that funds returned to the Lead Agency after the end of the applicable obligation period must be returned to the Federal government. Under this provision, however, and as previous regulations permitted, funds returned during the obligation period may be re-obligated for activities specified in the Plan, provided they are obligated by the end of the obligation period. This provision was inadvertently deleted in the proposed rule but has been added back in the final rule at section 98.61(g)(1). The re-obligation of funds will not result in any extension of the obligation period.

The 1992 regulations allowed States to follow State or local law or procedures regarding funds returned after the end of the obligation period.

The provision was applicable only to what now are the Discretionary Funds part of the CCDF. It recognized that although section 685J(c) of the Act provided for a two-year obligation period for those funds, the Departments of Labor, Health and Human Services and Related Agencies Appropriations Act, 1991 (Pub. Law 101-517) provided that FY 1991 funds became available on September 7, 1991. The impact of that appropriation was that CCDBG funds (now called Discretionary Funds) were available for obligation only for barely over a year, instead of for two full years. The now-superseded provision regarding returned funds reflected ACF's desire that States not be put in the position of having to make premature decisions regarding obligations in a new program due to a truncated obligation period. Also, our reasoning for the former provision included the consideration that, even though the Act contained a reallocation provision for these funds, there appeared to be little likelihood that the States would return them for redistribution since they were 100 percent Federal funds.

The FY 1992 HHS appropriation (Pub. Law 102-170) moved the availability of CCDBG funds to the last day of the fiscal year, and the CCDBG funds continued to be paid on the last day of the fiscal year in subsequent years, until the Departments of Labor, Health and Human Services and Related Agencies Appropriations Act, 1997 (Pub. Law 104-208) again changed the date of the availability of these funds. The 1997 appropriation provides that, starting with the FY 1998 Discretionary Funds, Discretionary Funds will be made available on the first day of each fiscal year. The result of this change is that there now will be two full years to obligate Discretionary Funds.

Further, the regulations at the former § 98.60(h) would have been inappropriate to the new Mandatory and Matching Funds provided under PRWORA. The law, at section 418 of the Social Security Act, requires redistribution of the Matching Funds to other States, if the State to which they were granted does not use them in the fiscal year in which they are granted. Also, the Secretary must determine the amount of Matching Funds available for redistribution by the end of the first quarter of the fiscal year following the

year the grant was awarded. The law links use of Matching Funds to use of the Mandatory Funds—and, as provided in the regulations at § 98.60, Mandatory Funds must be obligated in the year in which they are granted if a State requests Matching Funds. Unlike the Discretionary and Mandatory Funds, the Matching Funds are not 100 percent Federal funds, and there seems to be a greater possibility that some of these funds would be returned for redistribution. Thus, the former returned funds regulations would not have been workable for these funds, and were changed.

Comment: Although not addressed in the proposed regulations, many commenters objected to our policy of allocating Discretionary and Mandatory Funds on a quarterly basis, rather than as a single grant at the beginning of the fiscal year. They felt that such a policy should be applicable to matching grant programs only, not to entitlements to the States, such as the Discretionary and Mandatory Funds.

Response: The Office of Management and Budget has determined that each of the individual CCDF funds are to be apportioned to the States quarterly. We note that other non-matching grant programs, such as title XX, are also subject to such quarterly apportionments.

Comment: Some commenters suggested that we allow unlimited obligation and expenditure periods for Tribal Mandatory funds, citing the unlimited periods for State Mandatory funds (if the State does not use Matching funds).

Response: We have kept the proposed obligation and liquidation time frames for Tribal Mandatory funds. Although there is a statutory exception for State Mandatory funds to the normal one-year obligation period (unless the State uses Matching funds), Tribal Mandatory funds are not analogous to State Mandatory funds and have no such statutory exception. Furthermore, in the past, a significant number of Tribes have returned funds to the Federal Treasury. Therefore, we believe that the required obligation/liquidation time frames are reasonable and necessary to ensure that funds are used in a timely manner.

Comment: Several commenters wanted us to revise § 98.60(d)(5)(ii) to allow Interagency agreements and or contracts between government entities at the same level to constitute obligations.

Response: We had not proposed any change to this regulation which has been in effect since 1992. This issue is addressed in the preamble to the 1992 regulations at 57 FR 34395 and that

discussion reflects our continued position.

As a practical matter, funds that are transferred to another part of State government, either at the same level, or at a lower level, simply do not reflect the same real fiscal commitment of funds to the CCDF program as occurs when funds are transferred to a third party.

Comment: One commenter observed that § 98.60(d)(6)—regarding obligating funds using a certificate—is problematic because the amount of funds that may be actually used by the family cannot be known with certainty as the family may use fewer hours of care than was indicated on the certificate. The commenter wanted to eliminate the requirement to include the amount of funds on the certificate.

Response: This provision is unchanged from the 1992 final rule and this situation was addressed in the preamble at 57 FR 34395. Without an amount it is unclear how the commenter would determine how much was obligated.

Stating an amount on the certificate fulfills the obligation requirement, yet, as explained in the 1992 preamble, the Lead Agency can nevertheless make adjustments to reflect the actual use of funds, reobligating if within the obligation period, to ensure the liquidation of funds within the prescribed period.

Comment: One commenter, understanding the necessity to recover fraudulently received payments, suggested that § 98.60(i) reflect a minimum threshold under which recovery would not be necessary. For example, if the administrative expense of recovery exceeded the amount fraudulently received.

Response: As we stated in the 1992 preamble at 57 FR 34397, any payments not made in accordance with the Act, regulation or approved State Plan may not be charged to the program and will be disallowed pursuant to § 98.66. Should a State choose not to pursue fraudulent payments because to do so may not be cost-effective, the amount of that fraudulent payment may not be charged to the CCDF.

Allotments From the Discretionary Fund (Section 98.61)

The allotment formulas for the Discretionary Fund are unchanged from the original formulas for the CCDBG and are discussed in the 1992 preamble at 57 FR 34397.

In response to an amendment to section 658P(14) of the CCDBG Act, we have added a provision allowing for Discretionary Fund grants to a Native

Hawaiian Organization and to a private nonprofit organization established for the purpose of serving Indian or Native Hawaiian youth. This provision is discussed below.

Data sources for tribal allotments. The CCDBG Act requires the Secretary to obtain the most recent data and information necessary, from each appropriate Federal agency, to determine State funding allotments. There is no similar statutory requirement for determining tribal allotments.

In past years, ACF used two separate data sources to calculate tribal child counts: the Bureau of Indian Affairs' (BIA) Indian Service Population and Labor Force Estimates Report, published biennially, and the 1990 Census (for Alaska-specific data). These data sources are addressed in the CCDBG Final Rule (45 CFR 98 and 99, published August 1992).

In the proposed rule, ACF discussed a new self-certification process for tribal child counts used to calculate tribal allotments under the Child Care and Development Fund. This approach affords Tribes the opportunity to select a data source, or utilize a method for counting tribal children, which most accurately reflects its child population.

In addition, the child count data will be available with minimal lag time and will more accurately reflect the natural fluctuations in child population. With data sources used and discussed in the 1992 CCDBG Final Rule, it can take 2 to 3 years for changes in population (such as reaching a child population of 50) to be reflected.

Finally, this approach supports the President's April 29, 1994, mandate to Federal agencies reaffirming the government-to-government relationship between Tribes and the Federal government and directing agencies to design solutions and tailor Federal programs, in appropriate circumstances, to address specific or unique needs of tribal communities.

Beginning with funding available in FY 1998, ACF implemented a new self-certification method for tribal child counts. In the proposed rule, we stated that self-certified counts for FY 1998 would continue to include children under age 16, consistent with the age category in the BIA Report. Furthermore, we proposed that for funds available in FY 1999, tribal child count declarations would include only children under age 13, in accordance with the CCDBG statute, thereby allowing a one-year transitional period for Tribal Lead Agencies to plan for a self-certified child count of children under age 13.

We have slightly modified this approach in this regulation to continue to permit self-certification of tribal child counts to include children under age 16 for funds which become available in FY 1999. While we fully embrace self-certification of tribal child counts, based on the practical experience in implementing this approach for FY 1998 tribal grant awards we believe that more time is necessary for some tribal grantees to plan for counting children under age 13.

This additional time is particularly important since Tribes will no longer be able to use the data in the BIA Report, and there is no frequently published national data source which provides counts of children under age 13 for all current or potential CCDF tribal grantees. However, despite the extension of the transition period, we still plan to require self-certification of children under age 13 beginning in FY 2000.

Each year ACF will issue instructions for Tribes to follow in submitting their self-certified child counts. Each tribal grantee and each Tribe participating in a consortium will be required to submit a child count declaration signed by the governing body of the Tribe or an individual authorized to act on behalf of the applicant Tribe or organization.

Grants to a Native Hawaiian organization and a private nonprofit organization serving Indian or Native Hawaiian youth. Section 658P(14) of the amended CCDBG Act adds the following second definition to the term "tribal organization" which are potentially eligible for Discretionary Funds:

"Other organizations—Such term includes a Native Hawaiian Organization, as defined in section 4009(4) of the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988 and a private nonprofit organization established for the purpose of serving youth who are Indians or Native Hawaiians."

Section 4009(4) of the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988 defines a Native Hawaiian Organization as:

"A private nonprofit organization that serves the interests of Native Hawaiians, and is recognized by the Governor of Hawaii for the purpose of planning, conducting, or administering programs (or parts of programs) for the benefit of Native Hawaiians."

No other changes were made in the Act with respect to Native Hawaiians or Native Hawaiian Organizations (NHOs) or private nonprofit organizations (PNOs) established for the purpose of serving youth who are Indians or Native

Hawaiians; nor is the Conference Agreement instructive as to Congressional intent. However, given the statutory language, we provide at § 98.61(e) that only a single NHO and a single PNO will be funded.

Several options were considered for allocating funds in accordance with this expanded definition of tribal organization. We considered, for example, treating NHOs and PNOs in the same manner for allocation purposes as other tribal organizations (i.e., a base amount plus a per child amount, or only a per child amount).

Based on an analysis of the statute, however, we believe the Congress intended for an NHO and a PNO to be treated differently from Indian Tribes and tribal organizations which are eligible to receive CCDF funding. CCDF funds are awarded on a formula basis to all eligible Tribes and consortia. However, only a single NHO and a single PNO are to be awarded grants. Determination of those entities requires a discretionary grant process rather than the formula basis used for Indian Tribes and tribal consortia.

Eligible NHOs and PNOs, as well as the States, are reminded that under § 98.80(d), Indian children continue to have dual eligibility to receive services funded by CCDF. Indian children and Native Hawaiian children will continue to be eligible for services provided under a grant awarded to a NHO or PNO and from the State of Hawaii (or other State in the case of a PNO awarded to a grantee not located in Hawaii).

Therefore, through a grant award to a NHO and a PNO, additional child care services (from the Discretionary Fund) are available to children who are currently eligible to be served under a State CCDF program. A more detailed explanation of dual eligibility is provided in the Preamble at Subpart I.

For these reasons, up to \$2 million is reserved from the total amount reserved for Tribes under the Discretionary Fund for two grants each fiscal year. We believe that such an amount is substantial enough to meaningfully serve populations that may have been under-served in the past, without jeopardizing existing tribal programs.

Allotments From the Mandatory Fund (Section 98.62)

Section 418(a) of the Social Security Act creates a capped entitlement for the 50 States and the District of Columbia. The amounts allotted to each State and the District are based on the Federal share of expenditures for child care under prior programs under title IV-A of the Social Security Act (i.e., the AFDC/JOBS, Transitional and At-Risk

Child Care programs) in FY 1994, FY 1995, or the average of FY 1992-1994, whichever is greatest. Before funds are allocated to the individual States, one-quarter of one percent of the total is reserved for the provision of technical assistance and up to two percent is reserved for grants to Tribes.

For Indian Tribes and tribal organizations we have chosen to allocate Mandatory Funds solely according to the number of Indian children in each Tribe's service area. That is, unlike the Discretionary Fund, there is no base amount provided to Tribes under the Mandatory Fund.

We chose this approach in response to tribal arguments for increased funding for direct services. We agree that tribal child care programs would especially benefit from additional service funds, and we did not wish to divert any new funds into non-service activities. Tribes have the flexibility to expend their base amount on administration or direct services, including quality activities. However, we are concerned that many large consortia already receive substantial sums of base amount monies. According to the program reports from those consortia, it appears that these large base amounts often do not translate into direct child care services for tribal children. We do not believe that tribal children would benefit from augmenting the existing base amount in lieu of direct child care services.

Lastly, we listed the 13 entities in Alaska that are eligible to receive Mandatory Funds pursuant to the amended section 419(4)(B) of the Social Security Act. We listed those eligible entities in this section of the regulation rather than have two different definitions of Tribes at § 98.2.

Allotments From the Matching Fund (Section 98.63)

As provided in the statute, allotments to each of the 50 States and the District of Columbia are based on the formula used to distribute funds under the now-repealed At-Risk child care program. The Matching Fund consists of the amount remaining from a fiscal year's appropriation under section 418(a)(3) of the Social Security Act after reserving amounts for technical assistance and for Tribes and awarding Mandatory Funds.

Reallotment and Redistribution of Funds (Section 98.64)

The provisions for reallotment and redistribution of Discretionary funds remain essentially unchanged from the 1992 regulations. The reallotment/redistribution process is described at 57 FR 34401, August 4, 1992. However, the

OMB-approved form ACF-696 now asks the State to indicate if it wants any Discretionary Funds that might be reallocated. Discretionary Funds will be reallocated only to those States that request them. Therefore, the provision formerly at § 98.64(b)(2)(iv) that returned to the Federal government any reallocated funds that a State "does not accept" is deleted as unnecessary.

Section 418(a)(2)(D) of the Social Security Act, which was amended after the proposed rule was published in July 1997, now provides for the redistribution of Federal Matching Funds which are allotted to a State, but not used. This new provision is now added to the regulations at § 98.64(c)(2). We have adopted the statutory term "redistribute" when discussing the Matching Fund in the regulation. However, we believe that the term is comparable to the "reallotment" of the Discretionary Funds and have therefore adopted a comparable process. For example, at § 98.64(c)(3) we have applied the language from the reallotment process at § 98.64(b)(2) to describe the same limits on the amounts of unobligated Matching grants that will be redistributed to other States that currently apply to the Discretionary Fund. That is, no redistribution will be made to States if the total to be redistributed is less than \$25,000. Nor will any grant be made to an individual State if it would be less than \$500. As provided in the statute, redistribution of the Matching Funds will be based on a formula similar to that used for the original allotments to the 50 States and the District of Columbia.

Section 98.64(c)(1) provides that Matching Funds allotted to a State, but not obligated by the end of that fiscal year, be redistributed to the other States which did obligate all of the Matching Funds allocated to them. Unused Matching Funds, then, would be made available only to those States which demonstrated their ability to use the entire amount already granted to them. According to the statute, such States must request the redistributed funds; the Funds will not automatically be redistributed to all qualifying States. We considered redistributing unused Matching Funds among each of the 50 States and the District of Columbia, including the States that returned the money being reallocated. We rejected that approach since it raised the possibility that States which were unable to use all of their funds in one year would again be unable to use them in the following year. This would result in funds reverting to the Federal Treasury rather than being used to assist families.

Sections 98.64(c)(3) and (4) provide that States use the regular financial reporting form, ACF-696, instead of a separate notification from the State. These provisions allow for a simplified process by which States can both notify us of any unobligated Matching Funds available for redistribution and request redistributed Matching Funds.

Section 98.64(c)(6) reflects the statutory language that redistributed Matching Funds are to be considered as part of the grant for the fiscal year in which the redistribution occurs, not as a part of the grant for the year in which the funds were first awarded. This is in contrast to reallotment of Discretionary Funds; for Discretionary Funds the obligation period is based on the award year and is not extended.

An amendment to section 6580 of the Act provides for the reallotment of tribal Discretionary Funds. That amendment, at 6580(e)(4), requires the Secretary to reallot any portion of a tribal grant that she determines "is not being used in a manner consistent with the provision of [the Act]."

Although the statutory language seems to suggest that the Secretary may make a determination which is separate and apart from the usual audit practice on the manner of use of funds by Tribes, there is no discussion in the Conference Agreement to indicate such an interpretation. Furthermore, we believe that Congress would have been more explicit if it desired the Secretary to create a separate audit or investigatory process. Therefore, § 98.64(d) provides for a reallotment process that parallels the State process. That is, we will determine the amounts to be reallotted based upon reports submitted by the Tribes, pursuant to paragraph (d)(1) of this section. Each Tribe must submit a report to the Secretary indicating either the amount of funds from the previous year's grant it will be unable to obligate timely pursuant to § 98.64(d), or that it will obligate all funds in a timely manner. The reports must be submitted each year by a deadline established by the Secretary. Unless notified otherwise, this deadline will be April 1, and the reports may be in the form of a letter. We chose the April 1st deadline to allow the Secretary the necessary time to reallot the funds and to allow Tribes the necessary time to obligate such funds on a timely basis. While the proposed rule included the April 1 deadline in the regulatory language itself, we decided in the final regulation to leave flexibility to accommodate any changes that might be necessary as we implement the reallotment procedures.

We will reallot funds that Tribes indicate are available for reallotment to

the other Tribes, in proportion to their original allotment, if the total amount available for reallotment is \$25,000 or more. If the total amount is less than \$25,000, we will not reallot these funds; instead, they will revert to the Federal Treasury. It is administratively impractical for the Department to issue small awards. Likewise, the Secretary will not award any reallocated funds to a Tribe if its individual grant award is less than \$500, as it is administratively impractical to do so.

If a Tribe does not submit a reallotment report by the deadline for report submittal, we will determine that the Lead Agency does not have any funds available for purposes of the reallotment. If a report is postmarked after the deadline established by the Secretary (April 1, unless notified otherwise), we will not reallot the amount of funds reported to be available for reallotment; instead, such funds will revert to the Federal Treasury. As previously discussed, late reports do not allow the Secretary sufficient time to reallot the funds nor do they allow the Tribes sufficient time to obligate such funds timely as required by § 98.64(d). We anticipate the Secretary will reallot funds made available for reallotment within a month of the deadline for receipt of reallotment reports. Reallocated funds must meet the same programmatic and financial requirements as funds made available to Tribes in their initial allotments.

The statute, and hence the regulations, remain unchanged regarding the reallotment of Discretionary Funds to the Territories. That is, there is no reallotment of Territorial Discretionary Funds.

Comment: A number of commenters questioned why the regulation did not specifically reflect the statute regarding the timing of the determination and redistribution of returned Matching funds.

Response: Section 418(a)(2)(D) of the Social Security Act provides that the Secretary shall make a determination "not later than the end of the first quarter of the subsequent fiscal year" whether Matching funds are available for redistribution. And, that any redistribution "shall be made as close as practicable to the date" on which that determination is made.

Because this is a requirement on the Secretary, we did not believe it is necessary to include it in the regulation. We will follow the timeframes provided for in the Act.

Comment: One commenter suggested that the obligation and liquidation periods for reallocated Matching Funds should start from the time the funds are

reallotted, not at the beginning of the fiscal year in which the reallotment takes place.

Response: The requirement is statutory and the statute does not provide for extending the program period of reallotted Matching Funds.

Comment: Another commenter asked how States will know that Matching funds are available for redistribution, and noted that the regulation fails to state when a request for redistributed Matching funds is to be made by the State.

Response: We did not want to create a cumbersome, time-consuming process for redistributing Matching funds. Therefore, we did not propose the separate step of notifying States of the availability of redistributed funds. Rather, the required quarterly ACF-696 referred to in the regulation asks if the State wishes to request redistributed Matching funds, should any become available. This request is to be completed in the quarter preceding the final quarter in a fiscal year, as described in the instructions to the ACF-696 published as Program Instruction ACYF-CC-PI-05, dated September 26, 1997. We believe that this process will best expedite the redistribution of Matching Funds, should any become available. This process should also allow us to meet the time requirements in the Act on redistribution, thereby maximizing the amount of time that remains in the fiscal year for the State to obligate the redistributed Matching funds.

Comment: One commenter suggested that instead of redistributing returned State Discretionary funds to other States, those funds should be reallotted to the Tribes in the State that returns them.

Response: As discussed in the preamble to the 1992 rule at 57 FR 34401, Tribes are not eligible to receive State funds made available for reallotment.

Comment: Several commenters objected to the proposed dollar thresholds required for reallotment to Tribes. In the proposed rule, we used the same thresholds for Tribes as for States—\$25,000 for the total amount available for reallotment and \$500 for an individual grant award. Commenters argued that the thresholds for Tribes should be lower, given the smaller size of tribal grant awards.

Response: Based on these comments, we considered lowering the dollar threshold for Tribes in the final regulation. However, after discussing the administrative burden of small grants with ACF fiscal staff we decided to keep the \$25,000 and \$500 thresholds

because it is administratively impractical for the Department to issue and track grant awards for smaller amounts.

Audits and Financial Reporting (Section 98.65)

Commenters were almost universally opposed to our proposed regulatory interpretation of the amended section 658K of the Act. They pointed out that our interpretation of “an entity that is independent of the State” was inconsistent with section 7501(a)(8) of the Single Audit Act Amendments of 1996. That section defines an independent auditor as an “external State or local government auditor who meets the independence standards included in generally accepted government auditing standards.” We have, therefore, amended the regulation to reflect that State auditors who meet the generally accepted auditing standards issued by the Comptroller General, including public accountants who meet such independence standards, may perform the required audits. We also corrected certain references, such as replacing the reference to OMB Circular A-128 with a reference to OMB Circular A-133, which was issued to replace A-128 after our proposed rule was published.

Subpart H—Program Reporting Requirements

Reporting Requirements (Section 98.70)

Section 658K(a) of the amended Act requires each State receiving Child Care and Development Fund funding to submit two reports: monthly case-level data for families (reported quarterly) and annual aggregate data. Territories are considered States for reporting purposes. The first annual aggregate report was required to be submitted by December 31, 1997, and annually thereafter.

Comment: Several commenters requested a delay in the submission of the first case record report (ACF-801) due to the changes made by the technical amendments to the law. They also requested that States be allowed to submit data monthly rather than quarterly.

Response: ACF recognizes these requests as justifiable. Therefore, as indicated at § 98.70, we extended the due date for the first quarterly submission (ACF-801) from February 15, 1998 to August 30, 1998. We also allow States to submit data monthly rather than quarterly. If they choose to submit data monthly, the first reported month, April 1998, is due 90 days later

by July 30, 1998, with following reports every 30 days thereafter.

Section 658L of the Act requires the Secretary to prepare a report to Congress every two years summarizing the data and information required at section 658K of the Act and § 98.71 of the regulation.

Section 658O(c)(2)(C) of the Act specifies that Tribes will report on programs and activities under CCDF. We require Tribes to submit annual aggregate data appropriate to tribal programs as they have previously in the CCDBG program.

Principles for data reporting. The amended Act significantly revised the reporting requirements for all child care services. As a result, ACF developed principles to guide the implementation of reporting requirements. ACF, in concert with the Lead Agencies, will:

1. Meet the statutory mandate for data reporting;
2. Streamline data collection and reporting procedures from the previous four programs into a single integrated program;
3. Build on data collection systems from the former four child care programs;
4. Apply flexibility in phasing in the implementation of the data collection requirements;
5. Apply flexibility in meeting data needs outside the Federal requirements;
6. Provide technical assistance to Lead Agencies in the design of new or revised data collection systems and reporting processes, encouraging linkages to TANF information systems and to other relevant Federal reporting systems;
7. Provide sampling specifications to Lead Agencies as part of the data collection process;
8. Provide technical assistance to Lead Agencies in the design and use of data for the development of program performance measures; and
9. Commit to making the data useful for Lead Agencies.

Content of the Reports (Section 98.71)

For States and territories. Consistent with the requirements of section 658K of the amended Act, we require States to collect monthly samples of case-level family data which are reported to ACF quarterly, or monthly if the State chooses to do so. To provide for adequate time for the approval process for sampling plans, we require at § 98.70(a)(3) that States submit their sampling plan to ACF for approval 60 days prior to the submission of the first report. States are not precluded from submitting case-level data for the entire population of families served under the

CCDF. Specific aggregate information is required in the annual report.

Cost of Care. Although the statute requires that cost of care information be provided in both the case-level and aggregate reports (658K(a)(1)(B)(ix) and 658K(a)(2)(B)), we will collect this information through the case-level report only and we will compile the information into the aggregate. This will eliminate duplicative reporting for the annual aggregate report.

Section 658K(a)(2)(C) requires that the number of payments made through various methods by types of providers be reported annually. Most States pay providers monthly; a few pay more frequently. If the statutory language is narrowly interpreted, States would be required to report as many as 12–24 payments or more for each subsidized child throughout the year. Because this information would be of limited value, we are regulating at § 98.71(b)(2) that the Lead Agency's report reflect the number of children served by payment method and primary type of provider during the final month of the report period only (or for the last month of service for those children leaving the program before the end of the report period). Changes in payment method or primary provider type over the report period should be ignored and only the last arrangement reported.

Comment: Several commenters requested that ACF include information about child care provider auspice or sponsorship in the reporting requirements, noting that the definitions section of these regulations (§ 98.2) refers to the type of provider as non-profit, sectarian, and relative providers and that the statute uses the word "types".

Response: Section 658K of the CCDBG Act as amended by the PRWORA specifically designates the child care data items which Congress mandated. In Section 658K(a)(1)(B)(vii), the statute states that quarterly case-level data should be collected on the "type of child care in which the child was enrolled (such as family child care, home care, or center-based care)." Additionally, Section 658K(a)(2)(A) of the amended statute requires Lead Agencies to report aggregate information about the number of child care providers that received funding "as separately identified based on the types of providers listed in section 658P(5)." Section 658P(5) specifically mentions center-based, group home, family child care, and relative care.

Although these statutory references seem to conflict with the term "types of providers" listed in § 98.2 of the rule, ACF has decided that it is not

inherently inconsistent to use a different statutory definition for reporting purposes. Congress entertained much discussion around reporting requirements. Their strong need for specific child care data can be inferred from their resolve to include specific reporting elements in the statute. Additionally, even though recent technical amendments slightly revised the reporting requirements, no specific direction was given in the technical amendments to collect information based on sponsorship.

During the time reporting procedures have been under development, ACF has consulted with program administrators and system/information management specialists at the State level, as well as the American Public Welfare Association and the National Association of Child Care Resource and Referral Agencies. We have learned that most State information systems are built on payment systems, rather than provider identification systems, such as licensing programs might maintain. Requiring the collection of auspice or sponsorship information would represent a significant information collection burden for States which is not specifically authorized by the statute.

Program sponsorship is a difficult element to collect. However, we do recognize the interest of some organizations to learn about different sponsoring agents and toward that end we will include sponsorship as an optional data reporting element when these are developed in the future.

Comment: Several commenters requested that ACF not collect Social Security Number (SSN) as a case identifier. One commenter in particular argued that the collection of Social Security numbers may have a chilling effect on immigrant families wishing to apply for child care services.

Response: ACF is requiring the collection of SSN as a case identifier because it is necessary for gathering the aggregate data needed for research tied to TANF, employment and other child-related programs. Legal immigrants who work are entitled to receive child care subsidies. Therefore, requesting them to provide SSN is not a deterrent. Illegal immigrants are prevented from working by law and would not need subsidized child care.

Comment: A commenter objected to the collection of average hours of care per month and suggested that we allow States that collect the data weekly to be able to report weekly averages.

Response: The technical amendments to the law require the change in reporting the hours of care from weekly to monthly. Uniform reporting

requirements dictate that data be reported by all States in the same manner to avoid confusion in data analysis. Therefore, all States should report monthly hours. States that collect the data weekly should transform the data into monthly data. We will provide technical assistance in how to perform this calculation.

Comment: Several commenters objected to the collection of "reasons for care" item because it is not in the law and puts an additional burden on the States.

Response: The "Reason for Care" data element has previously been collected in the old CCDBG and JOBS/AFDC child care programs and the collection of this data does not represent a new burden for the States. ACF will continue to collect "reasons for care," i.e. working, training/education, or protective services because it best informs State and Federal planning and policy efforts. In addition, since the State has the option of not requiring income data for children in protective services, these cases need to be identified to determine if the missing data is appropriate. We will provide technical assistance to States experiencing difficulties with this data element.

Comment: One commenter recommended using the Census Bureau standards for reporting race.

Response: We have changed our race definitions to comply with the new OMB guidelines (**Federal Register** of 10/30/97) for Census Bureau reporting of race. Under these new guidelines, we will divide the child race element into two questions:

Child Ethnicity

1. Hispanic or Latino
2. Not Hispanic or Latino

and

Child Race

1. American Indian or Alaska Native
2. Asian
3. Black or African American
4. Native Hawaiian or Other Pacific Islander
5. White

On the second question, respondents will be allowed to report more than one category.

Information concerning child care disregards is required by the statute at 658K(a)(2)(C); however, disregards, if used, would be provided under the TANF programs, not child care programs. As a result, information on the use of the disregard will be collected through TANF reporting procedures, since TANF agencies can collect this information more reliably.

Comment: One commenter was concerned that child care disregard information would not be collected by

TANF since it is not required by statute. They also were concerned that some States may elect to spend a lot of TANF funds on child care without transferring the funds to CCDF.

Response: We have coordinated data collection efforts with the TANF program. The proposed TANF regulations require information about the child care disregard, as well as child care information for families that receive child care through TANF funding.

Comment: Several commenters requested that ACF collect some additional items that are not required by the statute but are important for understanding the program and improvement of program management. The suggested elements included items such as disability status and number of weeks of care each month.

Response: Requiring the collection of such items is important, but represents a significant increase in the reporting burden on the States. ACF has decided against adding these items as required elements to avoid requiring an additional burden on the States. However, because we recognize the importance of such items, we will consider these and other important items, as we develop optional data reporting elements, with input from the States, in the future.

To have a complete picture of child care services in the States, quarterly case-level data and annual aggregate information will be collected on all funds of the Child Care and Development Fund, including Discretionary Funds (which include any funds transferred from the TANF Block Grant), Mandatory Funds, and Federal and State Matching Funds, as well as funds used for Maintenance-of-Effort (MOE). For States that choose to pool CCDF funds with non-CCDF funds (e.g. title XX, or State or local funds not part of the CCDF MOE or Match) we will allow reporting and/or sampling on all children served by the pooled funds, but will require States to indicate percentages of CCDF and non-CCDF funds in the pool of funds. Detailed instructions on how to construct sampling frames for States with pooled funds will be included in the sampling specifications developed by ACF. Technical assistance will be provided to States regarding collecting data across funding streams.

Additionally, States have indicated a desire to compare data which are not a part of the mandatory reporting requirements. To meet this need and to make the available child care data more useful to State planning efforts, the Department will collaborate with States

regarding a set of standardized optional data elements. The reporting of these data elements will not be required of any grantee.

We have provided additional information to Lead Agencies concerning specific reporting requirements, approved data definitions, reporting formats, sampling specifications for the quarterly case-level report, and the submission process in ACYF-PI-CC-97-08, dated November 25, 1997 and in ACYF-PI-CC-98-01, dated January 25, 1998. In this final rule, for ease of reference, we conformed the regulatory language at §§ 98.71(a)(1), (6), (7), and (10) to mirror the data collection elements of the ACF-801, Child Care Quarterly Case Record (OMB Number 0970-0167).

For Tribes. Tribes are neither required to submit the aggregate annual report nor the new case-level quarterly report as States are. Instead, Tribes will continue annually to submit the ACF-700 which is currently in use. They will include information on all children served under the Discretionary and Tribal Mandatory funds. As of fiscal year 2000, Tribes will no longer be required to submit the second page of the ACF-700 (fiscal programmatic data for CCDBG funds). Fiscal information for Tribes will be collected on a separate tribal financial reporting form.

Subpart I—Indian Tribes

This Part addresses requirements and procedures for Indian Tribes and tribal organizations applying for or receiving CCDF funds. In light of unique tribal circumstances, Subpart I balances flexibility for Tribes with the need to ensure accountability and quality child care for children.

Subpart I specifies the extent to which general regulatory requirements apply to Tribes. In accordance with § 98.80(a), a Tribe shall be subject to all regulatory requirements in Parts 98 and 99, unless otherwise indicated. Subpart I lists general regulatory requirements that apply to Tribes. It also identifies requirements that do not apply to Tribes.

Most programmatic issues that apply to Tribes are consolidated in Subpart I. However, financial management issues that apply to Tribes, including the allotment formulas and underlying data sources, are addressed separately in Subpart G—Financial Management.

Tribes have the option to consolidate their CCDF funds under a plan authorized by the Indian Employment, Training and Related Services Demonstration Act of 1992 (Pub.L. 102-477). This law permits tribal governments to integrate a number of

their federally funded employment, training, and related services programs into a single, coordinated comprehensive program.

Senate Committee Report language for that Act prohibits the creation of new regulations for tribal programs operating under the 102-477 initiative (S. Rep. No. 188, 102 Cong. 2d Sess. (1992)), therefore ACF is not promulgating any additional regulations for the Indian Employment, Training and Related Services application and plan process. ACF does publish annual program instructions providing directions for Tribes wishing to consolidate CCDF funds under an Indian Employment, Training and Related Services plan. The Department of the Interior has lead responsibility for administration of P.L. 102-477 programs.

General Procedures and Requirements (Section 98.80)

Demonstrations from Consortia. The regulation at § 98.80(c)(1) provides that a consortium must adequately demonstrate that each participating Tribe authorizes the consortium to receive CCDF funds on its behalf. This demonstration is required once every two years through the two-year tribal CCDF Plan. It is the responsibility of each consortium to inform ACF, through an amendment to its Plan, of any changes in membership during the Plan period.

Consortia can demonstrate members' agreement to participate in a number of ways. A resolution is acceptable. We will also accept an agreement signed by the tribal leader or evidence that a tribal leader participated in a vote adopting a consortium agreement.

Comment: Several commenters recommended a one-time or "standing" resolution from each consortium member which will remain in effect until rescinded.

Response: The purpose of the demonstration is to show that the member has authorized the consortium to act on its behalf. We have not changed this requirement because it is a measure designed to provide accountability to the individual members. We recognize the challenges of obtaining demonstrations, particularly in rural areas in Alaska due to seasonal work activities, but as a standing requirement Tribes should now be aware in advance that it will be needed and we will remind grantees about the demonstration requirement well before the Plan due date.

Special requirements for Alaska Native grantees. By statute (section 419 of the Social Security Act), only specified Alaska Native entities may

receive Tribal Mandatory Funds. The Metlakatla Indian Community of the Annette Islands Reserve and the 12 Alaska Native Regional Nonprofit Corporations are eligible to receive Tribal Mandatory Funds. The law provides that Discretionary Funds, however, will continue to be available to all the eligible Alaska Native entities that could apply under old CCDBG rules.

For purposes of Discretionary funding, Alaska Native Regional Nonprofit Corporations, which are eligible to apply on behalf of their constituent villages, will need to demonstrate agreement from each constituent village.

In the absence of such demonstration of agreement from a constituent village, the Corporation will not receive the per-child amount or the base amount associated with that village. This changes the policy stated in the preamble to the final rule issued August 4, 1992 (57 FR 34406). The former policy permitted Alaska Native Regional Nonprofit Corporations to receive the per-child amount (but not the base amount) for a constituent village in the absence of a demonstrated agreement from the village that the Corporation was applying for funding on its behalf. Since all other tribal consortia are required to demonstrate agreement from their member Tribes in order to receive Discretionary funding, this change makes the funding requirements consistent for all consortia grantees.

For purposes of Tribal Mandatory Funds, since the statute specifically cited the 12 Alaska Native Regional Nonprofit Corporations as eligible entities, demonstrations are not required by member villages for these entities to be funded.

Since the law provides that only designated Alaska Native entities may receive the Tribal Mandatory Funds, there is a difference between which Alaska Native entities can be direct grantees for the two tribal parts of the CCDF. Our analysis indicates, however, that each of the Alaska tribal entities that are eligible to receive Discretionary Funds is served by one of the 12 Alaska Native Regional Nonprofit Corporations that by law can be direct grantees for the Tribal Mandatory Funds. In instances where there are different Alaska Native grantees for the two parts of the fund, we strongly encourage grantees to work together to ensure a coordinated tribal child care system in Alaska.

Dual eligibility. Under § 98.80(d), Indian children continue to have dual eligibility to receive child care services funded by CCDF. Section 6580(c)(5) of the Act mandates that, for child care

services funded by CCDF, the eligibility of Indian children for a tribal program does not affect their eligibility for a State program. To receive services under a program, the child must still meet the other specific eligibility criteria of that program.

This provision was in the original Act, and it was not affected by the recent PRWORA amendments. Regulations at § 98.20(b)(1) continue to provide that Lead Agencies may establish eligibility requirements, in addition to Federal eligibility requirements, so long as they do not “discriminate against children on the basis of race, national origin, ethnic background, sex, religious affiliation, or disability.” As a result, States cannot have a blanket policy of refusing to provide child care services to Indian children.

At the same time, tribal CCDF programs are a valuable source of child care for Indian children, including children whose families receive TANF assistance. In particular, a Tribe that operates its own TANF or work program (or both) will have an important role in promoting self-sufficiency for its low-income families, including the provision of adequate child care. However, Indian children have dual eligibility for CCDF child care services regardless of whether a Tribe operates its own TANF or work program. Therefore, we encourage States and Tribes to work closely together in planning for child care services. Coordination of child care resources will be needed to meet the child care needs of eligible Indian families.

Eligibility. Under § 98.80(f), Tribal Lead Agencies continue to have the option of using either the State’s median income or the tribal median income in determining eligibility for services. In determining eligibility for services pursuant to § 98.20(a)(2), a tribal program may use either: (1) up to 85 percent of the State median income for a family of the same size; or (2) up to 85 percent of the median income for a family of the same size residing in the area served by the tribal grantee.

Application and Plan Procedures (Section 98.81)

Section 98.81 contains application and Plan requirements for Tribes and tribal consortia. In accordance with § 98.81(a), Tribes must apply for funds pursuant to § 98.13, except that the requirement at § 98.13(b)(2) does not apply.

A Tribal Lead Agency must submit a CCDF Plan, as described at § 98.16, with the additions and exceptions described in § 98.81(b).

Section 98.81(b)(2) requires definitions of “Indian child” and “Indian reservation or tribal service area” for purposes of determining eligibility.

Section 98.81(b)(4) requires information necessary for determining the number of children for fund allocation purposes and grant eligibility requirements (i.e., the requirement that a Tribe must have at least 50 children under 13 years of age in order to directly apply for funding). The preamble discussion to Subpart G summarizes the data sources used to determine tribal allotments.

Other changes in Plan provisions are more fully discussed in related sections under Subpart I.

Comment: In the proposed rule we had included a new requirement that Tribes include a tribal resolution or similar demonstration which identifies the Tribal Lead Agency. A tribal leader responded to the proposed new requirement by stating that since he signs the Plan materials, a resolution identifying the Tribal Lead Agency should not be required.

Response: We understand that some tribal grantees may be required to include a resolution accompanying their Plan in order to comply with their own tribal regulations and/or procedures. However, as the commenter pointed out, since a grantee must identify the Tribal Lead Agency in its Plan, a resolution is not necessary. We agree with this comment and have eliminated this proposed requirement in the final rule.

Comment: Commenters asked if the financial reporting form could serve as the CCDF application for Tribes.

Response: Although the financial form ACF-696 and the CCDF Plan will serve as the application for States and territories, at this time Tribes are required to report financial information on the SF-269 form and do not use the ACF-696. ACF is developing a CCDF financial form specifically for Tribes. When this form is finalized it, along with the CCDF plan, will serve as the application for Tribes. However, since this form has not yet been developed, for years when the CCDF biennial Plan is due, the Plan itself will serve as the application. However, in non-Plan years, ACF will issue a Program Instruction which describes basic information that must be provided on an annual basis, including the self-certified child count, to apply for funds.

Coordination (Section 98.82)

Tribal Lead Agencies must meet the coordination requirements at §§ 98.12 and 98.14 and the planning requirements at § 98.14—including the

public hearing requirement at § 98.14(c). A Tribe must distribute notice of the hearing throughout its service area (rather than statewide).

Prior to the publication of new regulations, Tribal Lead Agencies were not required to coordinate with agencies responsible for health education, employment services or workforce development, and the State or tribal TANF agency, specified at § 98.14(a)(1). Although it was not a specific requirement in the Plan, during the pre-regulatory period ACF encouraged Tribal Lead Agencies to coordinate with these agencies.

We recognize that the agencies with which each Tribal Lead Agency coordinates may differ according to its own unique circumstances. We also recognize that child care is an essential part of a Tribe's self-sufficiency and workforce development efforts. In addition, the quality of child care benefits greatly from close coordination with the public health and education communities.

Therefore, in recognition of these important program linkages, in the final regulation Tribal Lead Agencies are required to meet the requirements at § 98.14(a)(1) to coordinate CCDF activities with tribal agencies responsible for health education, employment services or workforce development, and a Tribe's TANF agency, if the Tribe is administering its own TANF program.

Comment: A few commenters indicated that they were not operating their own TANF programs and inquired whether there was a specific mandate for coordination with State TANF agencies.

Response: Tribal Lead Agencies which are not administering their own TANF programs are not required, but are strongly encouraged to coordinate their program activities with the State TANF agency.

Requirements for Tribal Programs (Section 98.83)

In recognition of the unique social and economic circumstances of many tribal communities, Tribal Lead Agencies are exempt from a number of the CCDF requirements which apply to State Lead Agencies.

Administrative costs. Based on input from several tribal organizations and tribal representatives, and as proposed, we are providing greater flexibility for Tribal Lead Agencies by exempting them from the five percent administrative cost cap at § 98.52(a). Therefore, instead of enforcing the statutory five percent State administrative cost limit, a 15 percent

administrative limit for Tribal Lead Agencies was recommended by several tribal organizations during the course of our pre-drafting consultations to account for the varying infrastructural capabilities of many Indian Tribes. Tribal Lead Agencies may not expend more than 15 percent of the aggregate CCDF funds for administrative activities (including amounts used for construction and renovation in accordance with section § 98.84, but not including the base amount provided under section § 98.83(e)).

Section 98.52(a) provides a list of administrative activities which are subject to the 15 percent cost limitation. The preamble discussion of § 98.52(a) provides an additional discussion of related activities which are not considered administrative activities for purposes of the 15 percent cost cap.

Through the list of activities which are not considered administrative costs, the exemption from the five percent State administrative cost cap, and the base amount under the Discretionary Fund, we believe Tribal Lead Agencies will have sufficient flexibility in determining their administrative and/or indirect costs to run effective CCDF programs.

We recognize that many Federal programs permit Indian Tribes and tribal organizations to include an indirect costs rate in their grant awards. Indirect costs are administrative costs that cannot be easily charged to a specific program. Among other things, these generally include: the cost of accounting services, personnel services, and general administration of the organization. Since the cost of these items cannot be easily assigned to a program that a grantee is operating, the indirect cost rate is applied to the grantee's direct costs to determine the amount the grantee will be able to recover from the program for the grantee's total indirect costs.

An indirect cost rate is arrived at through negotiation between an Indian Tribe or tribal organization and the appropriate Federal agency. Agreements vary from Tribe to Tribe. For example, some agreements may apply the indirect cost rate to salaries and wages only; others may apply the indirect cost rate to salaries, wages, and fringe benefits only.

Indirect costs, as determined by an indirect cost agreement or cost allocation plan pursuant to § 98.55, are identified at § 98.52(a)(6) as an allowable administrative expense for tribal grantees. Tribal Lead Agencies are reminded that regardless of their negotiated indirect cost rates,

administrative costs may not exceed the 15 percent cost limitation at § 98.83(g).

Comment: A few commenters stated that a 15 percent administrative cost limit was too restrictive.

Response: The 15 percent limit is designed to provide Tribes greater flexibility than States which must meet a five percent administrative cost limit which was mandated by statute. The preamble discussion of § 98.52(a) provides an additional discussion of related activities which are not considered administrative activities for purposes of the 15 percent cost cap. Through these additional activities, the exemption from the five percent State administrative cost cap, and the base amount under the Discretionary Fund, we believe Tribal Lead Agencies will have sufficient flexibility in determining their administrative and/or indirect costs to run effective CCDF programs.

Comment: Several commenters requested that we adopt the following percentages: 63.75 for direct child care services; and 36.25 for child care services, activities to improve the availability and quality of child care, and/or administrative costs.

Response: Prior to the passage of PRWORA, the 63.75/36.25 percentages applied to exempt Tribal Lead Agencies. While this policy previously applied only to exempt Tribes, following the passage of PRWORA we extended it to apply to all Tribes during an interim period since the law was silent on administrative costs for Tribes. In a September 19, 1996 letter inviting Tribes to apply for Tribal Mandatory Funds and in ACF Program Instructions ACYF-PI-CC-97-03 and ACYF-PI-CC-97-04 we clearly indicated that this was an interim policy and that we intended to regulate on this issue. For the reasons given in this preamble, we have not retained the policy.

Comment: We received a comment asking why the administrative cost limit for Tribes at proposed § 98.83(g) applied to CCDF funds that were "provided" while the administrative cost limit for States at § 98.52 applied to CCDF funds that were "expended".

Response: We revised the administrative cost limit for Tribes at § 98.83(g) from the language in the proposed rule to more closely parallel the administrative cost limit for States at § 98.52. The revised § 98.83(g) requires that not more than 15 percent of the aggregate CCDF funds expended by the Tribal Lead Agency from each fiscal year's allotment (including amounts used for construction and renovation in accordance with § 98.84, but not including the base amount provided under § 98.83(e)) shall be expended for

administrative costs. We are using "expended" rather than "provided" to prevent a Tribal Lead Agency that does not expend its full allocation from receiving a windfall in administrative cost allowances. The revised language also clarifies that the administrative cost limit applies to the amounts expended from the total allocated, not to the amounts expended in a single fiscal year.

Exempt Tribes. We realize that many smaller tribal grantees do not have the infrastructure in place to support certain requirements. As a result, we are exempting Lead Agencies of smaller Tribes and tribal organizations (with total CCDF allocations less than an amount established by the Secretary) from certain requirements specified at § 98.83(f). Exempt tribal grantees are not required to comply with the four percent quality requirement at § 98.51(a) or to run a certificate program. Non-exempt tribal grantees are required to comply with these requirements.

The dollar threshold for determining which Tribes are exempt is established by the Secretary. Until Tribes are notified otherwise, the threshold is set at \$500,000. In other words, Tribal Lead Agencies with total CCDF allocations less than \$500,000 in a fiscal year will be considered exempt (any unobligated or unliquidated funds from prior fiscal years are not included in determining exempt/non-exempt status). Tribal Lead Agencies with allocations equal to or greater than \$500,000 are non-exempt.

In the proposed rule, we proposed that the threshold would be set to include as non-exempt all Tribes which were non-exempt prior to PRWORA. However, due to increased appropriations, this approach would have greatly increased the number of non-exempt Tribes. As an alternative, we have chosen a reasonable dollar threshold (\$500,000) that, while more than the dollar amount that was mentioned in the proposed rule (\$460,000), would still move some Tribes to a non-exempt category.

The increased number of non-exempt Tribes reflects the increased child care funding provided directly to Tribes under PRWORA. Since the exemption was originally intended to recognize the difficulty of meeting all requirements with a small grant amount, we believe it is reasonable for a Tribe with a grant of \$500,000 or higher to meet the four percent quality and certificate program requirements.

Comment: We received comments requesting the elimination of the exempt/non-exempt distinction. These commenters encouraged us to provide

Tribal Lead Agencies with increased flexibility by making all Tribes exempt.

Response: We are keeping the exempt/non-exempt distinction since we believe grantees with large grant allocations should be subject to the four percent minimum quality and certificate program requirements. While we appreciate the need for Lead Agency flexibility, the need for quality child care and parental choice for Indian children is paramount.

Particularly given the increased allocation of funds for child care programs under the CCDF, we believe it is vitally important that the tribal grantees with larger grants establish or maintain certificate programs so that the families they serve may select from a range of providers: center-based; group home; family child care; in-home or other providers. Many of the larger tribal grantees already operate certificate programs. Likewise, the four percent minimum quality provision will help to ensure that Tribal Lead Agencies make the necessary investments for quality. We believe the Tribal Lead Agencies with larger grants can play a leadership role in providing parental choice and providing quality care.

Furthermore, in FY 1998, a few States received CCDF grant awards which were smaller than the largest tribal grant award. These State Lead Agencies, regardless of size, must comply with all the CCDF requirements including the four percent minimum quality provision and the requirement to run a certificate program. As a result, we believe it is appropriate to require Tribes with larger grants to meet these requirements.

Comment: One commenter requested clarification on funding amounts required for quality activities.

Response: While we strongly encourage exempt Tribal Lead Agencies to expend CCDF funds on quality activities, they are not required to meet this provision. For non-exempt Tribal Lead Agencies subject to the quality expenditure requirement at § 98.51(a), not less than four percent of the "aggregate funds expended" by the Lead Agency shall be expended for quality activities. For purposes of this requirement, the "aggregate funds expended" by the Tribal Lead Agency includes amounts used for construction and renovation in accordance with § 98.84 but does not include the base amount provided under § 98.83(e).

Comment: Several commenters recommended that Tribes should not be subject to § 98.43(b)(2) which requires a market rate survey as one of the three elements in determining equal access. The commenters stated that more flexible methodologies should be

permitted for tribal grantees. For example, one commenter's Tribe currently establishes payment rates based on their State's market rate survey because their tribal service area is included in this market rate survey.

Response: In the final regulation, we have not exempted Tribal Lead Agencies from the requirement at § 98.43(b)(2) that their payment rates be based on a market rate survey. However, a Tribal Lead Agency may base its payment rates on the State's market rate survey rather than conducting its own survey if their service area is included in the State's survey. As noted at § 98.16(l), Tribal Lead Agencies must adequately describe the method used to ensure equal access.

While we are providing more flexibility for Tribal Lead Agencies regarding market rate surveys, we strongly encourage tribal CCDF grantees to survey their local providers in order to establish a payment rate which is an accurate reflection of the child care market on their reservation or tribal service area.

70 percent requirement. Section 418(b)(2) of the Social Security Act provides that States ensure that not less than 70 percent of the total amount of the State Mandatory and Matching funds received in a fiscal year be used to provide child care assistance to families receiving assistance under a State program under Part A of title IV of the Social Security Act, families who are attempting through work activities to transition from such assistance, and families at risk of becoming dependent on such assistance. The provision at section 418(b)(2) does not apply to Tribal Lead Agencies. Nonetheless, Tribes have a responsibility to ensure that their child care services provide a balance in meeting the needs of families listed in section 418(b)(2) and the child care needs of the working poor.

Since Tribes may apply for both Tribal Mandatory Funds and Discretionary Funds, they are receiving increased CCDF grant awards—compared to amounts received prior to PRWORA—to provide direct child care services. Also, as we pointed out in our discussion on dual eligibility of tribal children, Tribes now have the option under title IV of the Social Security Act to operate their own TANF programs. Additionally, Tribes that operated a tribal Job Opportunities and Basic Skills Training (JOBS) program in 1994 may choose to continue a tribal work program. Whatever the mixture of child care, TANF, and work services a Tribe chooses to administer, child care services should be designed to ensure that all eligible families receive a fair

share of services within the tribal service area.

Base amount. A base amount is included in tribal grant awards under the Discretionary Fund. As referenced at § 98.83(e), the base amount of any tribal grant is not subject to the administrative costs limitation at § 98.83(g) or the quality expenditure requirement at § 98.51(a).

The base amount for each tribal grant may be used for any activity consistent with the purposes of the CCDF, including the administrative costs of implementing a child care program. For examples of administrative costs, refer to § 98.52(a).

Lead agency. Tribal grantees, like States, must designate a Lead Agency to administer the CCDF. If a tribal grantee applies for both Tribal Mandatory Funds and Discretionary funds, the programs must be integrated and administered by the same Lead Agency.

Consortia. If a Tribe participating in a consortium arrangement elects to receive only part of the CCDF (e.g., Discretionary Funds), it may not join a different consortium to receive the other part of the CCDF (Tribal Mandatory Funds), or apply as a direct grantee to receive the other part of the fund. In order to receive CCDF program services, individual tribal consortium members must remain with the consortium they have selected for the fiscal year in which they are receiving any part of CCDF funds. However, an Alaska Native village that must receive Tribal Mandatory Funds indirectly through an Alaska Native Regional Nonprofit Corporation may still apply directly for Discretionary Funds.

Section 98.83(c)(1) requires that a tribal consortium include in its two-year CCDF Plan a brief description of the direct child care services being provided for each of its participating Tribes. We included this provision for three reasons: (1) It helps ensure that services are being delivered to the member Tribes; (2) since in some cases consortia receive sizeable base amounts, it will provide documentation of the actual services being delivered to member Tribes through consortia arrangements; and (3) it provides the opportunity for public comment, as part of the public hearing process required by § 98.14(c), on the services provided to member Tribes.

Comment: One commenter was interested in how ACF would treat an individual consortium member that decided to drop out of its authorized CCDF consortium arrangement prior to the end of the fiscal year.

Response: We strongly encourage Tribes to closely evaluate their child

care needs and eligibility for CCDF services before choosing to enter into a consortium arrangement. If a situation arises where a Tribe decides it must relinquish its membership in a consortium prior to the end of the fiscal year, the CCDF funds which were awarded to the consortium on behalf of the departing member Tribe will remain with the tribal consortium. The consortium may use these funds to provide direct child care services to other consortium members for the duration of the fiscal year. The final regulations codify this policy at § 98.83(c)(4).

Child care standards. Section 658E(c)(2)(E)(ii) of the Act requires the development of minimum child care standards for Indian Tribes and tribal organizations. Based on input from tribal leaders and tribal child care administrators, we are developing a process for Tribes to establish minimum child care standards that appropriately reflect tribal needs and available resources. Until the minimum standards are developed, Tribes must have in effect tribal and/or State licensing requirements applicable to child care services pursuant to § 98.40. Tribes must also have in place requirements designed to protect the health and safety of children in accordance with § 98.41 of the regulations, including, but not limited to: (1) The prevention and control of infectious diseases (including immunization); (2) building and physical premises safety; and (3) minimum health and safety training appropriate to the provider setting.

Comment: We received comments about the process for developing the minimum child care standards, and about the need for flexibility under the standards in light of unique tribal needs and resources.

Response: The Child Care Bureau invited tribal leaders to consult with ACF officials on this issue in special focus groups at the Tribal Child Care Conference in April 1997. In addition, on March 26, 1997, a "Request for Comments on the Development of Minimum Tribal Child Care Standards" was published in the **Federal Register**. We are continuing to consult with tribal officials regarding the development of these standards. Regarding the need for flexibility, we recognize unique tribal circumstances and the fact that many Tribes have already developed their own standards. We are committed to an approach that considers both the need for flexibility as well as the statutory mandate to develop minimum standards.

Planning costs for initial plan. Section 98.83(h) provides that CCDF funds are

available for costs incurred by a Tribal Lead Agency only after the funds are made available by Congress for Federal obligation unless costs are incurred for planning activities related to the submission of an initial CCDF Plan. Federal obligation of funds for planning costs is subject to the actual availability of the appropriation.

Construction and Renovation (Section 98.84)

Upon requesting and receiving approval from the Secretary of the Department of Health and Human Services, a Tribal Lead Agency may use amounts from its CCDF allocation for construction and major renovation of child care facilities (pursuant to section 6580(c)(6) of the Act and regulations at § 98.84(a)).

Under the final rule, these payments could cover costs of amortizing the principal and paying interest on loans for construction and major renovation. As was also recognized in the Head Start procedures for construction and renovation, which allow use of funds to pay for principal and interest on loans, loans are an essential part of many construction and renovation projects.

The regulation at § 98.84(b) reflects the statutory requirement that, to be approved by the Secretary, a request to use CCDF funds for construction or major renovation must be made in accordance with uniform procedures developed by the Secretary. These uniform procedures were provided to Tribal Lead Agencies via program instructions ACYF-CC-PI-05, issued August 18, 1997, and ACYF-PI-CC-97-06 issued November 4, 1997. The Administration for Children and Families' Regional Offices have responsibility for approval of construction/renovation applications.

By statute (and § 98.84(b)), such requests must demonstrate that: (1) Adequate facilities are not otherwise available to enable the Tribal Lead Agency to carry out child care programs; (2) the lack of such facilities will inhibit the operation of child care programs in the future; and (3) the use of funds for construction or major renovation will not result in a decrease in the level of child care services provided by the Tribal Lead Agency as compared to the level of services provided by the Tribal Lead Agency in the preceding fiscal year. In light of the requirement that a Tribe cannot reduce the level of child care services, a Tribal Lead Agency should plan in advance for anticipated construction and renovation costs.

Section 98.84(c) allows Tribal Lead Agencies to use CCDF funds for reasonable and necessary planning costs

associated with assessing the need for construction or renovation or for preparing a request, in accordance with the uniform procedures established by program instruction, to spend CCDF funds on construction or major renovation. This section of the rule also addresses the use of CCDF funds to pay for the costs of an architect, engineer, or other consultant.

The regulation at § 98.84(d) requires Tribal Lead Agencies which receive approval from the Secretary to use CCDF funds for construction or major renovation to comply with specified requirements in 45 CFR Part 92 and any additional requirements established by program instruction. Title 45 CFR Part 92 does not generally apply to the Child Care and Development Fund. However, we made specified sections which deal with the special circumstances of construction and renovation applicable for those purposes.

The ACF has an interest in property that is constructed or renovated with CCDF funds. This interest takes the form of restrictions on use and disposition of the property. The Federal interest also is manifested in the requirement that ACF receive a share of the proceeds from any sale of property. These requirements regarding Federal share and the use and disposition of property are found at 45 CFR 92.31(b) and (c).

Title requirements at 45 CFR 92.31(a) provide that title to a facility constructed or renovated with CCDF funds vests with the grantee upon acquisition.

Title 45 CFR 92.22 concerns cost principles and allowable cost requirements. Consistent with these cost principles, reasonable fees and costs associated with and necessary to the construction or renovation of a facility are payable with CCDF funds, but require prior, written approval from ACF.

Title 45 CFR 92.25 governs program income. Program income derived from real property constructed or renovated with CCDF funds must be deducted from the total allowable costs of the budget period in which it was produced.

All facility construction and renovation transactions must comply with the procurement procedures in 45 CFR 92.36, and must be conducted in a manner to provide, to the maximum extent practicable, open and free competition.

Tribal Lead Agencies must also comply with any additional requirements established by program instruction. These requirements may include, but are not limited to, requirements concerning: the recording

of a Notice of Federal Interest in property; rights and responsibilities in the event of a grantee's default on a mortgage; insurance and maintenance; submission of plans, specifications, inspection reports, and other legal documents; and modular units.

The definition of "facility" at § 98.2 allows Tribal Lead Agencies to use CCDF funds for the construction or renovation of modular units as well as real property.

The definitions of "facility," "construction," and "major renovation" are the same definitions used in Head Start construction and renovation procedures. While a Tribal Lead Agency must request approval from the Secretary before spending CCDF funds on construction or major renovation, approval is not necessary for minor renovation pursuant to section 658F(b) of the Act and regulations at § 98.84(f). For Tribal Lead Agencies, minor renovation includes all renovation other than major renovation or construction.

Section 98.84(e) requires that, in lieu of obligation and liquidation requirements at § 98.60(e), Tribal Lead Agencies must liquidate CCDF funds used for construction or major renovation by the end of the second fiscal year following the fiscal year for which the grant is awarded. This gives Tribal Lead Agencies three years to liquidate funds approved by the Secretary for use on construction or major renovation with no separate obligation period. This separate obligation/liquidation requirement should allow sufficient time for construction and renovation projects.

Amounts used for construction and major renovation are not considered administrative costs for the purpose of the 15 percent administrative cost limit under § 98.83(g). We do not believe that Congress intended for us to unnecessarily limit a Tribal Lead Agency's ability to use CCDF funds on construction and renovation projects which meet the requirements necessary for Secretarial approval.

The ACF will transfer funds to be used for construction and major renovation to a separate grant award to be used specifically for construction or renovation activities. This approach is necessary to track the exact amount of funds spent on construction or renovation.

Finally, the new statutory provision allowing tribal construction with CCDF funds provides an opportunity for tribal grantees to leverage resources for quality facilities and services by coordinating with their Tribe's Head Start program.

Comment: We received comments objecting to the proposal at § 98.84(c)

that would have prohibited a Tribal Lead Agency from using CCDF funds to pay for the costs of an architect, engineer, or other consultant until after the Lead Agency's construction/renovation application was approved by the Secretary. The commenters argued that the application procedures require construction/renovation plans and specifications as part of an application, and, unless Tribes are allowed to use CCDF funds, many Tribes would be unable to pay for the costs of architects, engineers, or consultants necessary to develop these plans and specifications.

Response: We eliminated the prohibition against the use of CCDF funds to pay for consultants prior to application approval. As revised, § 98.84(c) allows a Tribal Lead Agency to use CCDF funds to pay for the costs of an architect, engineer, or other consultant for a project that is subsequently approved by the Secretary. If the project later fails to gain Secretarial approval, the Tribal Lead Agency must pay for the architectural, engineering or consultant costs using non-CCDF funds. This approach allows Tribes access to the expertise necessary to prepare an application and launch a construction/renovation project. At the same time, it protects the Federal government from paying for consultant costs on a project that is not approvable. This revised policy is consistent with program instruction ACYF-CC-PI-05, issued August 18, 1997. We strongly encourage Tribes to involve ACF Regional Office staff early in the development of their construction/renovation applications.

Comment: We received questions regarding how the requirement at § 98.84(b)(3) would apply to new grantees. Under this provision (as well as the Act), use of funds for construction and renovation cannot result in a decrease in the Tribe's level of child care services compared to the preceding fiscal year. However, a new tribal grantee has no existing level of services to maintain.

Response: Since § 98.84(b)(3) does not apply to a new grantee (i.e., one that did not receive CCDF funds the preceding fiscal year), we added § 98.84(g) to address the amount of CCDF funds that a new grantee can use for construction or renovation. This section allows a new tribal grantee to spend no more than an amount equivalent to its Tribal Mandatory allocation on construction/renovation. A new tribal grantee must spend an amount equivalent to its Discretionary allocation on activities other than construction or renovation (i.e., direct services, quality activities, or administrative costs).

The CCDF program is primarily designed to provide direct child care services. Authority for construction and renovation was added as an amendment under the PRWORA. The statutory provision that prohibits a decrease in the level of child care services clearly indicates that Congress intended for construction and renovation activities only to be in addition to direct services. Limiting the amount of CCDF funds that a new tribal grantee may spend on construction or renovation to the amount of the Tribal Mandatory allocation is consistent with Congressional intent.

Comment: One commenter objected to the definition for major renovation. Section 98.2 defines "major renovation" as: (1) Structural changes to the foundation, roof, floor, exterior or load-bearing walls of a facility, or the extension of a facility to increase its floor area; or (2) extensive alteration of a facility such as to significantly change its function and purpose, even if such renovation does not include any structural change. The commenter objected to the second part of this definition, arguing that some projects may change the function and purpose of a facility (e.g., from a community center to a child care center) but only involve small, non-structural renovations that should not require an application seeking Secretarial approval.

Response: We did not revise the definition—which has also been used by the Head Start program. Projects that involve *extensive* alteration that change the function and purpose of the facility are potentially large and expensive and should therefore be subject to Secretarial approval. However, in order for a project that does not involve structural change to be considered major renovation under the definition at § 98.2, it must involve both: (1) Extensive alteration, and (2) a change in the function and purpose of the facility. Therefore, if a renovation project is *not* extensive (and does not involve structural change), the project would not be considered major renovation even if it changes the function and purpose of the facility.

Comment: We received a question as to whether non-exempt Tribal Lead Agencies could count construction and renovation costs as quality expenditures for purposes of meeting the four percent minimum quality requirement at § 98.51(a).

Response: Construction and renovation costs cannot be counted as quality expenditures for purposes of the four percent minimum quality requirement. Quality activities such as those described at § 98.51(a)(2) (resource

and referral, provider loans, monitoring, training and technical assistance) are essential to the well-being of children in child care. The size of grant awards received by non-exempt Tribal Lead Agencies is sufficient to allow these Tribes to meet the four percent minimum quality requirement through activities other than construction or renovation.

Comment: We received a question regarding whether the costs of items such as parking lots, playground equipment, furniture, and kitchen equipment are considered to be construction/renovation costs?

Response: The regulations at § 98.2 define "construction" and "major renovation" for purposes of determining what activities are allowable under the CCDF and when prior approval from the Secretary is necessary.

However, these definitions do not directly address the question of what costs should be considered as part of the construction and renovation project. This question is relevant in at least three circumstances: (1) When ensuring that construction and renovation costs will not result in a decrease in the level of child care services in accordance with § 98.84(b)(3); (2) when providing an estimate of construction and renovation costs as required by the uniform procedures established by program instruction; and (3) when determining which costs should come from the separate grant award for construction and renovation.

For these three purposes, § 98.84(h) provides that a construction and renovation project that requires and receives the approval of the Secretary must include as construction and renovation costs the following: (1) Planning costs as allowed at § 98.84(c); (2) labor, materials and services necessary for the functioning of the facility; and (3) initial equipment, as discussed below, for the facility. All such costs must be identified in the Tribal Lead Agency's construction or renovation application to the Secretary and, to the extent that CCDF funds are used, must be paid for using the separate grant award for construction and renovation.

Under this framework, the cost of the construction or renovation project includes items which are not part of the actual facility itself, but which are necessary for the functioning of the facility (such as a parking lot or fence) when the item is part of a larger construction or renovation project that requires and receives approval by the Secretary.

Equipment, as used above, means items which are tangible,

nonexpendable personal property having a useful life of more than five years. The intent of the five-year threshold is to include as construction and renovation costs only equipment that remains useful for an extended period of time, such as playground equipment, furniture, and kitchen equipment. Current operating expenses or items that are consumed in use (such as food, paper, books, toys or disposable housekeeping items) are not considered construction or renovation costs.

This relatively broad definition of construction and renovation costs emphasizes the importance of considering *all* costs when planning construction and renovation projects. The alternative approach, to exclude items such as playgrounds, parking lots and equipment from construction and renovation costs, would have underestimated the true costs of constructing or renovating a child care facility. A new or newly renovated facility requires the proper equipment to be operational. Furthermore, a facility must be constructed or renovated in a manner that ensures the health and safety of children in care, consistent with § 98.41(a)(2) of the regulations.

Equipment and other costs are only considered part of the construction or renovation costs, however, if they are included as part of a larger construction or renovation project that requires and receives approval by the Secretary. Costs of allowable activities (e.g., purchase of equipment necessary to bring a facility into compliance with health and safety standards) that are *not* part of a larger construction or renovation project as defined at § 98.2 should be considered quality improvement costs—not construction or renovation costs.

Subpart J—Monitoring, Non-compliance and Complaints

Penalties and Sanctions (Section 98.92)

We have amended paragraphs (1) and (2) of § 98.92(a), because the statutory amendments changed the penalty for a Lead Agency found to have failed to substantially comply with the statute, the regulations, or its own Plan. We also have deleted the former § 98.92(b) as redundant due to the statutory amendments. Section 658I(b)(2)(A)(ii) of the Act gives the Secretary the option to disallow improperly expended funds or to deduct an amount equal to or less than an improperly expended amount from the administrative portion of the Lead Agency's allotment for the following fiscal year. The Secretary can also impose a penalty that is a combination of these two options.

As proposed, we also added a new regulation at paragraph (b)(2) to establish a penalty on the Lead Agency for: (1) a failure to implement any part of the CCDF program in accordance with the Act or regulations or its Plan; or (2) a violation of the Act or regulations. Such penalty would be invoked when a failure or violation by the Lead Agency does not result in a clearly identifiable amount of improperly expended funds. For example, the failure to provide the reports required under subpart H or the inappropriate limitation of access to a particular type of provider in violation of the parental choice provisions of Subpart D do not result in a clearly identifiable amount of improperly expended funds. Hence, the penalties at paragraph (a) could not be applied. However, our stewardship of the program since its creation indicates the need for a more effective means of ensuring conformity with the statute and regulations than is offered by the existing regulations. Section 658I(b)(2)(B) of the CCDBG Act provides for an "additional sanction" if the Secretary finds there has been non-compliance with the Plan or any requirement of the program.

Because a failure or violation which would cause the penalty under § 98.92(b)(2) to be imposed may not have an amount of improperly expended funds associated with it, we needed to determine what amount of penalty should be imposed. We considered the range of TANF penalties found at section 409 of the Social Security Act and decided to use the TANF penalty provisions for failure to report at section 409(a)(2) as that was most analogous to the potential CCDF non-compliance. Accordingly, § 98.92(b)(2) provides that a penalty equal to four percent of the annual Discretionary allotment will be withheld no earlier than the second full quarter following the quarter in which the Lead Agency was notified of the potential penalty.

The TANF penalties include provisions for good cause and corrective action, and we have included similar provisions in § 98.92(b)(2). We believe that both provisions are good policy as the goal of the new provision is to achieve compliance with CCDF requirements, not punishment. If there is sufficient reason for not complying, or if the Lead Agency will comply without a penalty, the purpose is met without the imposition of a penalty. The penalty will not be applied if the Lead Agency corrects the failure or violation before the penalty is to be applied or if it submits a plan for corrective action that

is accepted by the Secretary. Waiting at least one full quarter before applying the penalty provides sufficient time to remedy the situations which we envision would cause the penalty to be invoked. The Lead Agency may, during that time, show cause to the Secretary why the amount of the penalty, if imposed, should be reduced.

The paragraphs formerly located at § 98.92(d) and (e) are relocated at § 98.92(c) and (d), respectively. We have added a new § 98.92(e) providing that it is at the Secretary's sole discretion to choose the penalty to be imposed.

Comment: While a few comments supported the need for the new penalty at § 98.92(b)(2), most opposed it stating that there is no basis for it in the PRWORA statute.

Response: As we stated in the preamble, the statutory basis for the penalty at § 98.92(b)(2) is section 658I(b)(2)(B) of the original CCDBG Act which provides for an "additional sanction" if the Secretary finds there has been non-compliance with the Plan or any requirement of the program. Our experience since the beginning of the program indicated the need for such an additional sanction.

Comment: Many of the same commenters objected to the use of the phrase "failed to properly implement" in the regulation, saying that it made the entire process subjective with only the Secretary deciding what was "proper".

Response: We agree that the use of the word "proper" gave the appearance of a subjective process, and we have eliminated it. It is not the intent of the regulation to second-guess how Lead Agencies implement the program, especially in light of the enormous flexibility they have. Rather, this regulation is specifically designed for those clear-cut instances wherein the Act, regulations, or Plan have not been followed, but for which there is not an amount of funds that are "misspent" as a result.

Comment: One commenter objected to the provision which allows the Secretary not to apply the penalty if the Lead Agency corrects the failure or violation or submits an acceptable plan for corrective action. The commenter wanted the penalty to be applied in all cases.

Response: As our goal is compliance with the requirements and not punishment, we believe it is good policy to forgive a penalty if the Lead Agency corrects the non-compliance without a penalty through corrective action. We also believe that Lead Agencies should be able to demonstrate that special circumstances, such as natural disasters or other circumstances beyond their

control, prevent compliance and thus the penalty should be reduced. We believe that such instances will be rare.

List of Subjects

45 CFR Part 98

Child care, Grant program—social programs, Parental choice, Reporting and record keeping requirements.

45 CFR Part 99

Administrative practice and procedure, Child care, Grant program—social programs.

(Catalog of Federal Domestic Assistance Programs: 93.575, Child Care and Development Block Grant; 93.596, Child Care Mandatory and Matching Funds)

Dated: March 16, 1998.

Olivia A. Golden,

Assistant Secretary for Children and Families.

Approved: June 10, 1998.

Donna E. Shalala,

Secretary, Department of Health and Human Services.

For the reasons set forth in the preamble, Parts 98 and 99 of Subtitle A of Title 45 of the Code of Federal Regulations are amended as follows:

1. Part 98 is revised as follows:

PART 98—CHILD CARE AND DEVELOPMENT FUND

Subpart A—Goals, Purposes and Definitions

Sec.

- 98.1 Goals and purposes.
- 98.2 Definitions.
- 98.3 Effect on State law.

Subpart B—General Application Procedures

- 98.10 Lead Agency responsibilities.
- 98.11 Administration under contracts and agreements.
- 98.12 Coordination and consultation.
- 98.13 Applying for funds.
- 98.14 Plan process.
- 98.15 Assurances and certifications.
- 98.16 Plan provisions.
- 98.17 Period covered by plan.
- 98.18 Approval and disapproval of plans and plan amendments.

Subpart C—Eligibility for Services

- 98.20 A child's eligibility for child care services.

Subpart D—Program Operations (Child Care Services)—Parental Rights and Responsibilities

- 98.30 Parental choice.
- 98.31 Parental access.
- 98.32 Parental complaints.
- 98.33 Consumer education.
- 98.34 Parental rights and responsibilities.

Subpart E—Program Operations (Child Care Services)—Lead Agency and Provider Requirements

- 98.40 Compliance with applicable State and local regulatory requirements.
 98.41 Health and safety requirements.
 98.42 Sliding fee scales.
 98.43 Equal access.
 98.44 Priority for child care services.
 98.45 List of providers.
 98.46 Nondiscrimination in admissions on the basis of religion.
 98.47 Nondiscrimination in employment on the basis of religion.

Subpart F—Use of Child Care and Development Funds

- 98.50 Child care services.
 98.51 Activities to improve the quality of child care.
 98.52 Administrative costs.
 98.53 Matching Fund requirements.
 98.54 Restrictions on the use of funds.
 98.55 Cost allocation.

Subpart G—Financial Management

- 98.60 Availability of funds.
 98.61 Allotments from the discretionary fund.
 98.62 Allotments from the mandatory fund.
 98.63 Allotments from the matching fund.
 98.64 Reallotment and redistribution of funds.
 98.65 Audits and financial reporting
 98.66 Disallowance procedures.
 98.67 Fiscal requirements.

Subpart H—Program Reporting Requirements

- 98.70 Reporting requirements.
 98.71 Content of reports.

Subpart I—Indian Tribes

- 98.80 General procedures and requirements.
 98.81 Application and Plan procedures.
 98.82 Coordination.
 98.83 Requirements for tribal programs.
 98.84 Construction and renovation of child care facilities.

Subpart J—Monitoring, Non-Compliance and Complaints

- 98.90 Monitoring.
 98.91 Non-compliance.
 98.92 Penalties and sanctions.
 98.93 Complaints.

Authority: 42 U.S.C. 618, 9858.

Subpart A—Goals, Purposes and Definitions

§ 98.1 Goals and purposes.

- (a) The goals of the CCDF are to:
- (1) Allow each State maximum flexibility in developing child care programs and policies that best suit the needs of children and parents within the State;
 - (2) Promote parental choice to empower working parents to make their own decisions on the child care that best suits their family's needs;
 - (3) Encourage States to provide consumer education information to help

parents make informed choices about child care;

(4) Assist States to provide child care to parents trying to achieve independence from public assistance; and

(5) Assist States in implementing the health, safety, licensing, and registration standards established in State regulations.

(b) The purpose of the CCDF is to increase the availability, affordability, and quality of child care services. The program offers Federal funding to States, Territories, Indian Tribes, and tribal organizations in order to:

(1) Provide low-income families with the financial resources to find and afford quality child care for their children;

(2) Enhance the quality and increase the supply of child care for all families, including those who receive no direct assistance under the CCDF;

(3) Provide parents with a broad range of options in addressing their child care needs;

(4) Strengthen the role of the family;

(5) Improve the quality of, and coordination among, child care programs and early childhood development programs; and

(6) Increase the availability of early childhood development and before- and after-school care services.

(c) The purpose of these regulations is to provide the basis for administration of the Fund. These regulations provide that Lead Agencies:

(1) Maximize parental choice through the use of certificates and through grants and contracts;

(2) Include in their programs a broad range of child care providers, including center-based care, family child care, in-home care, care provided by relatives and sectarian child care providers;

(3) Provide quality child care that meets applicable requirements;

(4) Coordinate planning and delivery of services at all levels;

(5) Design flexible programs that provide for the changing needs of recipient families;

(6) Administer the CCDF responsibly to ensure that statutory requirements are met and that adequate information regarding the use of public funds is provided; and

(7) Design programs that provide uninterrupted service to families and providers, to the extent statutorily possible.

§ 98.2 Definitions.

For the purpose of this part and part 99:

The Act refers to the Child Care and Development Block Grant Act of 1990,

section 5082 of the Omnibus Budget Reconciliation Act of 1990, Pub. L. 101-508, as amended and codified at 42 U.S.C. 9858 *et seq.*

ACF means the Administration for Children and Families;

Application is a request for funding that includes the information required at § 98.13;

Assistant Secretary means the Assistant Secretary for Children and Families, Department of Health and Human Services;

Caregiver means an individual who provides child care services directly to an eligible child on a person-to-person basis;

Categories of care means center-based child care, group home child care, family child care and in-home care;

Center-based child care provider means a provider licensed or otherwise authorized to provide child care services for fewer than 24 hours per day per child in a non-residential setting, unless care in excess of 24 hours is due to the nature of the parent(s)' work;

Child care certificate means a certificate (that may be a check, or other disbursement) that is issued by a grantee directly to a parent who may use such certificate only as payment for child care services or as a deposit for child care services if such a deposit is required of other children being cared for by the provider, pursuant to § 98.30. Nothing in this part shall preclude the use of such certificate for sectarian child care services if freely chosen by the parent. For the purposes of this part, a child care certificate is assistance to the parent, not assistance to the provider;

Child Care and Development Fund (CCDF) means the child care programs conducted under the provisions of the Child Care and Development Block Grant Act, as amended. The Fund consists of Discretionary Funds authorized under section 658B of the amended Act, and Mandatory and Matching Funds appropriated under section 418 of the Social Security Act;

Child care provider that receives assistance means a child care provider that receives Federal funds under the CCDF pursuant to grants, contracts, or loans, but does not include a child care provider to whom Federal funds under the CCDF are directed only through the operation of a certificate program;

Child care services, for the purposes of § 98.50, means the care given to an eligible child by an eligible child care provider;

Construction means the erection of a facility that does not currently exist;

The Department means the Department of Health and Human Services;

Discretionary funds means the funds authorized under section 658B of the Child Care and Development Block Grant Act. The Discretionary funds were formerly referred to as the Child Care and Development Block Grant;

Eligible child means an individual who meets the requirements of § 98.20;

Eligible child care provider means:

(1) A center-based child care provider, a group home child care provider, a family child care provider, an in-home child care provider, or other provider of child care services for compensation that—

(i) Is licensed, regulated, or registered under applicable State or local law as described in § 98.40; and

(ii) Satisfies State and local requirements, including those referred to in § 98.41 applicable to the child care services it provides; or

(2) A child care provider who is 18 years of age or older who provides child care services only to eligible children who are, by marriage, blood relationship, or court decree, the grandchild, great grandchild, sibling (if such provider lives in separate residence), niece, or nephew of such provider, and complies with any applicable requirements that govern child care provided by the relative involved;

Facility means real property or modular unit appropriate for use by a grantee to carry out a child care program;

Family child care provider means one individual who provides child care services for fewer than 24 hours per day per child, as the sole caregiver, in a private residence other than the child's residence, unless care in excess of 24 hours is due to the nature of the parent(s)' work;

Group home child care provider means two or more individuals who provide child care services for fewer than 24 hours per day per child, in a private residence other than the child's residence, unless care in excess of 24 hours is due to the nature of the parent(s)' work;

Indian Tribe means any Indian Tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. § 1601 *et seq.*) that is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians;

In-home child care provider means an individual who provides child care services in the child's own home;

Lead Agency means the State, territorial or tribal entity designated under §§ 98.10 and 98.16(a) to which a grant is awarded and that is accountable for the use of the funds provided. The Lead Agency is the entire legal entity even if only a particular component of the entity is designated in the grant award document.

Licensing or regulatory requirements means requirements necessary for a provider to legally provide child care services in a State or locality, including registration requirements established under State, local or tribal law;

Liquidation period means the applicable time period during which a fiscal year's grant shall be liquidated pursuant to the requirements at § 98.60.;

Major renovation means: (1) structural changes to the foundation, roof, floor, exterior or load-bearing walls of a facility, or the extension of a facility to increase its floor area; or (2) extensive alteration of a facility such as to significantly change its function and purpose, even if such renovation does not include any structural change;

Mandatory funds means the general entitlement child care funds described at section 418(a)(1) of the Social Security Act;

Matching funds means the remainder of the general entitlement child care funds that are described at section 418(a)(2) of the Social Security Act;

Modular unit means a portable structure made at another location and moved to a site for use by a grantee to carry out a child care program;

Obligation period means the applicable time period during which a fiscal year's grant shall be obligated pursuant to § 98.60;

Parent means a parent by blood, marriage or adoption and also means a legal guardian, or other person standing *in loco parentis*;

The Plan means the Plan for the implementation of programs under the CCDF;

Program period means the time period for using a fiscal year's grant and does not extend beyond the last day to liquidate funds;

Programs refers generically to all activities under the CCDF, including child care services and other activities pursuant to § 98.50 as well as quality and availability activities pursuant to § 98.51;

Provider means the entity providing child care services;

The regulation refers to the actual regulatory text contained in parts 98 and 99 of this chapter;

Real property means land, including land improvements, structures and

appurtenances thereto, excluding movable machinery and equipment;

Secretary means the Secretary of the Department of Health and Human Services;

Sectarian organization or sectarian child care provider means religious organizations or religious providers generally. The terms embrace any organization or provider that engages in religious conduct or activity or that seeks to maintain a religious identity in some or all of its functions. There is no requirement that a sectarian organization or provider be managed by clergy or have any particular degree of religious management, control, or content;

Sectarian purposes and activities means any religious purpose or activity, including but not limited to religious worship or instruction;

Services for which assistance is provided means all child care services funded under the CCDF, either as assistance directly to child care providers through grants, contracts, or loans, or indirectly as assistance to parents through child care certificates;

Sliding fee scale means a system of cost sharing by a family based on income and size of the family, in accordance with § 98.42;

State means any of the States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands of the United States, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and includes Tribes unless otherwise specified;

Tribal mandatory funds means the child care funds set aside at section 418(a)(4) of the Social Security Act. The funds consist of between one and two percent of the aggregate Mandatory and Matching child care funds reserved by the Secretary in each fiscal year for payments to Indian Tribes and tribal organizations;

Tribal organization means the recognized governing body of any Indian Tribe, or any legally established organization of Indians, including a consortium, which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities: Provided, that in any case where a contract is let or grant is made to an organization to perform services benefiting more than one Indian Tribe, the approval of each such Indian Tribe shall be a prerequisite to the letting or making of such contract or grant; and

Types of providers means the different classes of providers under each category of care. For the purposes of the CCDF, types of providers include non-profit providers, for-profit providers, sectarian providers and relatives who provide care.

§ 98.3 Effect on State law.

(a) Nothing in the Act or this part shall be construed to supersede or modify any provision of a State constitution or State law that prohibits the expenditure of public funds in or by sectarian organizations, except that no provision of a State constitution or State law shall be construed to prohibit the expenditure in or by sectarian institutions of any Federal funds provided under this part.

(b) If a State law or constitution would prevent CCDF funds from being expended for the purposes provided in the Act, without limitation, then States shall segregate State and Federal funds.

Subpart B—General Application Procedures

§ 98.10 Lead Agency responsibilities.

The Lead Agency, as designated by the chief executive officer of the State (or by the appropriate Tribal leader or applicant), shall:

- (a) Administer the CCDF program, directly or through other governmental or non-governmental agencies, in accordance with § 98.11;
- (b) Apply for funding under this part, pursuant to § 98.13;
- (c) Consult with appropriate representatives of local government in developing a Plan to be submitted to the Secretary pursuant to § 98.14(b);
- (d) Hold at least one public hearing in accordance with § 98.14(c); and
- (e) Coordinate CCDF services pursuant to § 98.12.

§ 98.11 Administration under contracts and agreements.

(a) The Lead Agency has broad authority to administer the program through other governmental or non-governmental agencies. In addition, the Lead Agency can use other public or private local agencies to implement the program; however:

- (1) The Lead Agency shall retain overall responsibility for the administration of the program, as defined in paragraph (b) of this section;
- (2) The Lead Agency shall serve as the single point of contact for issues involving the administration of the grantee's CCDF program; and
- (3) Administrative and implementation responsibilities undertaken by agencies other than the Lead Agency shall be governed by

written agreements that specify the mutual roles and responsibilities of the Lead Agency and the other agencies in meeting the requirements of this part.

(b) In retaining overall responsibility for the administration of the program, the Lead Agency shall:

- (1) Determine the basic usage and priorities for the expenditure of CCDF funds;
- (2) Promulgate all rules and regulations governing overall administration of the Plan;
- (3) Submit all reports required by the Secretary;
- (4) Ensure that the program complies with the approved Plan and all Federal requirements;
- (5) Oversee the expenditure of funds by subgrantees and contractors;
- (6) Monitor programs and services;
- (7) Fulfill the responsibilities of any subgrantee in any: disallowance under subpart G; complaint or compliance action under subpart J; or hearing or appeal action under part 99 of this chapter; and
- (8) Ensure that all State and local or non-governmental agencies through which the State administers the program, including agencies and contractors that determine individual eligibility, operate according to the rules established for the program.

§ 98.12 Coordination and consultation.

The Lead Agency shall:

- (a) Coordinate the provision of services for which assistance is provided under this part with the agencies listed in § 98.14(a).
- (b) Consult, in accordance with § 98.14(b), with representatives of general purpose local government during the development of the Plan; and
- (c) Coordinate, to the maximum extent feasible, with any Indian Tribes in the State receiving CCDF funds in accordance with subpart I of this part.

§ 98.13 Applying for Funds.

The Lead Agency of a State or Territory shall apply for Child Care and Development funds by providing the following:

- (a) The amount of funds requested at such time and in such manner as prescribed by the Secretary.
- (b) The following assurances or certifications:
 - (1) An assurance that the Lead Agency will comply with the requirements of the Act and this part;
 - (2) A lobbying certification that assures that the funds will not be used for the purpose of influencing pursuant to 45 CFR part 93, and, if necessary, a Standard Form LLL (SF-LLL) that discloses lobbying payments;

(3) An assurance that the Lead Agency provides a drug-free workplace pursuant to 45 CFR 76.600, or a statement that such an assurance has already been submitted for all HHS grants;

(4) A certification that no principals have been debarred pursuant to 45 CFR 76.500;

(5) Assurances that the Lead Agency will comply with the applicable provisions regarding nondiscrimination at 45 CFR part 80 (implementing title VI of the Civil Rights Act of 1964, as amended), 45 CFR part 84 (implementing section 504 of the Rehabilitation Act of 1973, as amended), 45 CFR part 86 (implementing title IX of the Education Amendments of 1972, as amended) and 45 CFR part 91 (implementing the Age Discrimination Act of 1975, as amended); and

(6) Assurances that the Lead Agency will comply with the applicable provisions of Public Law 103-277, Part C—Environmental Tobacco Smoke, also known as the Pro-Children Act of 1994, regarding prohibitions on smoking.

(c) The Child Care and Development Fund Plan, at times and in such manner as required in § 98.17; and

(d) Such other information as specified by the Secretary.

§ 98.14 Plan process.

In the development of each Plan, as required pursuant to § 98.17, the Lead Agency shall:

(a)(1) Coordinate the provision of services funded under this Part with other Federal, State, and local child care and early childhood development programs, including such programs for the benefit of Indian children. The Lead Agency shall also coordinate with the State, and if applicable, tribal agencies responsible for:

- (A) Public health, including the agency responsible for immunizations;
- (B) Employment services/workforce development;
- (C) Public education; and
- (D) Providing Temporary Assistance for Needy Families.

(2) Provide a description of the results of the coordination with each of these agencies in the CCDF Plan.

(b) Consult with appropriate representatives of local governments;

(c)(1) Hold at least one hearing in the State, after at least 20 days of statewide public notice, to provide to the public an opportunity to comment on the provision of child care services under the Plan.

(2) The hearing required by paragraph (c)(1) shall be held before the Plan is submitted to ACF, but no earlier than nine months before the Plan becomes effective.

(3) In advance of the hearing required by this section, the Lead Agency shall make available to the public the content of the Plan as described in § 98.16 that it proposes to submit to the Secretary.

§ 98.15 Assurances and certifications.

(a) The Lead Agency shall include the following assurances in its CCDF Plan:

(1) Upon approval, it will have in effect a program that complies with the provisions of the CCDF Plan, and that is administered in accordance with the Child Care and Development Block Grant Act of 1990, as amended, section 418 of the Social Security Act, and all other applicable Federal laws and regulations;

(2) The parent(s) of each eligible child within the area served by the Lead Agency who receives or is offered child care services for which financial assistance is provided is given the option either:

(i) To enroll such child with a child care provider that has a grant or contract for the provision of the service; or

(ii) To receive a child care certificate as defined in § 98.2;

(3) In cases in which the parent(s), pursuant to § 98.30, elects to enroll their child with a provider that has a grant or contract with the Lead Agency, the child will be enrolled with the eligible provider selected by the parent to the maximum extent practicable;

(4) In accordance with § 98.30, the child care certificate offered to parents shall be of a value commensurate with the subsidy value of child care services provided under a grant or contract;

(5) With respect to State and local regulatory requirements (or tribal regulatory requirements), health and safety requirements, payment rates, and registration requirements, State or local (or tribal) rules, procedures or other requirements promulgated for the purpose of the CCDF will not significantly restrict parental choice from among categories of care or types of providers, pursuant to § 98.30(f).

(6) That if expenditures for pre-Kindergarten services are used to meet the maintenance-of-effort requirement, the State has not reduced its level of effort in full-day/full-year child care services, pursuant to § 98.53(h)(1).

(b) The Lead Agency shall include the following certifications in its CCDF Plan:

(1) In accordance with § 98.31, it has procedures in place to ensure that providers of child care services for which assistance is provided under the CCDF, afford parents unlimited access to their children and to the providers caring for their children, during the normal hours of operations and

whenever such children are in the care of such providers;

(2) As required by § 98.32, the State maintains a record of substantiated parental complaints and makes information regarding such complaints available to the public on request;

(3) It will collect and disseminate to parents of eligible children and the general public, consumer education information that will promote informed child care choices, as required by § 98.33;

(4) There are in effect licensing requirements applicable to child care services provided within the State (or area served by Tribal Lead Agency), pursuant to § 98.40;

(5) There are in effect within the State (or other area served by the Lead Agency), under State or local (or tribal) law, requirements designed to protect the health and safety of children that are applicable to child care providers that provide services for which assistance is made available under the CCDF, pursuant to § 98.41;

(6) In accordance with § 98.41, procedures are in effect to ensure that child care providers of services for which assistance is provided under the CCDF comply with all applicable State or local (or tribal) health and safety requirements; and

(7) Payment rates for the provision of child care services, in accordance with § 98.43, are sufficient to ensure equal access for eligible children to comparable child care services in the State or sub-State area that are provided to children whose parents are not eligible to receive assistance under this program or under any other Federal or State child care assistance programs.

§ 98.16 Plan provisions.

A CCDF Plan shall contain the following:

(a) Specification of the Lead Agency whose duties and responsibilities are delineated in § 98.10;

(b) The assurances and certifications listed under § 98.15;

(c)(1) A description of how the CCDF program will be administered and implemented, if the Lead Agency does not directly administer and implement the program;

(2) Identification of the entity designated to receive private donated funds and the purposes for which such funds will be expended, pursuant to § 98.53(f);

(d) A description of the coordination and consultation processes involved in the development of the Plan, including a description of public-private partnership activities that promote business involvement in meeting child

care needs pursuant to § 98.14(a) and (b);

(e) A description of the public hearing process, pursuant to § 98.14(c);

(f) Definitions of the following terms for purposes of determining eligibility, pursuant to §§ 98.20(a) and 98.44:

(1) Special needs child;

(2) Physical or mental incapacity (if applicable);

(3) Attending (a job training or educational program);

(4) Job training and educational program;

(5) Residing with;

(6) Working;

(7) Protective services (if applicable), including whether children in foster care are considered in protective services for purposes of child care eligibility; and whether respite care is provided to custodial parents of children in protective services.

(8) Very low income; and

(9) *in loco parentis*.

(g) For child care services pursuant to § 98.50:

(1) A description of such services and activities;

(2) Any limits established for the provision of in-home care and the reasons for such limits pursuant to § 98.30(e)(1)(iv);

(3) A list of political subdivisions in which such services and activities are offered, if such services and activities are not available throughout the entire service area;

(4) A description of how the Lead Agency will meet the needs of certain families specified at § 98.50(e).

(5) Any additional eligibility criteria, priority rules and definitions established pursuant to § 98.20(b);

(h) A description of the activities to provide comprehensive consumer education, to increase parental choice, and to improve the quality and availability of child care, pursuant to § 98.51;

(i) A description of the sliding fee scale(s) (including any factors other than income and family size used in establishing the fee scale(s)) that provide(s) for cost sharing by the families that receive child care services for which assistance is provided under the CCDF, pursuant to § 98.42;

(j) A description of the health and safety requirements, applicable to all providers of child care services for which assistance is provided under the CCDF, in effect pursuant to § 98.41;

(k) A description of the child care certificate payment system(s), including the form or forms of the child care certificate, pursuant to § 98.30(c);

(l) Payment rates and a summary of the facts, including a biennial local

market rate survey, relied upon to determine that the rates provided are sufficient to ensure equal access pursuant to § 98.43;

(m) A detailed description of how the State maintains a record of substantiated parental complaints and how it makes information regarding those complaints available to the public on request, pursuant to § 98.32;

(n) A detailed description of the procedures in effect for affording parents unlimited access to their children whenever their children are in the care of the provider, pursuant to § 98.31;

(o) A detailed description of the licensing requirements applicable to child care services provided, and a description of how such licensing requirements are effectively enforced, pursuant to § 98.40;

(p) Pursuant to § 98.33(b), the definitions or criteria used to implement the exception, provided in section 407(e)(2) of the Social Security Act, to individual penalties in the TANF work requirement applicable to a single custodial parent caring for a child under age six;

(q)(1) When any Matching funds under § 98.53(b) are claimed, a description of the efforts to ensure that pre-Kindergarten programs meet the needs of working parents;

(2) When State pre-Kindergarten expenditures are used to meet more than 10% of the amount required at § 98.53(c)(1), or for more than 10% of the funds available at § 98.53(b), or both, a description of how the State will coordinate its pre-Kindergarten and child care services to expand the availability of child care; and

(r) Such other information as specified by the Secretary.

§ 98.17 Period covered by Plan.

(a) For States, Territories, and Indian Tribes the Plan shall cover a period of two years.

(b) The Lead Agency shall submit a new Plan prior to the expiration of the time period specified in paragraph (a) of this section, at such time as required by the Secretary in written instructions.

§ 98.18 Approval and disapproval of Plans and Plan amendments.

(a) *Plan approval.* The Assistant Secretary will approve a Plan that satisfies the requirements of the Act and this part. Plans will be approved not later than the 90th day following the date on which the Plan submittal is received, unless a written agreement to extend that period has been secured.

(b) *Plan amendments.* Approved Plans shall be amended whenever a

substantial change in the program occurs. A Plan amendment shall be submitted within 60 days of the effective date of the change. Plan amendments will be approved not later than the 90th day following the date on which the amendment is received, unless a written agreement to extend that period has been secured.

(c) *Appeal of disapproval of a Plan or Plan amendment.*

(1) An applicant or Lead Agency dissatisfied with a determination of the Assistant Secretary pursuant to paragraphs (a) or (b) of this section with respect to any Plan or amendment may, within 60 days after the date of receipt of notification of such determination, file a petition with the Assistant Secretary asking for reconsideration of the issue of whether such Plan or amendment conforms to the requirements for approval under the Act and pertinent Federal regulations.

(2) Within 30 days after receipt of such petition, the Assistant Secretary shall notify the applicant or Lead Agency of the time and place at which the hearing for the purpose of reconsidering such issue will be held.

(3) Such hearing shall be held not less than 30 days, nor more than 90 days, after the notification is furnished to the applicant or Lead Agency, unless the Assistant Secretary and the applicant or Lead Agency agree in writing on another time.

(4) Action pursuant to an initial determination by the Assistant Secretary described in paragraphs (a) and (b) of this section that a Plan or amendment is not approvable shall not be stayed pending the reconsideration, but in the event that the Assistant Secretary subsequently determines that the original decision was incorrect, the Assistant Secretary shall certify restitution forthwith in a lump sum of any funds incorrectly withheld or otherwise denied. The hearing procedures are described in part 99 of this chapter.

Subpart C—Eligibility for Services

§ 98.20 A child's eligibility for child care services.

(a) In order to be eligible for services under § 98.50, a child shall:

- (1)(i) Be under 13 years of age; or,
- (ii) At the option of the Lead Agency, be under age 19 and physically or mentally incapable of caring for himself or herself, or under court supervision;
- (2) Reside with a family whose income does not exceed 85 percent of the State's median income for a family of the same size; and
- (3)(i) Reside with a parent or parents (as defined in § 98.2) who are working

or attending a job training or educational program; or

(ii) Receive, or need to receive, protective services and reside with a parent or parents (as defined in § 98.2) other than the parent(s) described in paragraph (a)(3)(i) of this section.

(A) At grantee option, the requirements in paragraph (a)(2) of this section and in § 98.42 may be waived for families eligible for child care pursuant to this paragraph, if determined to be necessary on a case-by-case basis by, or in consultation with, an appropriate protective services worker.

(B) At grantee option, the provisions in (A) apply to children in foster care when defined in the Plan, pursuant to § 98.16(f)(7).

(b) Pursuant to § 98.16(g)(5), a grantee or other administering agency may establish eligibility conditions or priority rules in addition to those specified in this section and § 98.44 so long as they do not:

(1) Discriminate against children on the basis of race, national origin, ethnic background, sex, religious affiliation, or disability;

(2) Limit parental rights provided under Subpart D; or

(3) Violate the provisions of this section, § 98.44, or the Plan. In particular, such conditions or priority rules may not be based on a parent's preference for a category of care or type of provider. In addition, such additional conditions or rules may not be based on a parent's choice of a child care certificate.

Subpart D—Program Operations (Child Care Services)—Parental Rights and Responsibilities

§ 98.30 Parental choice.

(a) The parent or parents of an eligible child who receives or is offered child care services shall be offered a choice:

(1) To enroll the child with an eligible child care provider that has a grant or contract for the provision of such services, if such services are available; or

(2) To receive a child care certificate as defined in § 98.2.

Such choice shall be offered any time that child care services are made available to a parent.

(b) When a parent elects to enroll the child with a provider that has a grant or contract for the provision of child care services, the child will be enrolled with the provider selected by the parent to the maximum extent practicable.

(c) In cases in which a parent elects to use a child care certificate, such certificate:

(1) Will be issued directly to the parent;

(2) Shall be of a value commensurate with the subsidy value of the child care services provided under paragraph (a)(1) of this section;

(3) May be used as a deposit for child care services if such a deposit is required of other children being cared for by the provider;

(4) May be used for child care services provided by a sectarian organization or agency, including those that engage in religious activities, if those services are chosen by the parent;

(5) May be expended by providers for any sectarian purpose or activity that is part of the child care services, including sectarian worship or instruction;

(6) Shall not be considered a grant or contract to a provider but shall be considered assistance to the parent.

(d) Child care certificates shall be made available to any parents offered child care services.

(e)(1) For child care services, certificates under paragraph (a)(2) of this section shall permit parents to choose from a variety of child care categories, including:

- (i) Center-based child care;
- (ii) Group home child care;
- (iii) Family child care; and
- (iv) In-home child care, with

limitations, if any, imposed by the Lead Agency and described in its Plan at § 98.16(g)(2).

Under each of the above categories, care by a sectarian provider may not be limited or excluded.

(2) Lead Agencies shall provide information regarding the range of provider options under paragraph (e)(1) of this section, including care by sectarian providers and relatives, to families offered child care services.

(f) With respect to State and local regulatory requirements under § 98.40, health and safety requirements under § 98.41, and payment rates under § 98.43, CCDF funds will not be available to a Lead Agency if State or local rules, procedures or other requirements promulgated for purposes of the CCDF significantly restrict parental choice by:

- (1) Expressly or effectively excluding:
 - (i) Any category of care or type of provider, as defined in § 98.2; or
 - (ii) Any type of provider within a category of care; or
- (2) Having the effect of limiting parental access to or choice from among such categories of care or types of providers, as defined in § 98.2; or
- (3) Excluding a significant number of providers in any category of care or of any type as defined in § 98.2.

§ 98.31 Parental access.

The Lead Agency shall have in effect procedures to ensure that providers of child care services for which assistance is provided afford parents unlimited access to their children, and to the providers caring for their children, during normal hours of provider operation and whenever the children are in the care of the provider. The Lead Agency shall provide a detailed description of such procedures.

§ 98.32 Parental complaints.

The State shall:

- (a) Maintain a record of substantiated parental complaints;
- (b) Make information regarding such parental complaints available to the public on request; and
- (c) The Lead Agency shall provide a detailed description of how such record is maintained and is made available.

§ 98.33 Consumer education.

The Lead Agency shall:

- (a) Certify that it will collect and disseminate to parents and the general public consumer education information that will promote informed child care choices including, at a minimum, information about
 - (1) the full range of providers available, and
 - (2) health and safety requirements;
- (b) Inform parents who receive TANF benefits about the requirement at section 407(e)(2) of the Social Security Act that the TANF agency make an exception to the individual penalties associated with the work requirement for any single custodial parent who has a demonstrated inability to obtain needed child care for a child under six years of age. The information may be provided directly by the Lead Agency, or, pursuant to § 98.11, other entities, and shall include:

(1) The procedures the TANF agency uses to determine if the parent has a demonstrated inability to obtain needed child care;

(2) The criteria or definitions applied by the TANF agency to determine whether the parent has a demonstrated inability to obtain needed child care, including:

- (i) "Appropriate child care";
- (ii) "Reasonable distance";
- (iii) "Unsuitability of informal child care";
- (iv) "Affordable child care arrangements";

(3) The clarification that assistance received during the time an eligible parent receives the exception referred to in paragraph (b) of this section will count toward the time limit on Federal benefits required at section 408(a)(7) of the Social Security Act.

(c) Include in the biennial Plan the definitions or criteria the TANF agency uses in implementing the exception to the work requirement specified in paragraph (b) of this section.

§ 98.34 Parental rights and responsibilities.

Nothing under this part shall be construed or applied in any manner to infringe on or usurp the moral and legal rights and responsibilities of parents or legal guardians.

Subpart E—Program Operations (Child Care Services)—Lead Agency and Provider Requirements

§ 98.40 Compliance with applicable State and local regulatory requirements.

- (a) Lead Agencies shall:
 - (1) Certify that they have in effect licensing requirements applicable to child care services provided within the area served by the Lead Agency;
 - (2) Provide a detailed description of the requirements under paragraph (a)(1) of this section and of how they are effectively enforced.

(b)(1) This section does not prohibit a Lead Agency from imposing more stringent standards and licensing or regulatory requirements on child care providers of services for which assistance is provided under the CCDF than the standards or requirements imposed on other child care providers.

(2) Any such additional requirements shall be consistent with the safeguards for parental choice in § 98.30(f).

§ 98.41 Health and safety requirements.

(a) Although the Act specifically states it does not require the establishment of any new or additional requirements if existing requirements comply with the requirements of the statute, each Lead Agency shall certify that there are in effect, within the State (or other area served by the Lead Agency), under State, local or tribal law, requirements designed to protect the health and safety of children that are applicable to child care providers of services for which assistance is provided under this part. Such requirements shall include:

(1) The prevention and control of infectious diseases (including immunizations). With respect to immunizations, the following provisions apply:

- (i) As part of their health and safety provisions in this area, States and Territories shall assure that children receiving services under the CCDF are age-appropriately immunized. Those health and safety provisions shall incorporate (by reference or otherwise) the latest recommendation for

childhood immunizations of the respective State or territorial public health agency.

(ii) Notwithstanding paragraph (a)(1)(i) of this section, Lead Agencies may exempt:

(A) Children who are cared for by relatives (defined as grandparents, great grandparents, siblings (if living in a separate residence), aunts, and uncles);

(B) Children who receive care in their own homes;

(C) Children whose parents object to immunization on religious grounds; and

(D) Children whose medical condition contraindicates immunization;

(iii) Lead Agencies shall establish a grace period in which children can receive services while families are taking the necessary actions to comply with the immunization requirements;

(2) Building and physical premises safety; and

(3) Minimum health and safety training appropriate to the provider setting.

(b) Lead Agencies may not set health and safety standards and requirements under paragraph (a) of this section that are inconsistent with the parental choice safeguards in § 98.30(f).

(c) The requirements in paragraph (a) of this section shall apply to all providers of child care services for which assistance is provided under this part, within the area served by the Lead Agency, except the relatives specified in paragraph (e) of this section.

(d) Each Lead Agency shall certify that procedures are in effect to ensure that child care providers of services for which assistance is provided under this part, within the area served by the Lead Agency, comply with all applicable State, local, or tribal health and safety requirements described in paragraph (a) of this section.

(e) For the purposes of this section, the term "child care providers" does not include grandparents, great grandparents, siblings (if such providers live in a separate residence), aunts, or uncles, pursuant to § 98.2.

§ 98.42 Sliding fee scales.

(a) Lead Agencies shall establish, and periodically revise, by rule, a sliding fee scale(s) that provides for cost sharing by families that receive CCDF child care services.

(b) A sliding fee scale(s) shall be based on income and the size of the family and may be based on other factors as appropriate.

(c) Lead Agencies may waive contributions from families whose incomes are at or below the poverty level for a family of the same size.

§ 98.43 Equal access.

(a) The Lead Agency shall certify that the payment rates for the provision of child care services under this part are sufficient to ensure equal access, for eligible families in the area served by the Lead Agency, to child care services comparable to those provided to families not eligible to receive CCDF assistance or child care assistance under any other Federal, State, or tribal programs.

(b) The Lead Agency shall provide a summary of the facts relied on to determine that its payment rates ensure equal access. At a minimum, the summary shall include facts showing:

(1) How a choice of the full range of providers, *e.g.*, center, group, family, and in-home care, is made available;

(2) How payment rates are adequate based on a local market rate survey conducted no earlier than two years prior to the effective date of the currently approved Plan;

(3) How copayments based on a sliding fee scale are affordable, as stipulated at § 98.42.

(c) A Lead Agency may not establish different payment rates based on a family's eligibility status or circumstances.

(d) Payment rates under paragraph (a) of this section shall be consistent with the parental choice requirements in § 98.30.

(e) Nothing in this section shall be construed to create a private right of action.

§ 98.44 Priority for child care services.

Lead Agencies shall give priority for services provided under § 98.50(a) to:

(a) Children of families with very low family income (considering family size); and

(b) Children with special needs.

§ 98.45 List of Providers.

If a Lead Agency does not have a registration process for child care providers who are unlicensed or unregulated under State, local, or tribal law, it is required to maintain a list of the names and addresses of unlicensed or unregulated providers of child care services for which assistance is provided under this part.

§ 98.46 Nondiscrimination in admissions on the basis of religion.

(a) Child care providers (other than family child care providers, as defined in § 98.2) that receive assistance through grants and contracts under the CCDF shall not discriminate in admissions against any child on the basis of religion.

(b) Paragraph (a) of this section does not prohibit a child care provider from

selecting children for child care slots that are not funded directly (*i.e.*, through grants or contracts to providers) with assistance provided under the CCDF because such children or their family members participate on a regular basis in other activities of the organization that owns or operates such provider.

(c) Notwithstanding paragraph (b) of this section, if 80 percent or more of the operating budget of a child care provider comes from Federal or State funds, including direct or indirect assistance under the CCDF, the Lead Agency shall assure that before any further CCDF assistance is given to the provider,

(1) The grant or contract relating to the assistance, or

(2) The admission policies of the provider specifically provide that no person with responsibilities in the operation of the child care program, project, or activity will discriminate, on the basis of religion, in the admission of any child.

§ 98.47 Nondiscrimination in employment on the basis of religion.

(a) In general, except as provided in paragraph (b) of this section, nothing in this part modifies or affects the provision of any other applicable Federal law and regulation relating to discrimination in employment on the basis of religion.

(1) Child care providers that receive assistance through grants or contracts under the CCDF shall not discriminate, on the basis of religion, in the employment of caregivers as defined in § 98.2.

(2) If two or more prospective employees are qualified for any position with a child care provider, this section shall not prohibit the provider from employing a prospective employee who is already participating on a regular basis in other activities of the organization that owns or operates the provider.

(3) Paragraphs (a)(1) and (2) of this section shall not apply to employees of child care providers if such employees were employed with the provider on November 5, 1990.

(b) Notwithstanding paragraph (a) of this section, a sectarian organization may require that employees adhere to the religious tenets and teachings of such organization and to rules forbidding the use of drugs or alcohol.

(c) Notwithstanding paragraph (b) of this section, if 80 percent or more of the operating budget of a child care provider comes from Federal and State funds, including direct and indirect assistance under the CCDF, the Lead

Agency shall assure that, before any further CCDF assistance is given to the provider,

- (1) The grant or contract relating to the assistance, or
- (2) The employment policies of the provider specifically provide that no person with responsibilities in the operation of the child care program will discriminate, on the basis of religion, in the employment of any individual as a caregiver, as defined in § 98.2.

Subpart F—Use of Child Care and Development Funds

§ 98.50 Child care services.

(a) Of the funds remaining after applying the provisions of paragraphs (c), (d) and (e) of this section the Lead Agency shall spend a substantial portion to provide child care services to low-income working families.

(b) Child care services shall be provided:

- (1) To eligible children, as described in § 98.20;
- (2) Using a sliding fee scale, as described in § 98.42;
- (3) Using funding methods provided for in § 98.30; and
- (4) Based on the priorities in § 98.44.

(c) Of the aggregate amount of funds expended (i.e., Discretionary, Mandatory, and Federal and State share of Matching Funds), no less than four percent shall be used for activities to improve the quality of child care as described at § 98.51.

(d) Of the aggregate amount of funds expended (i.e., Discretionary, Mandatory, and Federal and State share of Matching Funds), no more than five percent may be used for administrative activities as described at § 98.52.

(e) Not less than 70 percent of the Mandatory and Matching Funds shall be used to meet the child care needs of families who:

- (1) Are receiving assistance under a State program under Part A of title IV of the Social Security Act,
- (2) Are attempting through work activities to transition off such assistance program, and
- (3) Are at risk of becoming dependent on such assistance program.

(f) Pursuant to § 98.16(g)(4), the Plan shall specify how the State will meet the child care needs of families described in paragraph (e) of this section.

§ 98.51 Activities to improve the quality of child care.

(a) No less than four percent of the aggregate funds expended by the Lead Agency for a fiscal year, and including the amounts expended in the State pursuant to § 98.53(b), shall be expended for quality activities.

(1) These activities may include but are not limited to:

- (i) Activities designed to provide comprehensive consumer education to parents and the public;
- (ii) Activities that increase parental choice; and
- (iii) Activities designed to improve the quality and availability of child care, including, but not limited to those described in paragraph (2) of this section.

(2) Activities to improve the quality of child care services may include, but are not limited to:

- (i) Operating directly or providing financial assistance to organizations (including private non-profit organizations, public organizations, and units of general purpose local government) for the development, establishment, expansion, operation, and coordination of resource and referral programs specifically related to child care;
- (ii) Making grants or providing loans to child care providers to assist such providers in meeting applicable State, local, and tribal child care standards, including applicable health and safety requirements, pursuant to §§ 98.40 and 98.41;
- (iii) Improving the monitoring of compliance with, and enforcement of, applicable State, local, and tribal requirements pursuant to §§ 98.40 and 98.41;
- (iv) Providing training and technical assistance in areas appropriate to the provision of child care services, such as training in health and safety, nutrition, first aid, the recognition of communicable diseases, child abuse detection and prevention, and care of children with special needs;
- (v) Improving salaries and other compensation (such as fringe benefits) for full- and part-time staff who provide child care services for which assistance is provided under this part; and
- (vi) Any other activities that are consistent with the intent of this section.

(b) Pursuant to § 98.16(h), the Lead Agency shall describe in its Plan the activities it will fund under this section.

(c) Non-Federal expenditures required by § 98.53(c) (i.e., the maintenance-of-effort amount) are not subject to the requirement at paragraph (a) of this section.

(d) Pursuant to § 98.16(h), the Lead Agency shall describe in its Plan the activities it will fund under this section.

(e) Non-Federal expenditures required by § 98.53(c) (i.e., the maintenance-of-effort amount) are not subject to the requirement at paragraph (a) of this section.

(f) Pursuant to § 98.16(h), the Lead Agency shall describe in its Plan the activities it will fund under this section.

(g) Non-Federal expenditures required by § 98.53(c) (i.e., the maintenance-of-effort amount) are not subject to the requirement at paragraph (a) of this section.

§ 98.52 Administrative costs.

(a) Not more than five percent of the aggregate funds expended by the Lead Agency from each fiscal year's allotment, including the amounts expended in the State pursuant to § 98.53(b), shall be expended for

administrative activities. These activities may include but are not limited to:

(1) Salaries and related costs of the staff of the Lead Agency or other agencies engaged in the administration and implementation of the program pursuant to § 98.11. Program administration and implementation include the following types of activities:

- (i) Planning, developing, and designing the Child Care and Development Fund program;
- (ii) Providing local officials and the public with information about the program, including the conduct of public hearings;
- (iii) Preparing the application and Plan;
- (iv) Developing agreements with administering agencies in order to carry out program activities;
- (v) Monitoring program activities for compliance with program requirements;
- (vi) Preparing reports and other documents related to the program for submission to the Secretary;
- (vii) Maintaining substantiated complaint files in accordance with the requirements of § 98.32;
- (viii) Coordinating the provision of Child Care and Development Fund services with other Federal, State, and local child care, early childhood development programs, and before- and after-school care programs;
- (ix) Coordinating the resolution of audit and monitoring findings;
- (x) Evaluating program results; and
- (xi) Managing or supervising persons with responsibilities described in paragraphs (a)(1)(i) through (x) of this section;

(2) Travel costs incurred for official business in carrying out the program;

(3) Administrative services, including such services as accounting services, performed by grantees or subgrantees or under agreements with third parties;

(4) Audit services as required at § 98.65;

(5) Other costs for goods and services required for the administration of the program, including rental or purchase of equipment, utilities, and office supplies; and

(6) Indirect costs as determined by an indirect cost agreement or cost allocation plan pursuant to § 98.55.

(b) The five percent limitation at paragraph (a) of this section applies only to the States and Territories. The amount of the limitation at paragraph (a) of this section does not apply to Tribes or tribal organizations.

(c) Non-Federal expenditures required by § 98.53(c) (i.e., the maintenance-of-effort amount) are not subject to the five percent limitation at paragraph (a) of this section.

§ 98.53 Matching fund requirements.

(a) Federal matching funds are available for expenditures in a State based upon the formula specified at § 98.63(a).

(b) Expenditures in a State under paragraph (a) of this section will be matched at the Federal medical assistance rate for the applicable fiscal year for allowable activities, as described in the approved State Plan, that meet the goals and purposes of the Act.

(c) In order to receive Federal matching funds for a fiscal year under paragraph (a) of this section:

(1) States shall also expend an amount of non-Federal funds for child care activities in the State that is at least equal to the State's share of expenditures for fiscal year 1994 or 1995 (whichever is greater) under sections 402(g) and (i) of the Social Security Act as these sections were in effect before October 1, 1995; and

(2) The expenditures shall be for allowable services or activities, as described in the approved State Plan if appropriate, that meet the goals and purposes of the Act.

(3) All Mandatory Funds are obligated in accordance with § 98.60(d)(2)(i).

(d) The same expenditure may not be used to meet the requirements under both paragraphs (b) and (c) of this section in a fiscal year.

(e) An expenditure in the State for purposes of this subpart may be:

(1) Public funds when the funds are:

(i) Appropriated directly to the Lead Agency specified at § 98.10, or transferred from another public agency to that Lead Agency and under its administrative control, or certified by the contributing public agency as representing expenditures eligible for Federal match;

(ii) Not used to match other Federal funds; and

(iii) Not Federal funds, or are Federal funds authorized by Federal law to be used to match other Federal funds; or

(2) Donated from private sources when the donated funds:

(i) Are donated without any restriction that would require their use for a specific individual, organization, facility or institution;

(ii) Do not revert to the donor's facility or use; and

(iii) Are not used to match other Federal funds;

(iv) Shall be certified both by the donor and by the Lead Agency as available and representing expenditures eligible for Federal match; and

(v) Shall be subject to the audit requirements in § 98.65 of these regulations.

(f) Donated funds need not be transferred to or under the administrative control of the Lead Agency in order to qualify as an expenditure eligible to receive Federal match under this subsection. They may be given to the entity designated by the State to receive donated funds pursuant to § 98.16(c)(2).

(g) The following are not counted as an eligible State expenditure under this Part:

(1) In-kind contributions; and

(2) Family contributions to the cost of care as required by § 98.42.

(h) Public pre-kindergarten (pre-K) expenditures:

(1) May be used to meet the maintenance-of-effort requirement only if the State has not reduced its expenditures for full-day/full-year child care services; and

(2) May be eligible for Federal match if the State includes in its Plan, as provided in § 98.16(q), a description of the efforts it will undertake to ensure that pre-K programs meet the needs of working parents.

(3) In any fiscal year, a State may use public pre-K funds for up to 20% of the funds serving as maintenance-of-effort under this subsection. In any fiscal year, a State may use other public pre-K funds for up to 20% of the expenditures serving as the State's matching funds under this subsection.

(4) If applicable, the CCDF Plan shall reflect the State's intent to use public pre-K funds in excess of 10%, but not for more than 20%, of either its maintenance-of-effort or State matching funds in a fiscal year. Also, the Plan shall describe how the State will coordinate its pre-K and child care services to expand the availability of child care.

(i) Matching funds are subject to the obligation and liquidation requirements at § 98.60(d)(3).

§ 98.54 Restrictions on the use of funds.

(a) *General.* (1) Funds authorized under section 418 of the Social Security Act and section 658B of the Child Care and Development Block Grant Act, and all funds transferred to the Lead Agency pursuant to section 404(d) of the Social Security Act, shall be expended consistent with these regulations. Funds transferred pursuant to section 404(d) of the Social Security Act shall be treated as Discretionary Funds;

(2) Funds shall be expended in accordance with applicable State and local laws, except as superseded by § 98.3.

(b) *Construction.* (1) For State and local agencies and nonsectarian agencies or organizations, no funds shall

be expended for the purchase or improvement of land, or for the purchase, construction, or permanent improvement of any building or facility. However, funds may be expended for minor remodeling, and for upgrading child care facilities to assure that providers meet State and local child care standards, including applicable health and safety requirements.

(2) For sectarian agencies or organizations, the prohibitions in paragraph (b)(1) of this section apply; however, funds may be expended for minor remodeling only if necessary to bring the facility into compliance with the health and safety requirements established pursuant to § 98.41.

(3) Tribes and tribal organizations are subject to the requirements at § 98.84 regarding construction and renovation.

(c) *Tuition.* Funds may not be expended for students enrolled in grades 1 through 12 for:

(1) Any service provided to such students during the regular school day;

(2) Any service for which such students receive academic credit toward graduation; or

(3) Any instructional services that supplant or duplicate the academic program of any public or private school.

(d) *Sectarian purposes and activities.* Funds provided under grants or contracts to providers may not be expended for any sectarian purpose or activity, including sectarian worship or instruction. Pursuant to § 98.2, assistance provided to parents through certificates is not a grant or contract. Funds provided through child care certificates may be expended for sectarian purposes or activities, including sectarian worship or instruction when provided as part of the child care services.

(e) The CCDF may not be used as the non-Federal share for other Federal grant programs.

§ 98.55 Cost allocation.

(a) The Lead Agency and subgrantees shall keep on file cost allocation plans or indirect cost agreements, as appropriate, that have been amended to include costs allocated to the CCDF.

(b) Subgrantees that do not already have a negotiated indirect rate with the Federal government should prepare and keep on file cost allocation plans or indirect cost agreements, as appropriate.

(c) Approval of the cost allocation plans or indirect cost agreements is not specifically required by these regulations, but these plans and agreements are subject to review.

Subpart G—Financial Management**§ 98.60 Availability of funds.**

(a) The CCDF is available, subject to the availability of appropriations, in accordance with the apportionment of funds from the Office of Management and Budget as follows:

(1) Discretionary Funds are available to States, Territories, and Tribes,

(2) Mandatory and Matching Funds are available to States;

(3) Tribal Mandatory Funds are available to Tribes.

(b) Subject to the availability of appropriations, in accordance with the apportionment of funds from the Office of Management and Budget, the Secretary:

(1) May withhold no more than one-quarter of one percent of the CCDF funds made available for a fiscal year for the provision of technical assistance; and

(2) Will award the remaining CCDF funds to grantees that have an approved application and Plan.

(c) The Secretary may make payments in installments, and in advance or by way of reimbursement, with necessary adjustments due to overpayments or underpayments.

(d) The following obligation and liquidation provisions apply to States and Territories:

(1) Discretionary Fund allotments shall be obligated in the fiscal year in which funds are awarded or in the succeeding fiscal year. Unliquidated obligations as of the end of the succeeding fiscal year shall be liquidated within one year.

(2)(i) Mandatory Funds for States requesting Matching Funds per § 98.53 shall be obligated in the fiscal year in which the funds are granted and are available until expended.

(ii) Mandatory Funds for States that do not request Matching Funds are available until expended.

(3) Both the Federal and non-Federal share of the Matching Fund shall be obligated in the fiscal year in which the funds are granted and liquidated no later than the end of the succeeding fiscal year.

(4) Except for paragraph (d)(5) of this section, determination of whether funds have been obligated and liquidated will be based on:

(i) State or local law; or,

(ii) If there is no applicable State or local law, the regulation at 45 CFR 92.3, Obligations and Outlays (expenditures).

(5) Obligations may include subgrants or contracts that require the payment of funds to a third party (e.g., subgrantee or contractor). However, the following are not considered third party subgrantees or contractors:

(i) A local office of the Lead Agency;

(ii) Another entity at the same level of government as the Lead Agency; or

(iii) A local office of another entity at the same level of government as the Lead Agency.

(6) For purposes of the CCDF, funds for child care services provided through a child care certificate will be considered obligated when a child care certificate is issued to a family in writing that indicates:

(i) The amount of funds that will be paid to a child care provider or family, and

(ii) The specific length of time covered by the certificate, which is limited to the date established for redetermination of the family's eligibility, but shall be no later than the end of the liquidation period.

(7) Any funds not obligated during the obligation period specified in paragraph (d) of this section will revert to the Federal government. Any funds not liquidated by the end of the applicable liquidation period specified in paragraph (d) of this section will also revert to the Federal government.

(e) The following obligation and liquidation provisions apply to Tribal Discretionary and Tribal Mandatory Funds:

(1) Tribal grantees shall obligate all funds by the end of the fiscal year following the fiscal year for which the grant is awarded. Any funds not obligated during this period will revert to the Federal government.

(2) Obligations that remain unliquidated at the end of the succeeding fiscal year shall be liquidated within the next fiscal year. Any tribal funds that remain unliquidated by the end of this period will also revert to the Federal government.

(f) Cash advances shall be limited to the minimum amounts needed and shall be timed to be in accord with the actual, immediate cash requirements of the State Lead Agency, its subgrantee or contractor in carrying out the purpose of the program in accordance with 31 CFR part 205.

(g) Funds that are returned (e.g., loan repayments, funds deobligated by cancellation of a child care certificate, unused subgrantee funds) as well as program income (e.g., contributions made by families directly to the Lead Agency or subgrantee for the cost of care where the Lead Agency or subgrantee has made a full payment to the child care provider) shall,

(1) if received by the Lead Agency during the applicable obligation period, described in paragraphs (d) and (e) of this section, be used for activities

specified in the Lead Agency's approved plan and must be obligated by the end of the obligation period; or

(2) if received after the end of the applicable obligation period described at paragraphs (d) and (e) of this section, be returned to the Federal government.

(h) Repayment of loans, pursuant to § 98.51(a)(2)(ii), may be made in cash or in services provided in-kind. Payment provided in-kind shall be based on fair market value. All loans shall be fully repaid.

(i) Lead Agencies shall recover child care payments that are the result of fraud. These payments shall be recovered from the party responsible for committing the fraud.

§ 98.61 Allotments from the Discretionary Fund.

(a) To the 50 States, the District of Columbia, and the Commonwealth of Puerto Rico an amount equal to the funds appropriated for the Child Care and Development Block Grant, less amounts reserved for technical assistance and amounts reserved for the Territories and Tribes, pursuant to § 98.60(b) and paragraphs (b) and (c) of this section, shall be allotted based upon the formula specified in section 658O(b) of the Act.

(b) For the U.S. Territories of Guam, American Samoa, the Virgin Islands of the United States, and the Commonwealth of the Northern Mariana Islands an amount up to one-half of one percent of the amount appropriated for the Child Care and Development Block Grant shall be reserved.

(1) Funds shall be allotted to these Territories based upon the following factors:

(i) A Young Child factor—the ratio of the number of children in the Territory under five years of age to the number of such children in all Territories; and

(ii) An Allotment Proportion factor—determined by dividing the per capita income of all individuals in all the Territories by the per capita income of all individuals in the Territory.

(A) Per capita income shall be:

(1) Equal to the average of the annual per capita incomes for the most recent period of three consecutive years for which satisfactory data are available at the time such determination is made; and

(2) Determined every two years.

(B) Per capita income determined, pursuant to paragraph (b)(1)(ii)(A) of this section, will be applied in establishing the allotment for the fiscal year for which it is determined and for the following fiscal year.

(C) If the Allotment Proportion factor determined at paragraph (b)(1)(ii) of this section:

(1) Exceeds 1.2, then the Allotment Proportion factor of the Territory shall be considered to be 1.2; or

(2) Is less than 0.8, then the Allotment Proportion factor of the Territory shall be considered to be 0.8.

(2) The formula used in calculating a Territory's allotment is as follows:

$$\frac{YCF_t \times APF_t}{\sum (YCF_t \times APF_t)} \times \text{amount reserved for Territories at paragraph (a) of this section.}$$

(ii) For purposes of the formula specified at paragraph (b)(2)(i) of this section, the term "YCF_t" means the Territory's Young Child factor as defined at paragraph (b)(1)(i) of this section.

(iii) For purposes of the formula specified at paragraph (b)(2)(i) of this section, the term "APF_t" means the Territory's Allotment Proportion factor as defined at paragraph (b)(1)(ii) of this section.

(c) For Indian Tribes and tribal organizations, including any Alaskan Native Village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 *et seq*) an amount up to two percent of the amount appropriated for the Child Care and Development Block Grant shall be reserved.

(1) Except as specified in paragraph (c)(2) of this section, grants to individual tribal grantees will be equal to the sum of:

(i) A base amount as set by the Secretary; and

(ii) An additional amount per Indian child under age 13 (or such similar age as determined by the Secretary from the best available data), which is determined by dividing the amount of funds available, less amounts set aside for eligible Tribes, pursuant to paragraph (c)(1)(i) of this section, by the number of all Indian children living on or near tribal reservations or other appropriate area served by the tribal grantee, pursuant to § 98.80(e).

(2) Grants to Tribes with fewer than 50 Indian children that apply as part of a consortium, pursuant to § 98.80(b)(1), are equal to the sum of:

(i) A portion of the base amount, pursuant to paragraph (c)(1)(i) of this section, that bears the same ratio as the number of Indian children in the Tribe living on or near the reservation, or other appropriate area served by the tribal grantee, pursuant to § 98.80(e), does to 50; and

(ii) An additional amount per Indian child, pursuant to paragraph (c)(1)(ii) of this section.

(3) Tribal consortia will receive grants that are equal to the sum of the individual grants of their members.

(d) All funds reserved for Territories at paragraph (b) of this section will be allotted to Territories, and all funds reserved for Tribes at paragraph (c) of this section will be allotted to tribal grantees. Any funds that are returned by the Territories after they have been allotted will revert to the Federal government.

(e) For other organizations, up to \$2,000,000 may be reserved from the tribal funds reserved at paragraph (c) of this section. From this amount the Secretary may award a grant to a Native Hawaiian Organization, as defined in section 4009(4) of the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988 (20 U.S.C. 4909(4)) and to a private non-profit organization established for the purpose of serving youth who are Indians or Native Hawaiians. The Secretary will establish selection criteria and procedures for the award of grants under this subsection by notice in the **Federal Register**.

§ 98.62 Allotments from the Mandatory Fund.

(a) Each of the 50 States and the District of Columbia will be allocated from the funds appropriated under section 418(a)(3) of the Social Security Act, less the amounts reserved for technical assistance pursuant to § 98.60(b)(1) and the amount reserved for Tribes pursuant to paragraph (b) of this section, an amount of funds equal to the greater of:

(1) the Federal share of its child care expenditures under subsections (g) and (i) of section 402 of the Social Security Act (as in effect before October 1, 1995) for fiscal year 1994 or 1995 (whichever is greater); or

(2) the average of the Federal share of its child care expenditures under the subsections referred to in subparagraph (a)(1) of this section for fiscal years 1992 through 1994.

(b) For Indian Tribes and tribal organizations up to 2 percent of the amount appropriated under section 418(a)(3) of the Social Security Act shall be allocated according to the formula at paragraph (c) of this section. In Alaska, only the following 13 entities shall receive allocations under this subpart, in accordance with the formula at paragraph (c) of this section:

- (1) The Metlakatla Indian Community of the Annette Islands Reserve;
- (2) Arctic Slope Native Association;
- (3) Kawerak, Inc.;
- (4) Maniilaq Association;

(5) Association of Village Council Presidents;

(6) Tanana Chiefs Conference;

(7) Cook Inlet Tribal Council;

(8) Bristol Bay Native Association;

(9) Aleutian and Pribilof Islands

Association;

(10) Chugachmuit;

(11) Tlingit and Haida Central

Council;

(12) Kodiak Area Native Association; and

(13) Copper River Native Association.

(c)(1) Grants to individual Tribes with 50 or more Indian children, and to Tribes with fewer than 50 Indian children that apply as part of a consortium pursuant to § 98.80(b)(1), will be equal to an amount per Indian child under age 13 (or such similar age as determined by the Secretary from the best available data), which is determined by dividing the amount of funds available, by the number of Indian children in each Tribe's service area pursuant to § 98.80(e).

(2) Tribal consortia will receive grants that are equal to the sum of the individual grants of their members.

§ 98.63 Allotments from the Matching Fund.

(a) To each of the 50 States and the District of Columbia there is allocated an amount equal to its share of the total available under section 418(a)(3) of the Social Security Act. That amount is based on the same ratio as the number of children under age 13 residing in the State bears to the national total of children under age 13. The number of children under 13 is derived from the best data available to the Secretary for the second preceding fiscal year.

(b) For purposes of this subsection, the amounts available under section 418(a)(3) of the Social Security Act excludes the amounts reserved and allocated under § 98.60(b)(1) for technical assistance and under § 98.62(a) and (b) for the Mandatory Fund.

(c) Amounts under this subsection are available pursuant to the requirements at § 98.53(c).

§ 98.64 Reallotment and redistribution of funds.

(a) According to the provisions of this section State and Tribal Discretionary Funds are subject to reallotment, and State Matching Funds are subject to redistribution. State funds are reallotted or redistributed only to States as defined for the original allocation. Tribal funds are reallotted only to Tribes. Funds granted to the Territories are not subject to reallotment. Any funds granted to the Territories that are returned after they

have been allotted will revert to the Federal government.

(b) Any portion of a State's Discretionary Fund allotment that is not required to carry out its Plan, in the period for which the allotment is made available, shall be reallocated to other States in proportion to the original allotments. For purposes of this paragraph the term "State" means the 50 States, the District of Columbia, and the Commonwealth of Puerto Rico. The other Territories and the Tribes may not receive reallocated State Discretionary Funds.

(1) Each year, the State shall report to the Secretary either the dollar amount from the previous year's grant that it will be unable to obligate by the end of the obligation period or that all funds will be obligated during such time. Such report shall be postmarked by April 1st.

(2) Based upon the reallocation reports submitted by States, the Secretary will reallocate funds.

(i) If the total amount available for reallocation is \$25,000 or more, funds will be reallocated to States in proportion to each State's allotment for the applicable fiscal year's funds, pursuant to § 98.61(a).

(ii) If the amount available for reallocation is less than \$25,000, the Secretary will not reallocate any funds, and such funds will revert to the Federal government.

(iii) If an individual reallocation amount to a State is less than \$500, the Secretary will not issue the award, and such funds will revert to the Federal government.

(3) If a State does not submit a reallocation report by the deadline for report submittal, either:

(i) The Secretary will determine that the State does not have any funds available for reallocation; or

(ii) In the case of a report postmarked after April 1st, any funds reported to be available for reallocation shall revert to the Federal government.

(4) States receiving reallocated funds shall obligate and expend these funds in accordance with § 98.60. The reallocation of funds does not extend the obligation period or the program period for expenditure of such funds.

(c)(1) Any portion of the Matching Fund granted to a State that is not obligated in the period for which the grant is made shall be redistributed. Funds, if any, will be redistributed on the request of, and only to, those other States that have met the requirements of § 98.53(c) in the period for which the grant was first made. For purposes of this paragraph the term "State" means the 50 States and the District of Columbia. Territorial and tribal grantees

may not receive redistributed Matching Funds.

(2) Matching Funds allotted to a State under § 98.63(a), but not granted, shall also be redistributed in the manner described in paragraph (1) of this section.

(3) The amount of Matching Funds granted to a State that will be made available for redistribution will be based on the State's financial report to ACF for the Child Care and Development Fund (ACF-696) and is subject to the monetary limits at paragraph (b)(2) of this section.

(4) A State eligible to receive redistributed Matching Funds shall also use the ACF-696 to request its share of the redistributed funds, if any.

(5) A State's share of redistributed Matching Funds is based on the same ratio as the number of children under 13 residing in the State to the number of children residing in all States eligible to receive and that request the redistributed Matching Funds.

(6) Redistributed funds are considered part of the grant for the fiscal year in which the redistribution occurs.

(d) Any portion of a Tribe's allotment of Discretionary Funds that is not required to carry out its Plan, in the period for which the allotment is made available, shall be reallocated to other tribal grantees in proportion to their original allotments. States and Territories may not receive reallocated tribal funds.

(1) Each year, the Tribe shall report to the Secretary either the dollar amount from the previous year's grant that it will be unable to obligate by the end of the obligation period or that all funds will be obligated during such time. Such report shall be postmarked by a deadline established by the Secretary.

(2) Based upon the reallocation reports submitted by Tribes, the Secretary will reallocate Tribal Discretionary Funds among the other Tribes.

(i) If the total amount available for reallocation is \$25,000 or more, funds will be reallocated to other tribal grantees in proportion to each Tribe's original allotment for the applicable fiscal year pursuant to § 98.62(c).

(ii) If the total amount available for reallocation is less than \$25,000, the Secretary will not reallocate any funds, and such funds will revert to the Federal government.

(iii) If an individual reallocation amount to an applicant Tribe is less than \$500, the Secretary will not issue the award, and such funds will revert to the Federal government.

(3) If a Tribe does not submit a reallocation report by the deadline for report submittal, either:

(i) The Secretary will determine that Tribe does not have any funds available for reallocation; or

(ii) In the case of a report received after the deadline established by the Secretary, any funds reported to be available for reallocation shall revert to the Federal government.

(4) Tribes receiving reallocated funds shall obligate and expend these funds in accordance with § 98.60. The reallocation of funds does not extend the obligation period or the program period for expenditure of such funds.

§ 98.65 Audits and financial reporting.

(a) Each Lead Agency shall have an audit conducted after the close of each program period in accordance with OMB Circular A-133 and the Single Audit Act Amendments of 1996.

(b) Lead Agencies are responsible for ensuring that subgrantees are audited in accordance with appropriate audit requirements.

(c) Not later than 30 days after the completion of the audit, Lead Agencies shall submit a copy of their audit report to the legislature of the State or, if applicable, to the Tribal Council(s). Lead Agencies shall also submit a copy of their audit report to the HHS Inspector General for Audit Services, as well as to their cognizant agency, if applicable.

(d) Any amounts determined through an audit not to have been expended in accordance with these statutory or regulatory provisions, or with the Plan, and that are subsequently disallowed by the Department shall be repaid to the Federal government, or the Secretary will offset such amounts against any other CCDF funds to which the Lead Agency is or may be entitled.

(e) Lead Agencies shall provide access to appropriate books, documents, papers and records to allow the Secretary to verify that CCDF funds have been expended in accordance with the statutory and regulatory requirements of the program, and with the Plan.

(f) The audit required in paragraph (a) of this section shall be conducted by an agency that is independent of the State, Territory or Tribe as defined by generally accepted government auditing standards issued by the Comptroller General, or a public accountant who meets such independent standards.

(g) The Secretary shall require financial reports as necessary.

§ 98.66 Disallowance procedures.

(a) Any expenditures not made in accordance with the Act, the implementing regulations, or the approved Plan, will be subject to disallowance.

(b) If the Department, as the result of an audit or a review, finds that expenditures should be disallowed, the Department will notify the Lead Agency of this decision in writing.

(c)(1) If the Lead Agency agrees with the finding that amounts were not expended in accordance with the Act, these regulations, or the Plan, the Lead Agency shall fulfill the provisions of the disallowance notice and repay any amounts improperly expended; or

(2) The Lead Agency may appeal the finding:

(i) By requesting reconsideration from the Assistant Secretary, pursuant to paragraph (f) of this section; or

(ii) By following the procedure in paragraph (d) of this section.

(d) A Lead Agency may appeal the disallowance decision to the Departmental Appeals Board in accordance with 45 CFR part 16.

(e) The Lead Agency may appeal a disallowance of costs that the Department has determined to be unallowable under an award. A grantee may not appeal the determination of award amounts or disposition of unobligated balances.

(f) The Lead Agency's request for reconsideration in (c)(2)(i) of this section shall be postmarked no later than 30 days after the receipt of the disallowance notice. A Lead Agency may request an extension within the 30-day time frame. The request for reconsideration, pursuant to (c)(2)(i) of this section, need not follow any prescribed form, but it shall contain:

(1) The amount of the disallowance;

(2) The Lead Agency's reasons for believing that the disallowance was improper; and

(3) A copy of the disallowance decision issued pursuant to paragraph (b) of this section.

(g)(1) Upon receipt of a request for reconsideration, pursuant to (c)(2)(i) of this section, the Assistant Secretary or the Assistant Secretary's designee will inform the Lead Agency that the request is under review.

(2) The Assistant Secretary or the designee will review any material submitted by the Lead Agency and any other necessary materials.

(3) If the reconsideration decision is adverse to the Lead Agency's position, the response will include a notification of the Lead Agency's right to appeal to the Departmental Appeals Board, pursuant to paragraph (d) of this section.

(h) If a Lead Agency refuses to repay amounts after a final decision has been made, the amounts will be offset against future payments to the Lead Agency.

(i) The appeals process in this section is not applicable if the disallowance is part of a compliance review, pursuant to § 98.90, the findings of which have been appealed by the Lead Agency.

(j) Disallowances under the CCDF program are subject to interest regulations at 45 CFR part 30. Interest will begin to accrue from the date of notification.

§ 98.67 Fiscal requirements.

(a) Lead Agencies shall expend and account for CCDF funds in accordance with their own laws and procedures for expending and accounting for their own funds.

(b) Unless otherwise specified in this part, contracts that entail the expenditure of CCDF funds shall comply with the laws and procedures generally applicable to expenditures by the contracting agency of its own funds.

(c) Fiscal control and accounting procedures shall be sufficient to permit:

(1) Preparation of reports required by the Secretary under this subpart and under subpart H; and

(2) The tracing of funds to a level of expenditure adequate to establish that such funds have not been used in violation of the provisions of this part.

Subpart H—Program Reporting Requirements

§ 98.70 Reporting requirements.

(a) Quarterly Case-level Report—

(1) State and territorial Lead Agencies that receive assistance under the CCDF shall prepare and submit to the Department, in a manner specified by the Secretary, a quarterly case-level report of monthly family case-level data. Data shall be collected monthly and submitted quarterly. States may submit the data monthly if they choose to do so.

(2) The information shall be reported for the three-month federal fiscal period preceding the required report. The first report shall be submitted no later than August 31, 1998, and quarterly thereafter. The first report shall include data from the third quarter of FFY 1998 (April 1998 through June 1998). States and Territorial Lead Agencies which choose to submit case-level data monthly must submit their report for April 1998 no later than July 30, 1998. Following reports must be submitted every thirty days thereafter.

(3) State and territorial Lead Agencies choosing to submit data based on a sample shall submit a sampling plan to ACF for approval 60 days prior to the submission of the first quarterly report. States are not prohibited from submitting case-level data for the entire population receiving CCDF services.

(4) Quarterly family case-level reports to the Secretary shall include the information listed in § 98.71(a).

(b) Annual Report—

(1) State and territorial Lead Agencies that receive assistance under CCDF shall prepare and submit to the Secretary an annual report. The report shall be submitted, in a manner specified by the Secretary, by December 31 of each year and shall cover the most recent federal fiscal year (October through September).

(2) The first annual aggregate report shall be submitted no later than December 31, 1997, and every twelve months thereafter.

(3) Biennial reports to Congress by the Secretary shall include the information listed in § 98.71(b).

(c) Tribal Annual Report—

(1) Tribal Lead Agencies that receive assistance under CCDF shall prepare and submit to the Secretary an annual aggregate report.

(2) The report shall be submitted in the manner specified by the Secretary by December 31 of each year and shall cover services for children and families served with CCDF funds during the preceding Federal Fiscal Year.

(3) Biennial reports to Congress by the Secretary shall include the information listed in § 98.71(c).

§ 98.71 Content of reports.

(a) At a minimum, a State or territorial Lead Agency's quarterly case-level report to the Secretary, as required in § 98.70, shall include the following information on services provided under CCDF grant funds, including Federal Discretionary (which includes any funds transferred from the TANF Block Grant), Mandatory, and Matching Funds; and State Matching and Maintenance-of-Effort (MOE) Funds:

(1) The total monthly family income for determining eligibility;

(2) County of residence;

(3) Gender and month/year of birth of children;

(4) Ethnicity and race of children;

(5) Whether the head of the family is a single parent;

(6) The sources of family income, from employment (including self-employment), cash or other assistance under the Temporary Assistance for Needy Families program under Part A of title IV of the Social Security Act, cash or other assistance under a State program for which State spending is counted toward the maintenance of effort requirement under section 409(a)(7) of the Social Security Act, housing assistance, assistance under the Food Stamp Act of 1977; and other assistance programs;

(7) The month/year child care assistance to the family started;

(8) The type(s) of child care in which the child was enrolled (such as family child care, in-home care, or center-based child care);

(9) Whether the child care provider involved was a relative;

(10) The total monthly child care copayment by the family;

(11) The total expected dollar amount per month to be received by the provider for each child;

(12) The total hours per month of such care;

(13) Social Security Number of the head of the family unit receiving child care assistance;

(14) Reasons for receiving care; and

(15) Any additional information that the Secretary shall require.

(b) At a minimum, a State or territorial Lead Agency's annual aggregate report to the Secretary, as required in § 98.70(b), shall include the following information on services provided through all CCDF grant funds, including Federal Discretionary (which includes any funds transferred from the TANF Block Grant), Mandatory, and Matching Funds; and State Matching and MOE Funds:

(1) The number of child care providers that received funding under CCDF as separately identified based on the types of providers listed in section 658P(5) of the amended Child Care and Development Block Grant Act;

(2) The number of children served by payments through certificates or vouchers, contracts or grants, and cash under public benefit programs, listed by the primary type of child care services provided during the last month of the report period (or the last month of service for those children leaving the program before the end of the report period);

(3) The manner in which consumer education information was provided to parents and the number of parents to whom such information was provided;

(4) The total number (without duplication) of children and families served under CCDF; and

(5) Any additional information that the Secretary shall require.

(c) At a minimum, a Tribal Lead Agency's annual report to the Secretary, as required in § 98.70(c), shall include the following information on services provided through all CCDF tribal grant awards:

(1) Unduplicated number of families and children receiving services;

(2) Children served by age;

(3) Children served by reason for care;

(4) Children served by payment method (certificate/voucher or contract/grants);

(5) Average number of hours of care provided per week;

(6) Average hourly amount paid for care;

(7) Children served by level of family income; and

(8) Children served by type of child care providers.

Subpart I—Indian Tribes

§ 98.80 General procedures and requirements.

An Indian Tribe or tribal organization (as described in Subpart G of these regulations) may be awarded grants to plan and carry out programs for the purpose of increasing the availability, affordability, and quality of child care and childhood development programs subject to the following conditions:

(a) An Indian Tribe applying for or receiving CCDF funds shall be subject to all the requirements under this part, unless otherwise indicated.

(b) An Indian Tribe applying for or receiving CCDF funds shall:

(1) Have at least 50 children under 13 years of age (or such similar age, as determined by the Secretary from the best available data) in order to be eligible to operate a CCDF program. This limitation does not preclude an Indian Tribe with fewer than 50 children under 13 years of age from participating in a consortium that receives CCDF funds; and

(2) Demonstrate its current service delivery capability, including skills, personnel, resources, community support, and other necessary components to satisfactorily carry out the proposed program.

(c) A consortium representing more than one Indian Tribe may be eligible to receive CCDF funds on behalf of a particular Tribe if:

(1) The consortium adequately demonstrates that each participating Tribe authorizes the consortium to receive CCDF funds on behalf of each Tribe or tribal organization in the consortium; and

(2) The consortium consists of Tribes that each meet the eligibility requirements for the CCDF program as defined in this part, or that would otherwise meet the eligibility requirements if the Tribe or tribal organization had at least 50 children under 13 years of age; and

(3) All the participating consortium members are in geographic proximity to one another (including operation in a multi-State area) or have an existing consortium arrangement; and

(4) The consortium demonstrates that it has the managerial, technical and administrative staff with the ability to administer government funds, manage a CCDF program and comply with the provisions of the Act and of this part.

(d) The awarding of a grant under this section shall not affect the eligibility of any Indian child to receive CCDF services provided by the State or States in which the Indian Tribe is located.

(e) For purposes of the CCDF, the determination of the number of children in the Tribe, pursuant to paragraph (b)(1) of this section, shall include Indian children living on or near reservations, with the exception of Tribes in Alaska, California and Oklahoma.

(f) In determining eligibility for services pursuant to § 98.20(a)(2), a tribal program may use either:

(1) 85 percent of the State median income for a family of the same size; or

(2) 85 percent of the median income for a family of the same size residing in the area served by the Tribal Lead Agency.

§ 98.81 Application and Plan procedures.

(a) In order to receive CCDF funds, a Tribal Lead Agency shall apply for funds pursuant to § 98.13, except that the requirement at § 98.13(b)(2) does not apply.

(b) A Tribal Lead Agency shall submit a CCDF Plan, as described at § 98.16, with the following additions and exceptions:

(1) The Plan shall include the basis for determining family eligibility pursuant to § 98.80(f).

(2) For purposes of determining eligibility, the following terms shall also be defined:

(i) Indian child; and

(ii) Indian reservation or tribal service area.

(3) The Tribal Lead Agency shall also assure that:

(i) The applicant shall coordinate, to the maximum extent feasible, with the Lead Agency in the State in which the applicant shall carry out CCDF programs or activities, pursuant to § 98.82; and

(ii) In the case of an applicant located in a State other than Alaska, California, or Oklahoma, CCDF programs and activities shall be carried out on an Indian reservation for the benefit of Indian children, pursuant to § 98.83(b).

(4) The Plan shall include any information, as prescribed by the Secretary, necessary for determining the number of children in accordance with §§ 98.61(c), 98.62(c), and 98.80(b)(1).

(5) Plans for those Tribes specified at § 98.83(f) (i.e., Tribes with small grants) are not subject to the requirements in § 98.16(g)(2) or § 98.16(k) unless the Tribe chooses to include such services, and, therefore, the associated requirements, in its program.

(6) The Plan is not subject to requirements in § 98.16(f)(8) or § 98.16(g)(4).

(7) In its initial Plan, an Indian Tribe shall describe its current service delivery capability pursuant to § 98.80(b)(2).

(8) A consortium shall also provide the following:

- (i) A list of participating or constituent members, including demonstrations from these members pursuant to § 98.80(c)(1);
- (ii) A description of how the consortium is coordinating services on behalf of its members, pursuant to § 98.83(c)(1); and
- (iii) As part of its initial Plan, the additional information required at § 98.80(c)(4).

(c) When initially applying under paragraph (a) of this section, a Tribal Lead Agency shall include a Plan that meets the provisions of this part and shall be for a two-year period, pursuant to § 98.17(a).

§ 98.82 Coordination.

Tribal applicants shall coordinate as required by §§ 98.12 and 98.14 and:

- (a) To the maximum extent feasible, with the Lead Agency in the State or States in which the applicant will carry out the CCDF program; and
- (b) With other Federal, State, local, and tribal child care and childhood development programs.

§ 98.83 Requirements for tribal programs.

- (a) The grantee shall designate an agency, department, or unit to act as the Tribal Lead Agency to administer the CCDF program.
- (b) With the exception of Alaska, California, and Oklahoma, programs and activities shall be carried out on an Indian reservation for the benefit of Indian children.

(c) In the case of a tribal grantee that is a consortium:

- (1) A brief description of the direct child care services funded by CCDF for each of their participating Tribes shall be provided by the consortium in their two-year CCDF Plan; and
- (2) Variations in CCDF programs or requirements and in child care licensing, regulatory and health and safety requirements shall be specified in written agreements between the consortium and the Tribe.
- (3) If a Tribe elects to participate in a consortium arrangement to receive one part of the CCDF (e.g., Discretionary Funds), it may not join another consortium or apply as a direct grantee to receive the other part of the CCDF (e.g. Tribal Mandatory Funds).
- (4) If a Tribe relinquishes its membership in a consortium at any time

during the fiscal year, CCDF funds awarded on behalf of the member Tribe will remain with the tribal consortium to provide direct child care services to other consortium members for that fiscal year.

(d) Tribal Lead Agencies shall not be subject to the requirements at §§ 98.41(a)(1)(i), 98.44(a), 98.50(e), 98.52(a), 98.53 and 98.63.

(e) The base amount of any tribal grant is not subject to the administrative cost limitation at paragraph (g) of this section or the quality expenditure requirement at § 98.51(a). The base amount may be expended for any costs consistent with the purposes and requirements of the CCDF.

(f) Tribal Lead Agencies whose total CCDF allotment pursuant to §§ 98.61(c) and 98.62(b) is less than an amount established by the Secretary shall not be subject to the following requirements:

- (1) The assurance at § 98.15(a)(2);
- (2) The requirement for certificates at § 98.30(a) and (d); and
- (3) The requirements for quality expenditures at § 98.51(a).

(g) Not more than 15 percent of the aggregate CCDF funds expended by the Tribal Lead Agency from each fiscal year's (including amounts used for construction and renovation in accordance with § 98.84, but not including the base amount provided under § 98.83(e)) shall be expended for administrative activities. Amounts used for construction and major renovation in accordance with § 98.84 are not considered administrative costs.

(h)(1) CCDF funds are available for costs incurred by the Tribal Lead Agency only after the funds are made available by Congress for Federal obligation unless costs are incurred for planning activities related to the submission of an initial CCDF Plan.

(2) Federal obligation of funds for planning costs, pursuant to paragraph (h)(1) of this section is subject to the actual availability of the appropriation.

§ 98.84 Construction and renovation of child care facilities.

(a) Upon requesting and receiving approval from the Secretary, Tribal Lead Agencies may use amounts provided under §§ 98.61(c) and 98.62(b) to make payments for construction or major renovation of child care facilities (including paying the cost of amortizing the principal and paying interest on loans).

(b) To be approved by the Secretary, a request shall be made in accordance with uniform procedures established by program instruction and, in addition, shall demonstrate that:

- (1) Adequate facilities are not otherwise available to enable the Tribal

Lead Agency to carry out child care programs;

(2) The lack of such facilities will inhibit the operation of child care programs in the future; and

(3) The use of funds for construction or major renovation will not result in a decrease in the level of child care services provided by the Tribal Lead Agency as compared to the level of services provided by the Tribal Lead Agency in the preceding fiscal year.

(c)(1) Tribal Lead Agency may use CCDF funds for reasonable and necessary planning costs associated with assessing the need for construction or renovation or for preparing a request, in accordance with the uniform procedures established by program instruction, to spend CCDF funds on construction or major renovation.

(2) A Tribal Lead Agency may only use CCDF funds to pay for the costs of an architect, engineer, or other consultant for a project that is subsequently approved by the Secretary. If the project later fails to gain the Secretary's approval, the Tribal Lead Agency must pay for the architectural, engineering or consultant costs using non-CCDF funds.

(d) Tribal Lead Agencies that receive approval from the Secretary to use CCDF funds for construction or major renovation shall comply with the following:

- (1) Federal share requirements and use of property requirements at 45 CFR 92.31;
- (2) Transfer and disposition of property requirements at 45 CFR 92.31(c);
- (3) Title requirements at 45 CFR 92.31(a);
- (4) Cost principles and allowable cost requirements at 45 CFR 92.22;
- (5) Program income requirements at 45 CFR 92.25;
- (6) Procurement procedures at 45 CFR 92.36; and;
- (7) Any additional requirements established by program instruction, including requirements concerning:
 - (i) The recording of a Notice of Federal Interest in the property;
 - (ii) Rights and responsibilities in the event of a grantee's default on a mortgage;
 - (iii) Insurance and maintenance;
 - (iv) Submission of plans, specifications, inspection reports, and other legal documents; and
 - (v) Modular units.

(e) In lieu of obligation and liquidation requirements at § 98.60(e), Tribal Lead Agencies shall liquidate CCDF funds used for construction or major renovation by the end of the second fiscal year following the fiscal year for which the grant is awarded.

(f) Tribal Lead Agencies may expend funds, without requesting approval pursuant to paragraph (a) of this section, for minor renovation.

(g) A new tribal grantee (i.e., one that did not receive CCDF funds the preceding fiscal year) may spend no more than an amount equivalent to its Tribal Mandatory allocation on construction and renovation. A new tribal grantee must spend an amount equivalent to its Discretionary allocation on activities other than construction or renovation (i.e., direct services, quality activities, or administrative costs).

(h) A construction or renovation project that requires and receives approval by the Secretary must include as part of the construction and renovation costs:

- (1) planning costs as allowed at § 98.84(c);
- (2) labor, materials and services necessary for the functioning of the facility; and
- (3) initial equipment for the facility. Equipment means items which are tangible, nonexpendable personal property having a useful life of more than five years.

Subpart J—Monitoring, Non-compliance and Complaints

§ 98.90 Monitoring.

(a) The Secretary will monitor programs funded under the CCDF for compliance with:

- (1) The Act;
- (2) The provisions of this part; and
- (3) The provisions and requirements set forth in the CCDF Plan approved under § 98.18;

(b) If a review or investigation reveals evidence that the Lead Agency, or an entity providing services under contract or agreement with the Lead Agency, has failed to substantially comply with the Plan or with one or more provisions of the Act or implementing regulations, the Secretary will issue a preliminary notice to the Lead Agency of possible non-compliance. The Secretary shall consider comments received from the Lead Agency within 60 days (or such longer period as may be agreed upon between the Lead Agency and the Secretary).

(c) Pursuant to an investigation conducted under paragraph (a) of this section, a Lead Agency shall make appropriate books, documents, papers, manuals, instructions, and records available to the Secretary, or any duly authorized representatives, for examination or copying on or off the premises of the appropriate entity, including subgrantees and contractors, upon reasonable request.

(d)(1) Lead Agencies and subgrantees shall retain all CCDF records, as specified in paragraph (c) of this section, and any other records of Lead Agencies and subgrantees that are needed to substantiate compliance with CCDF requirements, for the period of time specified in paragraph (e) of this section.

(2) Lead Agencies and subgrantees shall provide through an appropriate provision in their contracts that their contractors will retain and permit access to any books, documents, papers, and records of the contractor that are directly pertinent to that specific contract.

(e) *Length of retention period.* (1) Except as provided in paragraph (e)(2) of this section, records specified in paragraph (c) of this section shall be retained for three years from the day the Lead Agency or subgrantee submits the Financial Reports required by the Secretary, pursuant to § 98.65(g), for the program period.

(2) If any litigation, claim, negotiation, audit, disallowance action, or other action involving the records has been started before the expiration of the three-year retention period, the records shall be retained until completion of the action and resolution of all issues that arise from it, or until the end of the regular three-year period, whichever is later.

§ 98.91 Non-compliance.

(a) If after reasonable notice to a Lead Agency, pursuant to § 98.90 or § 98.93, a final determination is made that:

(1) There has been a failure by the Lead Agency, or by an entity providing services under contract or agreement with the Lead Agency, to comply substantially with any provision or requirement set forth in the Plan approved under § 98.16; or

(2) If in the operation of any program for which funding is provided under the CCDF, there is a failure by the Lead Agency, or by an entity providing services under contract or agreement with the Lead Agency, to comply substantially with any provision of the Act or this part, the Secretary will provide to the Lead Agency a written notice of a finding of non-compliance. This notice will be issued within 60 days of the preliminary notification in § 98.90(b), or within 60 days of the receipt of additional comments from the Lead Agency, whichever is later, and will provide the opportunity for a hearing, pursuant to part 99.

(b) The notice in paragraph (a) of this section will include all relevant findings, as well as any penalties or

sanctions to be applied, pursuant to § 98.92.

(c) Issues subject to review at the hearing include the finding of non-compliance, as well as any penalties or sanctions to be imposed pursuant to § 98.92.

§ 98.92 Penalties and sanctions.

(a) Upon a final determination that the Lead Agency has failed to substantially comply with the Act, the implementing regulations, or the Plan, one of the following penalties will be applied:

(1) The Secretary will disallow the improperly expended funds;

(2) An amount equal to or less than the improperly expended funds will be deducted from the administrative portion of the State allotment for the following fiscal year; or

(3) A combination of the above options will be applied.

(b) In addition to imposing the penalties described in paragraph (a) of this section, the Secretary may impose other appropriate sanctions, including:

(1) Disqualification of the Lead Agency from the receipt of further funding under the CCDF; or

(2)(i) A penalty of not more than four percent of the funds allotted under § 98.61 (i.e., the Discretionary Funds) for a Fiscal Year shall be withheld if the Secretary determines that the Lead Agency has failed to implement a provision of the Act, these regulations, or the Plan required under § 98.16;

(ii) This penalty will be withheld no earlier than the second full quarter following the quarter in which the Lead Agency was notified of the proposed penalty;

(iii) This penalty will not be applied if the Lead Agency corrects the failure or violation before the penalty is to be applied or if it submits a plan for corrective action that is acceptable to the Secretary; or

(iv) The Lead Agency may show cause to the Secretary why the amount of the penalty, if applied, should be reduced.

(c) If a Lead Agency is subject to additional sanctions as provided under paragraph (b) of this section, specific identification of any additional sanctions being imposed will be provided in the notice provided pursuant to § 98.91.

(d) Nothing in this section, or in § 98.90 or § 98.91, will preclude the Lead Agency and the Department from informally resolving a possible compliance issue without following all of the steps described in §§ 98.90, 98.91 and 98.92. Penalties and/or sanctions, as described in paragraphs (a) and (b) of this section, may nevertheless be

applied, even though the issue is resolved informally.

(e) It is at the Secretary's sole discretion to choose the penalty to be imposed under paragraphs (a) and (b) of this section.

§ 98.93 Complaints.

(a) This section applies to any complaint (other than a complaint alleging violation of the nondiscrimination provisions) that a Lead Agency has failed to use its allotment in accordance with the terms of the Act, the implementing regulations, or the Plan. The Secretary is not required to consider a complaint unless it is submitted as required by this section. Complaints with respect to discrimination should be referred to the Office of Civil Rights of the Department.

(b) Complaints with respect to the CCDF shall be submitted in writing to the Assistant Secretary for Children and Families, 370 L'Enfant Promenade, S.W., Washington, D.C. 20447. The complaint shall identify the provision of the Plan, the Act, or this part that was

allegedly violated, specify the basis for alleging the violation(s), and include all relevant information known to the person submitting it.

(c) The Department shall promptly furnish a copy of any complaint to the affected Lead Agency. Any comments received from the Lead Agency within 60 days (or such longer period as may be agreed upon between the Lead Agency and Department) shall be considered by the Department in responding to the complaint. The Department will conduct an investigation of complaints, where appropriate.

(d) The Department will provide a written response to complaints within 180 days after receipt. If a final resolution cannot be provided at that time, the response will state the reasons why additional time is necessary.

(e) Complaints that are not satisfactorily resolved through communication with the Lead Agency will be pursued through the process described in § 98.90.

PART 99—PROCEDURE FOR HEARINGS FOR THE CHILD CARE AND DEVELOPMENT FUND

2. The heading of part 99 is revised to read as set forth above:

3. The authority citation for part 99 is revised to read as follows:

Authority: 42 U.S.C. 618, 9858.

4. In part 99 make the following changes:

a. Remove the words "Child Care and Development Block Grant" and add in their place, wherever they appear, the words "Child Care and Development Fund."

b. Remove the word "Grantees" and add in its place, wherever it appears, the words "Lead Agencies."

c. Remove the word "Grantee" and add in its place, wherever it appears, the words "Lead Agency."

d. Remove the words "Block Grant Plan" and add in their place, wherever they appear, the words "CCDF Plan."

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