

20. Section 498.88 is amended by adding a new paragraph (g) to read as follows:

**§ 498.88 Decision or remand by the Departmental Appeals Board.**

\* \* \* \* \*

(g) When a request for Board review is filed after an ALJ has issued a decision or dismissal order, the Board must issue a decision, dismissal order or remand to the ALJ, as appropriate, no later than 180 days after the appeal was received by the Board.

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance Program; and No. 93.774, Medicare—Supplementary Medical Insurance Program.)

Dated: August 30, 2005.

**Mark B. McClellan,**

*Administrator, Centers for Medicare and Medicaid Services.*

Dated: November 8, 2006.

**Micheal O. Leavitt,**

*Secretary.*

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**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Administration for Children and Families**

**45 CFR Part 98**

**RIN 0970–AC29**

**Child Care and Development Fund Error Rate Reporting**

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

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** This proposed rule revises the Child Care and Development Fund (CCDF) regulations to provide for the reporting of error rates in the expenditure of CCDF grant funds by the fifty States, the District of Columbia and Puerto Rico. The error rate reports will serve to implement provisions of the *Improper Payments Information Act of 2002 (IPIA)* and the *President's Management Agenda (PMA)*'s goal of "Eliminating Improper Payments." For reasons that will be explained in the preamble to the rule, the initial information collection under this proposed rule will require States, the District of Columbia, and Puerto Rico to review and report on a random sample of cases estimated to achieve the calculation of annual improper authorizations for payment (rather than improper payments made) with a 90

percent confidence interval of +/-5.0 percent.

**DATES:** *Comment Period:* You may submit comments through May 1, 2007. We will not consider comments received after this date.

**ADDRESSES:** You may mail comments to the Administration for Children and Families, Child Care Bureau, 1250 Maryland Ave. SW., 8th Floor, Washington, DC 20024. Attention: Christine Calpin, Associate Director.

Commenters also may provide comments on the ACF website. To transmit comments electronically, or to download an electronic version of the proposed rule, please go to <http://regulations.acf.hhs.gov>. We will have comments available for public inspection Monday through Friday, 8:30 a.m. to 5 p.m. at the above address. The information collection related to this regulation can be found at <http://www.acf.hhs.gov/programs/ccb/ccdf/ipi/ipi.htm>.

**FOR FURTHER INFORMATION CONTACT:** Jeff Polich, Child Care Program Specialist, Child Care Bureau, at (202) 205–8696, or by email at [jpolich@acf.hhs.gov](mailto:jpolich@acf.hhs.gov).

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**I. Background**

This proposed rule adds a new subpart to the Child Care and Development Fund (CCDF) regulations that would require States, the District of Columbia and Puerto Rico to employ a case review process in calculating CCDF error rates in accordance with an error rate methodology established by the Secretary of Health and Human Services (the Secretary). The proposed rule would require States, the District of

Columbia and Puerto Rico to report specified information regarding errors to the Department of Health and Human Services. The basic components of this error rate methodology, and how it was developed and pilot tested, are described in this proposed rule. The specifics of this methodology and how it will be implemented are detailed in the information collection forms and instructions associated with this rule, copies of which may be downloaded or requested as detailed in the section discussing the Paperwork Reduction Act below.

*A. Child Care and Development Fund (CCDF)*

CCDF provides Federal funds to States, Territories, Indian Tribes and tribal organizations for the purpose of assisting low-income families, including families receiving or transitioning from the Temporary Assistance for Needy Families program (TANF), in the purchase of child care services, thereby allowing parents to work or attend job training or an educational program. States and Territories must spend a portion of their CCDF allotment on expenditures to improve the quality and availability of child care. A principle goal of CCDF set forth in Section 658A of the Child Care and Development Block Grant (CCDBG) Act of 1990, as amended (42 U.S.C. 9858, *et seq.*), is 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." CCDF is provided only to States, Territories and Tribes—there is no provision for direct funding to individual families or providers.

Federal law establishes eligibility criteria for families receiving CCDF assistance; however, States and Territories administering CCDF funds may impose more restrictive eligibility standards. Regulations governing CCDF are codified in 45 CFR Parts 98 and 99, and the Federal definition of a child's eligibility for child care services is set forth in 45 CFR 98.20. This description includes eligibility requirements related to a child's age, a child's special needs or protective services status, family income and parent's work, training or educational activity. Lead Agencies of the CCDF Program—which are the State, territorial or tribal entities to which CCDF block grants are awarded and that are accountable for the use of the funds provided—have established policies and procedures that vary considerably across and even within jurisdictions, including, but not limited to, stricter income limits, special eligibility or priority for families receiving TANF and

eligibility that differs for a child with special needs. All clients seeking child care assistance supported by CCDF funds must undergo an eligibility determination process when they initially apply, and all Lead Agencies have defined a process for verifying information submitted in the application. Eligibility determination affects many other aspects of the program, including provider payment rates, authorized hours of care and a family's co-payment responsibility.

Section 658E of the CCDBG Act (42 U.S.C. 9858c) and 45 CFR 98.52 limit expenditures by States and Territories for the costs of administering the CCDF program to no more than five percent of the State's or Territory's aggregate expenditures from a fiscal year's allotment of CCDF funds. Various costs that are considered an integral part of service delivery are excluded from the five percent administrative cap, including eligibility determination and redetermination and the establishment and maintenance of computerized child care information systems.

#### B. Improper Payments

An August 2002 General Accountability Office (GAO) report, "Coordinated Approach Needed to Address the Government's Improper Payments Problems," (GAO-02-749) found that Federal agencies reported over \$19 billion in improper payments for fiscal year 2001 and estimated that the actual amount of improper payments is likely billions of dollars more. GAO further noted in a June 2004 report, "HHS Lacks Adequate Information to Assess Risk and Assist States in Managing Improper Payments," (GAO-04-723) that minimizing improper payments in the CCDF program is particularly important considering that almost \$5 billion in Federal CCDF funds is appropriated to the program annually. In the latter report, GAO recommended that HHS develop mechanisms to gather information on a recurring basis from all States on their internal control systems for measuring and minimizing improper payments. Finally, a November 2006 report, "Agencies' Fiscal Year 2005 Reporting under the Improper Payments Information Act Remains Incomplete," (GAO-07-92) cites CCDF as a susceptible program that is not currently reporting improper payment estimates. The GAO reports may be downloaded electronically at <http://www.gao.gov/new.items/d02749.pdf>, <http://www.gao.gov/new.items/d04723.pdf>, and <http://www.gao.gov/new.items/d0792.pdf>.

#### C. Statutory and Administrative Directives To Measure Improper Payments and Calculate Error Rates

Congress responded to the issue of improper payments by enacting the Improper Payments Information Act of 2002 (IPIA) (31 U.S.C. 3321 note). The IPIA requires Federal agencies to identify programs that are vulnerable to improper payments and to estimate annually the amount of underpayments and overpayments made by these programs. An improper payment, as defined by the IPIA, is any payment that should not have been made or that was made in an incorrect amount under statutory, contractual, administrative or other legally applicable requirement. Incorrect amounts are overpayments and underpayments (including inappropriate denials of payment or service). An improper payment includes any payment that was made to an ineligible recipient or for an ineligible service. Improper payments also are duplicate payments, payments for services not received and payments that do not account for credit for applicable discounts.

According to the IPIA, Federal agencies also must report on the actions they are taking to reduce improper payments. This report must include a discussion of the causes of improper payments, what actions Federal agencies have taken to correct those causes and the results achieved. Federal agencies also must state whether they have the information systems and other infrastructure needed to reduce improper payments and, if not, what resources they have requested in their budget submissions. Finally, Federal agencies must report on what steps they have taken to hold managers accountable for reducing improper payments. The IPIA may be downloaded at <http://thomas.loc.gov/cgi-bin/bdquery/z?d107:HR04878:TOM:/bss/d107query.html>.

The Executive Branch has also worked to address the improper payments issue. The *President's Management Agenda (PMA)*'s goal of "Eliminating Improper Payments" promises to establish a baseline of the extent of improper payments and to work with agencies to set goals to reduce improper payments for each program. The anticipated result of this effort is greater accuracy in benefit and assistance programs, which will enable programs to serve additional eligible recipients. The *PMA* may be downloaded at <http://www.whitehouse.gov/omb/budget/fy2002/mgmt.pdf>.

The modifications proposed in this notice of proposed rulemaking (NPRM) are designed to meet the requirements of IPIA as well as to meet the PMA's goal of "Eliminating Improper Payments."

#### D. Error Rate Methodology Pilots

The methodology that will be implemented through this rule is based on a methodology the Child Care Bureau developed and field-tested in 2005 in partnership with four States that volunteered to participate in a pilot study (Arkansas, Colorado, Illinois and Ohio). This methodology focused on administrative error associated with client eligibility. A principal reason for focusing on client eligibility is that, while the methods used to determine initial and ongoing client eligibility are not uniform across States, Territories and Tribes, all States, Territories and Tribes have procedures in place for parents to apply for child care services and some system to initially determine and periodically re-determine eligibility. Also, determining client eligibility is the first step in the child care subsidy process and therefore affects the administration of the entire program.

Federal staff and contractors worked with pilot State staff to select a statistically valid statewide random sample of child care subsidy cases from the universe of cases in which a child care payment had been authorized. Electronic or hard copy files for the selected cases were then retrieved and documentation from the case record was reviewed to determine if errors were made in determining client eligibility, whether any errors that were made resulted in an improper authorization for payment and the amount of any improper authorization.

Pilot States employed this case review process to identify the percentage of cases with an error, the percentage of cases with an improper authorization for payment, the percentage of improper authorizations for payment and the average amount of improper authorization for payment per child. This methodology focused on improper authorizations for payment rather than actual payments because we believe that improper authorizations for payment are closely related to improper payments. Eligibility and authorization are the first steps in the child care subsidy process and errors made at this stage in the process are likely to affect the administration of the entire program.

The Child Care Bureau provided the pilot States with a template of items to examine as part of each case review; pilot States were asked to modify this template to reflect specific State policies

and practices. Federal staff and contractors provided guidance and oversight through on-site visits and other means regarding the selection of the sample, the identification and categorization of errors as part of the case reviews and the calculation of the resulting error rates.

In summary, the error rate methodology used in the pilot included: (1) *Sample Selection*: A sample of cases was selected by each State using a sampling frame based on the child population served by eligibility offices for a one month period. (The number of cases selected was estimated to achieve a precision level of 6 percent at the 90 percent confidence interval.); (2) *Record Review Worksheet*: A template of a record review worksheet, which captured the detail for each element of eligibility, the benefit calculation as documented by the agency, the amount of the subsidy authorized for the review month and any resulting errors, modified by each State so their worksheets would conform to the specifics of their State plans; (3) *Case Review*: State representatives conducted case reviews and collected key pieces of information for a defined review month, including the county of service, administrative errors occurring during the review month, cause of improper authorization for payment, total amount of improper authorizations for payment during the review month and total amount of authorizations during the review month; (4) *Error Rate Calculation*: These data were compiled and error rates were computed for each State, including percentage of cases with an error (case error rate) (percentage of cases with an error as compared to the total number of cases in the sample), percentage of cases with an improper authorization for payment case rate (percentage of cases with an improper authorization for payment as compared to the total number of cases in the sample), percentage of improper authorizations for payment rate (percentage of child care payment dollars that were improper authorizations for payment as compared to the total amount of child care authorizations for payment dollars for the sample), and average amount of improper authorization for payment per child (total dollar amount of child care improper authorizations for payment made divided by the number of cases that had an improper authorization for payment); (5) *Federal Oversight and Monitoring, and Ongoing Technical Assistance*: As part of the pilot, Child Care Bureau and ACF Regional staff provided ongoing oversight, monitoring

and technical assistance, both on- and off-site. For example, the Child Care Bureau held a planning conference in February 2005 to provide an overview of the proposed research design and obtain input from participating States and conducted site visits of each participating State to review the error rate calculation process. Again, the pilot focused on administrative error in determining client eligibility (i.e., the extent of errors made by the agency in determining eligibility based on program rules and information available in case records); however, one State decided to extend the methodology to include provider error and client error.

The final report on the error rate methodology pilots may be downloaded electronically at [http://www.acf.hhs.gov/programs/ccb/ccdf//ipi/phase2/sec1\\_1.htm](http://www.acf.hhs.gov/programs/ccb/ccdf//ipi/phase2/sec1_1.htm). A pilot study of additional States (Florida, Kansas, New Jersey, Oregon, and West Virginia) was conducted in 2006, but results are still forthcoming.

#### *E. Operationalizing the Error Rate Methodology*

At the conclusion of the pilot, it was determined that a version of the tested methodology would be an appropriate tool for calculating error rates related to client eligibility. The proposed methodology described in this proposed rule and detailed in the information collection forms and instructions is substantively the same as the pilot described above with the following exceptions: (1) The sample size must be increased to achieve a 90% confidence level  $\pm$  5%; (2) States will do the sampling and calculate findings (a contractor performed those functions for pilot States), (3) Two items (portion of improper authorizations for payment attributable to insufficient or lack of documentation and type of improper authorization for payment [underauthorization and overauthorization]) are added to the required Data Entry Form to capture information required by revised Appendix C of OMB Circular A-123; (4) An informal process used with the pilots to consider causes of improper authorizations for payment and future actions to reduce them is formalized and requires submission of a State Improper Authorizations for Payment Report, and (5) States must review cases from each month of the year, rather than from one particular month as was done by the pilot States. The rationale for reviewing cases from each month of the year is to improve the statistical reliability of the case reviews: reviewing cases from only one designated month—as was done in the pilots—would have

yielded a statistically valid error rate only for that particular month rather than for the whole year.

Although the proposed rule is broad enough to encompass reporting on all types of errors, the initial methodology and reporting requirements will focus on administrative errors associated with client eligibility and improper authorizations for payment, as described in more detail in the information collection forms and instructions associated with this rule (please refer to the section discussing the Paperwork Reduction Act below).

During the initial information collection, States, the District of Columbia, and Puerto Rico will evaluate both the frequency with which errors occurred and the amount of improper authorization for payment. ACF will use the improper authorization for payment error rates and amounts for each State, the District of Columbia, and Puerto Rico to compute a national improper authorizations for payment rate and amount that will be annually reported in the HHS's Performance and Accountability Report (PAR) beginning with the Fiscal Year 2008 PAR.

We will use a 3-year rotational cycle to measure improper authorizations for payment in Child Care programs in the States, the District of Columbia, and Puerto Rico. Out of this group, we will select 18 to measure in the first year of each cycle and 17 in the remaining 2 years of each cycle. The result is that each State, the District of Columbia, and Puerto Rico will be measured once, and only once, in every 3 years. This rotation allows respondents to plan for the reviews because they know in advance in which year they will be measured. States, the District of Columbia, and Puerto Rico will be randomly assigned using the following methodology. First, each entity will be stratified by the 10 ACF regions, with the regions randomly ordered. Then within region each group will be sorted by caseload, from the most cases to the least cases. Every third State (including the District of Columbia and Puerto Rico) on the list will be selected, using a random start number between one and three the first year. After removing those selected for the first year from the frame, a second random start is drawn between one and two and every other State (including the District of Columbia and Puerto Rico, if they remain) is selected for the second year. The third year will include those not selected in year one or year two. This sampling approach will yield a mix of county-administered and State-administered programs and programs serving both large and small numbers of children each year. A list of

States (including the District of Columbia and Puerto Rico) assigned to each review year can be found in the information collection instructions.

Again, and for the reasons noted earlier, we are proposing to require States, the District of Columbia, and Puerto Rico to measure improper authorizations for payment rather than improper payments at this time. However, we would be interested in hearing from States, the District of Columbia, and Puerto Rico—as well as other interested stakeholders—as to how closely-related authorization for payment and final payment are linked. We would also be interested in hearing about how useful information about improper authorizations for payment will be in reducing improper payments and pursuing corrective action, without information about final payment. We would also like to better understand what additional burden and/or benefit the States, the District of Columbia, and Puerto Rico might reap if, at some future date, we were to request the measurement of actual improper payments as part of the measurement of improper authorizations for payment.

## II. Statutory Authority

This proposed regulation is being issued under the authority granted to the Secretary by Section 658I of the CCDBG Act (42 U.S.C. 9858g) and in accordance with the IPIA (31 U.S.C. 3321 note).

## III. Provisions of Proposed Rule

### A. Summary of the Existing Regulations

Under CCDF regulations, ACF employs several methods to gather the information from States, the District of Columbia, and Territories needed to comply with the statutory requirements of the CCDBG Act and to efficiently oversee the administration of the CCDF program. States and Territories must submit plans every two years detailing their intentions for implementing programs under 45 CFR 98.17. Pursuant to 45 CFR 98.70, States and Territories also must collect monthly case-level reports (which may be submitted monthly or quarterly) and submit annual aggregated reports on services provided through all CCDF grant funds. Finally, States and Territories are required to submit quarterly reports on estimates and expenditures in conjunction with 45 CFR 98.65.

45 CFR 98.65(a) requires Lead Agencies to 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 and 45 CFR 98.67(c) requires

Lead Agencies to have fiscal control and accounting procedures sufficient to establish that funds have been expended appropriately. CCDF regulations do not currently require the reporting of error rates at regular intervals.

### B. Consultation With States, Territories and Other Organizations

The Child Care Bureau has consulted with States, the District of Columbia and Territories since 2003 on different approaches to addressing improper payments. Through quarterly conference calls, workshops at annual State Administrators Meetings and an Improper Payments survey, the Child Care Bureau has engaged States and Territories in conversations about strategies to identify, measure, prevent, reduce and collect improper payments. The Child Care Bureau also has been in contact with national organizations such as the American Public Human Services Association, the National Association for Program Information and Performance Measurement and the United Council on Welfare Fraud through conferences, meetings and conference calls regarding strategies to address improper payments.

### C. Changes Made in This Proposed Rule

While retaining the provisions governing CCDF Lead Agency audits, financial reporting requirements and fiscal requirements (located in 45 CFR 98.65 and 45 CFR 98.67), this NPRM proposes to add a new Subpart K—Error Rate Reporting to require CCDF Lead Agencies of the fifty States, the District of Columbia and Puerto Rico to measure, calculate and report to the Department of Health and Human Services error rates in accordance with an error rate methodology established by the Secretary, as summarized in this rule and detailed in the associated information collection forms and instructions.

We anticipate publishing a final rule with an effective date of October 1, 2007. This means that the first round of States (including the District of Columbia and/or Puerto Rico if applicable) subject to the final regulations would need to complete their reviews and submit their data to ACF by June 30, 2008.

### Error Rate Report (Section 98.100)

Under proposed section 98.100(a), these requirements would apply only to the fifty States, the District of Columbia and Puerto Rico. American Samoa, the U.S. Virgin Islands, the Commonwealth of the Northern Mariana Islands, Guam and the Tribes would be exempted from the requirements of the proposed rule

because they serve smaller numbers of families. We do not believe that the benefits of the error rate data obtained from these exempted Territories and the Tribes justify the costs of compliance with the proposed regulation, which would require a much greater portion of child care resources relative to the States, the District of Columbia and Puerto Rico. However, we would encourage exempted Territories and Tribes to comply voluntarily with the requirements of the proposed rule or to create their own methods and strategies for identifying and reducing improper payments. Additionally, should funding and provision of services change in these exempted Tribes and Territories, we will consider removing the exemption through the notice and comment rulemaking process.

As stated earlier, the terms “error” and “improper payment” have been defined broadly enough in this rule to encompass reporting on all types of errors and all types of improper payments. For example, paragraph (c) proposes a definition of “error”; and paragraph (d) proposes a definition of “improper payment.” The important distinction between the two terms is that every improper payment is the result of an error; however, not every error result in an improper payment. Error is defined as any violation or misapplication of statutory, contractual, administrative, or other legally applicable requirements governing the administration of CCDF grant funds, regardless of whether such violations results in an improper payment. An improper payment is defined to mean any payment of CCDF grant funds that should not have been made or that was made in an incorrect amount (including overpayments and underpayments) under statutory, contractual, administrative or other legally applicable requirements governing the administration of CCDF grant funds, including any payment of CCDF grant funds to an ineligible recipient, any payment of CCDF grant funds for an ineligible service, any duplicate payment of CCDF grants funds and payments of CCDF grant funds for services not received.

Though we may consider expanding the measurement of error and improper payments in the future to include the full range of errors and improper payments, we are proposing to implement this rule for the time being by focusing on the measurement of error in eligibility determinations and improper authorizations for payment. For example, under proposed paragraph (b), States, the District of Columbia and Puerto Rico would prepare a report

calculating the “error rates,” defined as the percentage of cases with an error (expressed as the total number of cases with an error compared to the total number of cases). At this time—and consistent with our initial focus on client eligibility errors—we will be operationalizing this requirement by asking States, the District of Columbia, and Puerto Rico to measure only administrative errors.

Similarly, for the time being, we are asking States, the District of Columbia, and Puerto Rico to review and measure the improper authorizations for payments to subsidy recipients rather than improper payments made. Thus, under proposed paragraph (b), States, the District of Columbia, and Puerto Rico would also prepare a report calculating the percentage of cases with an error, the percentage of cases with an improper authorization for payment (expressed as the total number of cases with an improper authorization for payment compared to the total number of cases); the percentage of improper authorizations for payment (expressed as the total amount of improper authorizations for payment compared to the total dollar amount of authorizations made); the average amount of improper authorization for payment; and the estimated annual amount of improper authorizations for payment. The report would provide strategies for reducing the error rates and will allow States, the District of Columbia and Puerto Rico to set target error rates for the next cycle.

The rationale for capturing the information is as follows: (1) Percentage of cases with an error within a sample of cases for a reporting period is the basic measure of error rate for a child care agency. The overall goal of an agency should be to get this rate as close to zero as possible. (2) Percentage of cases with an improper authorization for payment typically should be a lower rate than the percentage of cases with an error because not all errors result in an improper authorization for payment being made. (3) Percentage of improper authorizations for payment based on the total amount (in dollars) of child care improper authorizations for payment in the sample divided by the total amount of child care authorizations (in dollars) for the sample. This provides a measure of the magnitude (from a financial standpoint) of the improper authorizations for payment compared with the authorizations for payment properly made during the reporting period. (4) Average amount of improper authorization for payment gives an estimate of the size (i.e., the average amount in dollars) of the errors for the reporting period. This can be helpful in

determining courses of action for recovery and also gives an agency a basis for estimating the potential benefit of preventive actions to improve the eligibility determination process (e.g., management interventions to reduce error rates). (5) Estimated annual amount of improper authorizations for payment gives an estimate of the total amount of improper authorizations for payment for the reporting period. The percentage of cases with an improper authorization for payment and the estimated annual amount of improper authorizations for payment are necessary to comply with the requirements of the IPIA and to provide a baseline from which future accomplishments in reducing improper authorizations for payment can be measured. We believe the other information will be useful for the States, the District of Columbia, and Puerto Rico to reduce errors and any improper payments resulting from errors. Additionally, we believe this information will be valuable to ACF in monitoring progress in addressing improper authorizations for payments, reducing improper payments, and providing technical assistance, as well as focusing entities on potential problems in the administration of their child care programs.

#### Case Review Methodology (Section 98.101)

Under proposed section 98.101, Case Review Methodology, the error reports that would be required by this proposed rule must be based on comprehensive reviews of case records conducted by States, the District of Columbia and Puerto Rico in accordance with a methodology established by the Secretary and detailed in this proposed rule and associated information collection forms and instructions. In determining which case records to review, States, the District of Columbia, and Puerto Rico must select a random sample of child records estimated to achieve the calculation of an estimated annual amount of improper payments with a 90 percent confidence interval of  $\pm 5.0$  percent. At this time—and for reasons stated earlier—we are operationalizing this requirement, through the information collection instruments and instructions, by asking States, the District of Columbia, and Puerto Rico to select a random sample of child records estimated to achieve the calculation of an estimated annual amount of improper authorizations for payments with a 90 percent confidence interval of  $\pm 5.0$  percent.

Pursuant to the proposed paragraph (b), the Secretary would provide forms

for use in complying with the proposed rule, together with instructions on an acceptable methodology. These forms and instructions may be requested or downloaded as detailed in the section discussing the Paperwork Reduction Act below. States, the District of Columbia, and Puerto Rico would be required under proposed paragraph (c) to conduct case reviews and submit error rate reports every three years on a staggered basis according to a cycle established by the Secretary and shared in instructions accompanying information collection forms. The proposed rule at paragraph (d) would require States, the District of Columbia and Puerto Rico to provide access to Federal staff to participate and provide oversight in the case review and error rate calculation process. Federal staff may make site visits, as was done during the error rate methodology pilots, to provide technical assistance and review compliance with the regulatory requirements. Pursuant to paragraph (e) of the proposed rule, States, the District of Columbia, and Puerto Rico would be required to retain records pertinent to the case reviews and submission of error rate reports for a period of five years from the date of submission of the applicable error rate report or, if the error rate report was revised, from the date of submission of the revision. We selected a period of five years so that records would be available for review through two cycles of case reviews and report submissions.

#### Content of Error Rate Reports (Section 98.102)

This proposed rule adds a new section 98.102, Content of Error Rate Reports addressing submission of baseline reports and standard reports. Under proposed paragraph (a), in the initial cycle, States, the District of Columbia and Puerto Rico would submit a baseline report listing baseline error rate information and targets for the next cycle, as well as information about causes of, and strategies to address, error and information about their information technology systems. Under proposed paragraph (b), in subsequent cycles, States, the District of Columbia and Puerto Rico would submit a standard report that would, in addition to updating the information provided in the baseline report, enable States, the District of Columbia and Puerto Rico to examine their ability to meet previously submitted targets, set future targets, and describe strategies to reduce their error rates. This report would be used by the Department to comply with the reporting requirements of the IPIA, to advance the goals of the PMA and to

address concerns raised by GAO and others regarding the problem of improper payments.

We intend that the initial case reviews and reports would focus on administrative error associated with client eligibility and authorizations for payment for the reasons previously set forth; however the regulatory language provides flexibility to allow for changing or expanding the error rate study and report if future circumstances warrant doing so. Therefore, should we decide to broaden the examination of "errors," we would provide notice and comment through the information collection process. However, we welcome comments regarding the use of improper authorizations for payment as a means to estimate improper payments as well as comments regarding the additional burden and/or benefit that measuring improper payments would entail.

We are proposing that the frequency of reporting would be every three years to conserve resources and to allow time for the results of responses to error rates undertaken by States, the District of Columbia and Puerto Rico to take effect. However, entities are encouraged to measure the impact of their corrective actions more frequently. In addition, the proposed rule would allow for sampling of cases as part of the review of case records, using methodology established by the Secretary and set forth in instructions accompanying information collection forms.

#### D. Relation to Existing Regulations

**Administrative Costs Cap**—45 CFR 98.52 prohibits Lead Agencies from spending more than five percent of the aggregate CCDF funds expended by the Lead Agency from each fiscal year's allotment for administrative activities. Section 658E(c)(3)(C) of the CCDBG Act (42 U.S.C. 9858c(c)(3)(C)) and the accompanying Conference Report (H.R. Conf. Rep. 104–725) specify that the costs of providing direct services are to be excluded from any definition of administrative costs. The Conference Report specifically identified eligibility determination and redetermination, reviews and supervision of child care placements and establishment and maintenance of computerized child care information systems as "integral part[s] of service delivery" that "should not be considered administrative costs." Therefore, provided the focus of the error rate calculations and reports continue to focus on client eligibility, the costs to Lead Agencies of conducting case reviews and preparing error rate reports shall be considered a part of service delivery and excluded

from administrative costs subject to the five percent administrative cap. Further, any costs incurred by a Lead Agency in complying with this proposed regulation that are directed toward establishing or improving child care information systems shall also be excluded from administrative costs subject to the five percent administrative cap.

**Identified Improper Payments**—Pursuant to 45 CFR 98.66, any actual improper payments related to specific cases that were included in the sample during the case review process would be subject to disallowance in accordance with the procedures set forth in 45 CFR 98.66. Extrapolations of estimated improper payments derived from random sampling of total cases are not subject to disallowance. In the event that improper payments identified through the case review process are recovered, 45 CFR 98.60(g) provides that such payments shall (1) if received by the Lead Agency during the applicable obligation period (described in 45 CFR 98.60(d) & (e)), 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, be returned to the Federal government.

**No Private Right of Action**—Section 658F(a) of the CCDBG Act (42 U.S.C. 9858d(a)) makes clear that CCDF funding is not an entitlement to any child care provider or recipient of child care services. As a result, detection of an underpayment in any specific case does not create an entitlement to that individual to a particular service or benefit. Nothing in this proposed rule should be construed to create a right requiring the States, the District of Columbia or Puerto Rico to remedy any individual, even if a payment error in the form of an underpayment has been made.

## IV. Regulatory Impact Analyses

### A. Executive Order 12866

Executive Order 12866 requires that regulations be drafted to ensure that they are consistent with the priorities and principles set forth in Executive Order 12866. The Department has determined that this proposed rule is consistent with these priorities and principles.

Executive Order 12866 encourages agencies, as appropriate, to provide the public with meaningful participation in the regulatory process. As described earlier, the Child Care Bureau has consulted with States, the District of Columbia, and Territories on numerous

occasions since 2003 concerning different approaches to addressing improper payments. Specifically, through quarterly conference calls, workshops at annual State Administrators Meetings and an Improper Payments survey, the Child Care Bureau has engaged States and Territories in conversations about strategies to identify, measure, prevent, reduce and collect improper payments. The Child Care Bureau also has been in contact with national organizations such as the American Public Human Services Association, the National Association for Program Information and Performance Measurement and the United Council on Welfare Fraud through conferences, meetings and conference calls regarding strategies to address improper payments. In addition, we are providing a 60 day public comment period.

This rule is considered a "significant regulatory action" as defined under Executive Order 12866 and therefore has been reviewed by the Office of Management and Budget. Specifically, the rule raises "novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order."

### B. Regulatory Flexibility Analysis

The Regulatory Flexibility Act (RFA) (5 U.S.C. Ch. 6) requires the Federal government to anticipate and reduce the impact of rules and paperwork requirements on small businesses and other small entities. Small entities are defined in the RFA to include small businesses, small non-profit organizations and small governmental entities. This rule will affect only the 50 States, the District of Columbia and Puerto Rico. Therefore, the Secretary certifies that this rule will not have a significant impact on small entities.

### C. Assessment of the Impact on Family Well-Being

We certify that we have made an assessment of this proposed rule's impact on the well-being of families, as required under Section 654 of the Treasury and General Appropriations Act of 1999. This proposed rule aims to identify and reduce errors in the administration of CCDF funds, thus ensuring that the program is operated as efficiently and fairly as possible. Because CCDF block grant allotments are capped (i.e., CCDF is not an entitlement), fewer improper payments translates into more funds for use in assisting low-income families in purchasing child care services, providing comprehensive consumer education to parents and the public and

improving the quality and availability of child care.

*D. Paperwork Reduction Act*

The proposed rule would require States, the District of Columbia and Puerto Rico to compile information regarding errors made in the administration of CCDF funds using an error rate methodology established by the Secretary and detailed in this proposed rule and proposed information collection forms and instructions. Towards this end, this rule would require States, the District of Columbia and Puerto Rico to submit reports to the Department on their findings. Copies of the proposed information collection forms and instructions may be obtained by writing to the Administration for Children and Families, Office of Information Services, 370 L'Enfant Promenade, SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. All requests should be identified by the title of the information collection. E-mail address: [rsargis@acf.hhs.gov](mailto:rsargis@acf.hhs.gov). Copies of the proposed information collection forms and instructions may also be obtained on the Child Care Bureau's webpage on Addressing Improper Payments at: <http://www.acf.hhs.gov/programs/ccb/ccdf/ipi/ipi.htm>.

In accordance with the Paperwork Reduction Act of 1995, this notice invites the general public and other public agencies to comment on the information collection requirements contained in this proposed rule. The Administration for Children and Families (ACF) will consider comments by the public on this proposed

collection of information in the following areas:

(1) Evaluating whether the proposed collection is necessary for the proper performance of the functions of ACF, including whether the information will have practical utility. For example, will the measurement of improper authorizations for payment provide a useful and meaningful component estimate of improper payments?;

(2) Evaluating the accuracy of ACF's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhancing the quality, usefulness and clarity of the information to be collected; and

(4) Minimizing the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technology, e.g., permitting electronic submission of responses.

As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the Administration for Children and Families has submitted a copy of this section, together with a copy of this notice of proposed rulemaking to the Office of Management and Budget (OMB) for its review.

OMB is required to make a decision concerning the collection of information contained in these proposed regulations between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. This does not affect the

deadline for the public to comment to the Department on the proposed regulations. These information collection requirements will not become effective until approved by OMB.

To make sure that your comments and related material reach OMB, please submit them by one of the following means:

1. By fax to OMB at (202) 395-6974. To ensure your comments are received in time, mark the fax to the attention of the Desk Officer for the Administration for Children and Families.

2. By e-mail to [OIRA\\_submission@omb.eop.gov](mailto:OIRA_submission@omb.eop.gov). To ensure your comments are received in time, mark the e-mail to the attention of the Desk Officer for the Administration for Children and Families.

*Title:* Child Care and Development Fund: Error Rate Report for States, the District of Columbia and Puerto Rico.

*Description:* States, the District of Columbia and Puerto Rico must prepare and submit to the Department reports of errors occurring in the administration of CCDF grant funds. They would be required to report the percentage of cases with an error, the percentage of cases with an improper authorization for payment; the percentage of improper authorizations for payment; the average improper authorization for payment amount; and the estimated annual amount of improper authorizations for payment. The report also will provide strategies for reducing the error rates and allow States, the District of Columbia and Puerto Rico to set target error rates for the next cycle.

*Respondents:* The fifty States, the District of Columbia and Puerto Rico.

ANNUAL BURDEN ESTIMATES

Instrument or requirement	Number of respondents*	Yearly submittals	Average burden hours per submittal	Total burden hours
Record Review Worksheet .....	17.33	**271	13.74	64,562
Data Entry Form .....	17.33	**271	.14	652
State Improper Payments Report .....	17.33	1	367	6,360
Estimated Total Annual Burden Hours .....				71,574

\* States, the District of Columbia and Puerto Rico will compile and submit error rate reports in staggered three-year cycles.

\*\* These burden estimates are based on a review of 271 cases, which is estimated to be the amount needed to meet the sampling requirements of the proposed rule.

*E. Unfunded Mandates Reform Act of 1995*

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) 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.

ACF has estimated the cost impact of conducting an error rate case review and preparing the required reports in compliance with the proposed rule. The cost estimate analysis was based on the error rate pilots and an estimation of the

amount of time and cost required to complete various tasks. The estimated cost for a single respondent to conduct its case reviews and prepare the required report is approximately \$150,000. The total estimated cost includes the cost from drawing of the sample of cases from 12 monthly sampling frames, training staff,

conducting record reviews, compiling data, calculating error rates and preparing the final report. The total annual cost burden of having 17 respondents, the average number required in any year, to conduct error rate case reviews and prepare the required reports would be approximately \$2.6 million. Thus, this proposed rule will not result in the expenditure by State, territorial, local and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year.

#### F. Congressional Review

This proposed rule is not a major rule as defined in 5 U.S.C. 804.

#### G. Executive Order 13132

Executive Order 13132 on Federalism requires that Federal agencies consult with State and local government officials in the development of regulatory policies with federalism implications. As noted above, the Child Care Bureau has engaged States and Territories in conversations about strategies to identify, measure, prevent, reduce and collect improper payments through quarterly conference calls, workshops at annual State Administrators Meetings and an Improper Payments survey. Further, consistent with Executive Order 13132, we specifically solicit comment from State and local government officials on this proposed rule. We will seriously consider these comments in developing the final rule.

#### List of Subjects in 45 CFR Part 98

Administrative practice and procedure, Day care, Grant programs, Reporting and recordkeeping requirements.

(Catalogue of Federal Domestic Assistance Programs: 93.575, Child Care and Development Block Grant; 93.596, Child Care Mandatory and Matching Funds)

Dated: April 10, 2006.

#### Wade F. Horn,

Assistant Secretary for Children and Families.

Approved: February 5, 2007.

#### Michael O. Leavitt,

Secretary, Department of Health and Human Services.

For the reasons set forth in the preamble, the Administration for Children and Families proposes to amend part 98 of title 45 of the Code of Federal Regulations as follows:

### PART 98—CHILD CARE AND DEVELOPMENT FUND

1. The authority for part 98 continues to read:

Authority: 42 U.S.C. 618, 9858.

2. Amend 45 CFR Part 98 to add Subpart K to read as follows:

#### Subpart K—Error Rate Reporting

Sec.

98.100 Error Rate Report.

98.101 Case Review Methodology.

98.102 Content of Error Rate Reports.

#### § 98.100 Error Rate Report.

(a) *Applicability*—The requirements of this subpart apply to the fifty States, the District of Columbia and Puerto Rico.

(b) *Generally*—States, the District of Columbia and Puerto Rico shall calculate, prepare and submit to the Department, a report of errors occurring in the administration of CCDF grant funds, at times and in a manner specified by the Secretary in instructions. States, the District of Columbia and Puerto Rico must use this report to calculate their error rates, which is defined as the percentage of cases with an error (expressed as the total number of cases with an error compared to the total number of cases); the percentage of cases with an improper payment (expressed as the total number of cases with an improper payment compared to the total number of cases); the percentage of improper payments (expressed as the total amount of improper payments in the sample compared to the total dollar amount of payments made in the sample); the average amount of improper payment; and the estimated annual amount of improper payments. The report also will provide strategies for reducing their error rates and allow States, the District of Columbia and Puerto Rico to set target error rates for the next cycle.

(c) *Error Defined*—For purposes of this subpart, an “error” shall mean any violation or misapplication of statutory, contractual, administrative, or other legally applicable requirements governing the administration of CCDF grant funds, regardless of whether such violation results in an improper payment.

(d) *Improper Payment Defined*—For purposes of this subpart, “improper payment” (1) means any payment of CCDF grant funds that should not have been made or that was made in an incorrect amount (including overpayments and underpayments) under statutory, contractual, administrative, or other legally applicable requirements governing the administration of CCDF grant funds; and

(2) Includes any payment of CCDF grant funds to an ineligible recipient, any payment of CCDF grant funds for an

ineligible service, any duplicate payment of CCDF grant funds and payments of CCDF grant funds for services not received.

(e) *Costs of Preparing the Error Rate Report*—Provided the error rate calculations and reports focus on client eligibility, expenses incurred by the States, the District of Columbia and Puerto Rico in complying with this rule, including preparation of required reports, shall be considered a cost of direct service related to eligibility determination and therefore is not subject to the five percent limitation on CCDF administrative costs pursuant to § 98.52(a).

#### § 98.101 Case Review Methodology.

(a) *Case Reviews and Sampling*—In preparing the error reports required by this subpart, States, the District of Columbia and Puerto Rico shall conduct comprehensive reviews of case records using a methodology established by the Secretary. For purposes of the case reviews, States, the District of Columbia and Puerto Rico shall select a random sample of child records which is estimated to achieve the calculation of an estimated annual amount of improper payments with a 90 percent confidence interval of  $\pm 5.0$  percent.

(b) *Methodology and Forms*—States, the District of Columbia and Puerto Rico must prepare and submit forms issued by the Secretary, following the accompanying instructions setting forth the methodology to be used in conducting case reviews and calculating the error rates.

(c) *Reporting Frequency and Cycle*—States, the District of Columbia and Puerto Rico shall conduct case reviews and submit error rate reports to the Department according to a staggered three-year cycle established by the Secretary such that each State, the District of Columbia, and Puerto Rico will be selected once, and only once, in every three years.

(d) *Access to Federal Staff*—States, the District of Columbia and Puerto Rico must provide access to Federal staff to participate and provide oversight in case reviews and error rate calculations, including access to forms related to determining error rates.

(e) *Record Retention*—Records pertinent to the case reviews and submission of error rate report shall be retained for a period of five years from the date of submission of the applicable error rate report or, if the error rate report was revised, from the date of submission of the revision. Records must be made available to Federal staff upon request.



**§ 98.102 Content of Error Rate Reports.**

(a) *Baseline Submission Report*—At a minimum, States, the District of Columbia and Puerto Rico shall submit an initial error rate report to the Department, as required in § 98.100, which includes the following information on errors and resulting improper payments occurring in the administration of CCDF grant funds, including Federal Discretionary Funds (which includes any funds transferred from the TANF Block Grant), Mandatory and Matching Funds and State Matching and Maintenance-of-Effort (MOE Funds):

(1) Percentage of cases with an error (regardless of whether such error resulted in an over or under payment), expressed as the total number of cases in the sample with an error compared to the total number of cases in the sample;

(2) Percentage of cases with an improper payment (both over and under payments), expressed as the total number of cases in the sample with an improper payment compared to the total number of cases in the sample;

(3) Percentage of improper payments (both over and under payments), expressed as the total dollar amount of improper payments in the sample compared to the total dollar amount of payments made in the sample;

(4) Average amount of improper payments (gross over and under payments, divided by the total number of cases in the sample that had an improper payment (both over and under payments));

(5) Estimated annual amount of improper payments (which is a projection of the results from the sample to the universe of cases statewide during the 12-month review period) calculated by multiplying the percentage of improper payments by the total dollar amount of child care payments that the State, the District of Columbia or Puerto Rico paid during the 12-month review period;

(6) For each category of data listed above, targets for errors and improper payments in the next reporting cycle (which must be lower than the most recent estimated error rates);

(7) Summary of methodology used to arrive at estimate, including fieldwork preparation, sample generation, record review and error rate computation processes;

(8) Discussion of the causes of improper payments identified and actions that will be taken to correct those causes in order to reduce the error rates;

(9) Description of the information systems and other infrastructure that assist the State, the District of Columbia

and Puerto Rico in identifying and reducing improper payments, or if the State, the District of Columbia or Puerto Rico does not have these tools, a description of actions that will be taken to acquire the necessary information systems and other infrastructure; and

(10) Such other information as specified by the Secretary.

(b) *Standard Report*—At a minimum, the State, the District of Columbia and Puerto Rico shall submit an error rate report to the Department, as required in § 98.100, made subsequent to the baseline submission report as set forth in § 98.102(a) which includes the following information on errors and resulting improper payments occurring in the administration of CCDF grant funds, including Federal Discretionary Funds (which includes any funds transferred from the TANF Block Grant), Mandatory and Matching Funds and State Matching and Maintenance-of-Effort (MOE Funds):

(1) All the information reported in the baseline submission, as set forth in § 98.102(a), updated for the current cycle;

(2) For each category of data listed in § 98.102(a)(1) through (5), States, the District of Columbia and Puerto Rico must include data and targets from the prior cycle in addition to data from the current cycle and targets for the next cycle;

(3) Description of whether the State, the District of Columbia or Puerto Rico met error rate targets set in the prior cycle and, if not, an explanation of why not;

(4) Discussion of the causes of improper payments identified in the prior cycle and actions that were taken to correct those causes, in addition to a discussion on the causes of improper payments identified in the current cycle and actions that will be taken to correct those causes in order to reduce the error rates; and

(5) Such other information as specified by the Secretary.

[FR Doc. E7-3664 Filed 3-1-07; 8:45 am]

**BILLING CODE 4184-01-P**

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**DEPARTMENT OF COMMERCE**
**National Oceanic and Atmospheric Administration**
**50 CFR Part 622**

[I.D. 021507B]

**South Atlantic Fishery Management Council; Public Hearings**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and

Atmospheric Administration, Commerce.

**ACTION:** Notice of additional public hearing.

**SUMMARY:** The South Atlantic Fishery Management Council (Council) will hold an additional public hearing in a series of public hearings regarding Amendment 18 to the Fishery Management Plan for Coastal Migratory Pelagic Resources of the Gulf of Mexico and South Atlantic. Amendment 18 will modify the total allowable catch (TAC) for the Atlantic migratory group king mackerel and Spanish mackerel fisheries, and change the commercial trip limits for Spanish mackerel to reflect recent changes in the fishing year.

**DATES:** The additional public hearing will be held March 18, 2007. Written comments regarding Amendment 18 must be received in the Council office by close of business on April 10, 2007. See **SUPPLEMENTARY INFORMATION** for the date, time, and location of the public hearing.

**ADDRESSES:** Written comments should be sent to Bob Mahood, Executive Director, South Atlantic Fishery Management Council, 4055 Faber Place Drive, Suite 201, North Charleston, SC 29405, or via email to [MackerelAmendment18@safmc.net](mailto:MackerelAmendment18@safmc.net). Copies of the public hearing document are available from Kim Iverson, South Atlantic Fishery Management Council, 4055 Faber Place Drive, Suite 201, North Charleston, SC 29405; telephone: 843-571-4366 or toll free at 866/SAFMC-10.

**FOR FURTHER INFORMATION CONTACT:** Kim Iverson, South Atlantic Fishery Management Council, 4055 Faber Place Drive, Suite 201, North Charleston, SC 29405; telephone: 843-571-4366; fax: 843-769-4520; email address: [kim.iverson@safmc.net](mailto:kim.iverson@safmc.net).

**SUPPLEMENTARY INFORMATION:** The Council initiated a regulatory amendment in June 2006 to adjust the TAC following an assessment and report reflecting the need to reduce the current TACs for both Atlantic migratory group king and Spanish mackerel. The Council is proposing to reduce the current annual TAC for king mackerel from 10.0 million pounds to 7.1 million pounds, and for Spanish mackerel from 7.04 million pounds to 6.7 million pounds. Amendment 18 was changed from a regulatory amendment to a plan amendment in September 2006 to allow more flexibility for alternatives. While the title has changed, the alternatives and information contained in the plan amendment remain the same.