

# SUBSIDIZING THE CHILDCARE ECONOMY

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*This Article studies how government childcare subsidies redistribute resources and values among children, parents, providers, and their workers engaged in diverse forms of childcare. Formal centers provide developmentally beneficial care in a regulated setting but are detached from supporting the children's families. Home-based care often occurs informally, exempt from or in violation of regulations, but its mode of low-cost, flexible-hour, in-community care supports low-income parents' work and family life. Federal and state policies today are shifting to concentrating subsidies primarily on centers, enhancing regulation of subsidized providers, and incorporating quality measurements.*

*Analyzing the political economy process behind this formalization trend, this Article finds that an educational mode of childcare is taking over the field of childcare experts and advocates, marginalizing childcare's other societal values, such as its support to low-income parents and minority communities. The Article also offers the first systematic account of the reform's distributional consequences across the childcare economy. In exchange for more developmental benefits to children in subsidized centers, this reform risks deteriorating home-based care, making the subsidies less accessible to low-income families, and escalating the pressure on low-income parents to trade off paid work and childcare. It concludes that the costs of this formalization trend for low-income families have been underestimated and urges policy responses that support select forms of informal care. This Article primarily focuses on the Child Care and Development Fund (CCDF), the major federal-state partnership program making quality childcare accessible to low-income families.*

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## INTRODUCTION

Childcare subsidy programs help to structure a childcare economy that ranges from centers that are highly formal businesses, with employees and regulated quality standards, to various types of more informal care sited in the provider's or the child's home. Federal and state policies in the Child Care and Development Fund (CCDF), the major federal-state partnership program making quality childcare accessible to low-income families, are shifting to concentrating

childcare subsidies primarily on formal center-based care, enhancing regulation of subsidized providers, and incorporating standardized quality measurements into subsidy calculations.<sup>1</sup> The interaction among these measures constitutes a formalization reform. This Article unpacks the trade-offs associated with different modes of care, analyzes the political economy context of this formalization trend, and offers the first systematic account of its costs and benefits for children, parents, providers, and employees in the childcare economy. It concludes that the costs of this formalization trend to low-income families and home-based providers have been underestimated and urges policy responses that support select forms of home-based care.

This Article contributes to two academic debates. First, it takes part in the debate about public childcare spending programs by positing an internally diverse childcare economy. Scholarship on childcare subsidies has either discussed their benefits to childcare in the aggregate or focused on their effect on recipients. For example, Maxine Eichner attributes the scarcity of public childcare spending to the “free-market family” ideology holding that the “free market” is a sufficient, reliable, or superior institution to provide for families’ care needs.<sup>2</sup> She finds that the current system is neither functional nor fair.<sup>3</sup> Eichner then calls for more government subsidies to improve childcare for all families and benefit society at large.<sup>4</sup> Focusing on recipients, welfare law and critical race theory scholars have studied childcare subsidies as a subsidiary to anti-poverty laws’ work requirements for low-income mothers of color seeking welfare benefits, criticizing the mandate of paid work for creating an unaddressed care gap.<sup>5</sup> But they do not adequately consider subsidies’ impacts on other actors.

This Article pursues a system-wide distributional analysis to study the subsidies’ heterogeneous impacts across the childcare economy. Thus, it follows Noah Zatz, who has examined welfare programs’ heterogenous distribution

1. Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 42 U.S.C.); Child Care and Development Block Grant Act of 2014 (CCDBG), Pub. L. No. 113-186, 128 Stat. 1971 (codified as amended in scattered sections of 42 U.S.C.); Child Care and Development Fund (CCDF), 45 C.F.R. § 98 (1998). For a brief discussion of other subsidies, see *infra* Part III.A.

2. MAXINE EICHNER, *THE FREE-MARKET FAMILY: HOW THE MARKET CRUSHED THE AMERICAN DREAM (AND HOW IT CAN BE RESTORED)* 128-35 (2020).

3. *Id.* at xxiv-xxv. Similarly, Meredith Harbach argues that childcare constitutes a classic market failure problem in need of state intervention. High-quality childcare has massive positive externalities to the society beyond parties in the immediate transaction, leading the market to under-produce. See generally Meredith Johnson Harbach, *Childcare Market Failure*, 2015 UTAH L. REV. 659 (2015).

4. EICHNER, *supra* note 2, at xxii; Harbach, *supra* note 3, at 705-08.

5. Lucie E. White, *Closing the Care Gap that Welfare Reform Left Behind*, 577 ANNALS. AM. ACAD. POL. & SOC. SCI. 131, 132-34 (2001); Dorothy E. Roberts, *Welfare Reform and Economic Freedom: Low-Income Mothers’ Decisions about Work at Home and in the Market*, 44 SANTA CLARA L. REV. 1029, 1048-49 (2004).

among dual-earner, breadwinner-caregiver, and single-parent families.<sup>6</sup> Extending this approach, this Article studies subsidies' distributional impacts among various modes of childcare and involved parties. Childcare subsidy programs and their accompanying regulatory systems define and distribute childcare, its compensation and value, and other resources. Given the resource scarcity across the childcare economy, the economic interactions within it are highly sensitive to government subsidies. Thus, access to subsidies—and conversely, their absence—can be a life-changer for a family, a provider, or even a whole sector producing a specific mode of care. In other words, the subsidy programs that are designed to channel resources to vulnerable providers, parents, and children also distribute among them—and in some circumstances, away from them.

Specifically, this Article finds that the CCDF's formalization reform is redistributing resources from informal, home-based care to formal centers, and, accordingly, from the former's constituents to the latter's. On the user side, low-income families, especially single working mothers of color, disproportionately demand the mode of care—low-cost, flexible-hour, adjacent location, and culturally compatible—that home-based care is much more likely to provide. In contrast, center care raises children's school readiness and is most compatible with upper-middle-income families' needs.<sup>7</sup> For the childcare workforce, center- and home-based childcare present two contrasting forms of paid care work: a more regulated, higher appraised, yet hierarchical and detached model of work vis-à-vis less visible, less compensated yet more flexible work where the provider enjoys both the pros and cons of working inside her own home. As a result, the CCDF policies marginalizing home-based care have unaddressed costs on low-income parents and home-based providers.

More broadly, this Article adds to the academic literature on informal care work. Low-income women informally provide caregiving to others' children inside private homes, yet this phenomenon remains understudied.<sup>8</sup> The mainstream literature has a strong preference against informality and proposes either extending formal family law or labor law or curbing informal practices. For instance, Martha Fineman's early work arguing that the legal family should reflect dependency and caregiving bonds has inspired scholars to argue that informal caregivers should enjoy formal rights as family members in child custody and social services.<sup>9</sup> In parallel, labor feminists, motivated by the

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6. Noah D. Zatz, *Supporting Workers by Accounting for Care*, 5 HARV. J.L. & PUB. POL'Y 45, 48-50 (2011); See generally Joanna Vieira Noronha, *Engendering Parenthood: A Distributive Analysis of Parental Leave Law in Canada and the USA* (July 2018) (Ph.D. Dissertation) (on file with the Harvard Law School Library) (comparing how different parental leave laws impact families with different family compositions).

7. See *infra* Part I.B.2.

8. Lucy Williams, *Poor Women's Work Experiences: Gaps in the 'Work/Family' Discussion*, in LABOUR LAW, WORK, AND FAMILY 195, 195 (Joanne Conaghan & Kerry Rittich eds., 2005).

9. See generally MARTHA FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND*

International Labor Organization's agenda on the informal economy, argue for extending formal employment standards to paid care workers and flag informal work as extreme labor exploitation.<sup>10</sup> Although these two approaches have both achieved some success in revising the formal laws, neither has successfully converted the mass of informal caregivers into formality.<sup>11</sup> Further, they often compete at the border between them: courts, for instance, tend to rule that a caregiver cannot simultaneously have full rights as a family member and as a worker.<sup>12</sup> Some scholars propose to curb informal care by expanding public investment in formal care. For instance, Eichner, based on its lack of regulation and low quality indicators, regards informal home-based care as suboptimal and argues for expansively subsidizing formal care.<sup>13</sup>

A more critical approach to informality emerges among some labor law scholars. Resisting the negative presumptions about informal work, some explore the diverse packages of benefits and harms to workers within the informal economy while others propose a more contextual analysis of informality.<sup>14</sup>

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OTHER TWENTIETH CENTURY TRAGEDIES (1995) (arguing for reconstructing the legal family to reflect caregiving arrangements); Laura T. Kessler, *Community Parenting*, 24 WASH. U. J.L. & POL'Y 47 (2007) (arguing for legally recognizing parenthood in more-than-two-parent families); Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. LAW REV. 385 (2008) (arguing for more legal recognition of functional parenthood); Pamela Laufer-Ukeles, *Money, Caregiving, and Kinship: Should Paid Caregivers Be Allowed to Obtain De Facto Parental Status?*, 74 MO. L. REV. 25 (2009) (arguing for the possibility of allowing parental rights to paid caregivers).

10. See generally Pegg R. Smith, *The Pitfalls of Home: Protecting the Health and Safety of Paid Domestic Workers*, 23 CAN. J. WOMEN & L. 309 (2011) (evaluating labor advocates' efforts to formalize paid care work) Einat Albin & Virginia Mantouvalou, *The ILO Convention on Domestic Workers: From the Shadows to the Light*, 41 INDUS. L.J. 67 (2012) (summarizing the ILO's approach to domestic work).

11. See generally Solangel Maldonado, *When Father (or Mother) Doesn't Know Best: Quasi-Parents and Parental Deference After Troxel v. Granville*, 88 IOWA L. REV. 865 (2002) (finding relative caregivers rarely raise custody claims against biological parents); for informal care workers' relation with formal labor law, see Part II.A.

12. See generally Laufer-Ukeles, *supra* note 9 (finding that courts often deny paid caregivers custody and visitation rights).

13. EICHNER, *supra* note 2, at 124.

14. Kerry Rittich, *Formality and Informality in the Law of Work*, in THE DAUNTING ENTERPRISE OF LAW: ESSAYS IN HONOUR OF HARRY W. ARTHURS 109, 111-15 (Simon Archer, Daniel Drache & Peer Zumbansen eds., 2017); see generally Hila Shamir, *The Paradox of "Legality": Temporary Migrant Worker Programs and Vulnerability to Trafficking*, in REVISITING THE LAW AND GOVERNANCE OF TRAFFICKING, FORCED LABOR AND MODERN SLAVERY 471 (Prabha Kotiswaran ed., 2017) (arguing that workers within formal labor migration programs are more vulnerable to human trafficking than informal migrant workers); see generally Natalia Ramirez, *Bargaining Women: Negotiating Care and Work across Formality and Informality in the Colombian Garment Industry* (Nov. 2017) (SJD Thesis, Harvard L. School) (arguing that workers with different care duties have different preferences for formal and informal manufacturing work); see generally Yiran Zhang, *Rethinking the Global Governance of Migrant Domestic Workers: The Heterodox Case of Informal Filipina Workers in China*, 36 GEO. IMMIGR L.J. 963 (2022) (finding that some migrant care workers

Following this critical approach, this Article analyzes informality and formalization in a granular way. By mapping divergent understandings and advocacy agendas of childcare, it sheds light on the costs of formal care and the benefits of informal care that the literature has so far overlooked. Further, instead of treating the quality of informal care as a precondition for policymaking, it unpacks it as a product of distributional childcare subsidy policies. Subsidy policies stipulate a set of evaluation standards that favor formal care and then allocate scarce resources in a way that deprives the home-based sectors of opportunities to upgrade.<sup>15</sup> Meanwhile, informal care's benefits remain under-acknowledged and, hence, not sufficiently incorporated into the subsidized childcare economy.

Thus, this Article argues for policy alternatives that support select forms of informal care to mitigate the formalization reform's harsh consequences to the home-based sectors and low-income working parents. They include flexible regulation of providers who fill logistical care gaps, subsidizing cross-sector partnerships, and expanding quality metrics to include values expressed by low-income working parents.

Beyond its contribution to the academic debate, this Article also writes into a salient political moment for childcare policies. The COVID pandemic's disruption of the childcare economy and the resulting impacts on families and workers made the public more aware than ever that a functional childcare economy is fundamental to the society. President Biden's Build Back Better framework's proposal to strengthen the care infrastructure<sup>16</sup> also has reinvigorated political attention to various government spending on childcare. This has made the present a politically ripe moment to re-examine existent subsidy programs' redistributive role in the childcare economy and beyond.

To unpack the analysis, Part I first examines childcare along the formal/informal dimension to outline the sectors in the childcare economy and the sectoral distribution across families in different income groups. Part II maps the plural policy goals of childcare subsidies and describes how the tension among these policy goals plays out in the CCDF. The rest of the Article examines in detail the CCDF's formalization reform. Part III maps invested interest groups' different visions of childcare and their divergent agendas on CCDF subsidy policies, concluding that the Early Childhood Education advocates—who argue for formalization on an educational rather than a custodial model—are enjoying predominance in childcare policy debates. Part IV analyzes the resulting CCDF's formalization reform and its distributional consequences across the childcare economy, with an emphasis on low-income families. Part V proposes some policy suggestions before the Conclusion.

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find informality empowering in workplace bargaining).

15. See *infra* Part IV.

16. THE WHITE HOUSE, *The Build Back Better Framework: President Biden's Plan to Rebuild the Middle Class*, <https://perma.cc/FE85-VCDX> (archived Jan. 19, 2023).

## I. FORMALITY AND INFORMALITY IN THE CHILDCARE ECONOMY

This Part first lays out a taxonomy of childcare sectors. For each sector, I use the formal/informal lens to unpack the regulatory regime, including safety, health, and quality regulation, workplace regulation, and child protective services (CPS)' regulation of parenting; as well as the mode of care that the sector produces. Then I show how families in different income groups tend to use different sectors due to their divergent employment and family conditions.

### A. Sectors in the Childcare Economy

The location, in or outside a private home, predominantly determines the law's mode of governing the provider-parent-child care relationship. The center-based provider is a formally incorporated business entity where formally employed caregivers provide care under meticulous state regulation. In contrast, home-based care can be divided into paid care in the child's home, or nanny care; paid care in the provider's home, or Family Child Care (FCC); and networks of family, friends, and neighbors who exchange care for payment or other goods, or Family, Friends, and Neighbor (FFN) care.<sup>17</sup> The boundaries between the three home-based sectors are fluid.<sup>18</sup> The parties often have mixed identities transcending the category markers: for instance, a home-based provider might simultaneously take unpaid care of her own child along with other children for whom she is a paid provider. The home-based sectors, relatively untouched by state scrutiny, rely more on the interpersonal relationship between providers and parents to protect the parties' welfare. In other words, they are more informal.

While centers almost exclusively occupy the public conceptualization of "quality childcare," most childcare workers in the United States are home-based. The 2012 National Survey of Early Care and Education, the latest national representative statistics of early childhood care providers, showed that less than one-quarter of the estimated 4.7 million childcare providers worked in centers.<sup>19</sup> One million were home-based workers receiving regular monetary payments. Another 2.7 million home-based caregivers did not receive standard monetary compensation for their labor.<sup>20</sup>

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17. I adopt the terms of FCC and FFN from the official categorizations of the US Department of Health & Human Services [hereinafter HHS].

18. Different states and government agencies have inconsistent categorizations. See AMY SUSMAN-STILLMAN & PATTI L. BANGHART, RSCH. CONNECTIONS, DEMOGRAPHICS OF FAMILY, FRIEND, AND NEIGHBOR CHILD CARE IN THE UNITED STATES 4 (2008).

19. See A. RUPA DATTA, U.S. DEP'T OF HEALTH & HUM. SERVS., OPRE REPORT 2013-38, NUMBER AND CHARACTERISTICS OF EARLY CARE AND EDUCATION (ECE) TEACHERS AND CAREGIVERS: INITIAL FINDINGS FROM THE NATIONAL SURVEY OF EARLY CARE AND EDUCATION (NSECE) 4 (2013).

20. *Id.*



## 1. Center-Based Care

The U.S. Census Bureau's 2014 Survey of Income and Program Participation (SIPP) surveying families' childcare arrangements showed that 44 percent of children under five were placed in center-based care facilities.<sup>21</sup> According to the 2012 National Survey of Early Care and Education, one million teachers and caregivers directly serve nearly seven million preschool-age children in an estimated 129,000 center-based programs.<sup>22</sup>

Center-based care is the most formal sector. It is non-residential; the legal system treats each center as a business entity and a standard workplace. Since the industry serves children, the state institutes intricate consumer-oriented health, safety, and quality regulation. Almost all states conduct unannounced compliance inspections at least once a year.<sup>23</sup> While a set of coherent federal regulation does not exist, states, influenced by federal guidelines and national organizations, trend toward stricter and converging regulation of centers.<sup>24</sup>

The most intensive regulation focuses on care workers. Each state sets basic certification requirements for childcare workers, which often apply to workers in both centers and large-scale FCCs. A typical state certification process sets a minimum level of workers' professional training and caregiving experience, runs background checks, and requires training on specific safety issues.<sup>25</sup> States have additional educational requirements for advanced positions such as teachers and directors.<sup>26</sup>

The minimum staff-to-child ratio and maximum group size provide the essential numerical structure for the care process. The maximum number of children per provider is intended to ensure that each child receives a set minimum of attention and to provide some de facto labor protection against overwork.<sup>27</sup> In return, as labor expenses on average constitute 60 to 80 percent of a childcare center's costs, the structural numeric sets the floor of the per-child-per-hour cost in formal care.<sup>28</sup> Different child-staff ratios largely explain the cost differences across states and age groups.<sup>29</sup> The resulting higher labor costs make it harder to

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21. US CENSUS BUREAU, 2014 SURVEY OF INCOME AND PROGRAM PARTICIPATION, <https://perma.cc/DN7P-RWS4> (archived Jan. 19, 2023). For analysis, see RASHEED MALIK, WORKING FAMILIES ARE SPENDING BIG MONEY ON CHILD CARE (2019), <https://perma.cc/CPR5-5CDJ>.

22. DATTA, *supra* note 19, at 8.

23. NAT'L CTR. ON EARLY CHILDHOOD QUALITY ASSURANCE, RESEARCH BRIEF 1, TRENDS IN CHILD CARE LICENSING REQUIREMENTS AND POLICIES FOR 2017, at 25 (2020).

24. *Id.* at 5-6.

25. *Id.*

26. *Id.* at 31.

27. Harbach, *supra* note 3, at 700-03.

28. SIMON WORKMAN, CTR. FOR AM. PROGRESS, WHERE DOES YOUR CHILD CARE DOLLAR GO? (2019), <https://perma.cc/57X9-LJF4>.

29. Even when workers caring for infants and toddlers have much lower educational attainments and receive lower hourly wages than workers caring for older children, the per-child cost remains significantly higher because the highest staff-child ratios apply to the



profit from caring for the youngest children. Consequently, not all centers (less than 70 percent) serve infants and toddlers, and when they do, they also receive older children to cross-subsidize infant care.<sup>30</sup>

Licensure for centers involves additional guidelines for institutional governance. State regulations require centers to standardize the care process by instituting written plans for nutrition, physical activities, curriculum, and so on, in compliance with state guidelines.<sup>31</sup> The curriculum requirement is stricter than for home-based sectors but still less rigid than for schools that serve older children.<sup>32</sup> As of 2017, 40 states also require the centers to keep attendance records for each individual child and report injuries to the authorities.<sup>33</sup> In addition, state governments often publicize administrative lists of childcare providers, on which most centers register.<sup>34</sup> These policies make centers more visible to the public.

Childcare work in centers is stable yet hierarchical. Most center-based workers are full-time employees who work precisely 40 hours a week.<sup>35</sup> The centers usually divide the workforce into lead teachers, assistant teachers, and aides based on their educational attainment and work experience.<sup>36</sup> Like the rest of the childcare workforce, center-based workers, especially those in non-teacher roles, receive low wages.<sup>37</sup>

Regulation of the childcare industry is well integrated with the states' CPS systems. States' certification of childcare workers often considers their caregiving performance at their own homes.<sup>38</sup> By 2017, 34 states require center workers to go through five types of background checks, including child abuse and neglect registries.<sup>39</sup> Additionally, they are often mandatory reporters of child

youngest children. The national average staff-child ratios for infant, toddler, and preschool children are respectively 1:4, 1:8, and 1:11. The national average monthly per-child cost is \$1,230 for center-based infant care and \$760 for preschoolers. See SIMON WORKMAN & STEVEN JESSEN-HOWARD, *CTR. FOR AM. PROGRESS, UNDERSTANDING THE TRUE COST OF CHILD CARE FOR INFANTS AND TODDLERS* 7 (2018).

30. DATTA, *supra* note 19, at 10.

31. NAT'L CTR. ON EARLY CHILDHOOD QUALITY ASSURANCE, *supra* note 23, at 18.

32. Also, a number of state licensure regulations exempt religious institutions. *Id.* at 8.

33. *Id.* at 23.

34. DATTA, *supra* note 19, at 15.

35. *Id.* at 19.

36. *Id.* at 9. Workers from different ethnic and racial groups are unequally distributed across the rankings. Hispanic workers disproportionately hold non-teaching roles. In addition, Black and Hispanic workers are more likely to care for children of younger ages. MARCY WHITEBOOK, CAITLIN MCLEAN, LEA J.E. AUSTIN & BETHANY EDWARDS, *CTR. FOR THE STUDY OF CHILD CARE EMP., EARLY CHILDHOOD WORKFORCE INDEX 2018*, at 26 (2018).

37. WHITEBOOK ET AL., *supra* note 36, at 34.

38. For example, in Massachusetts, a care worker's parenting experience counts toward the duration of required childcare experience. 606 MASS. CODE REGS. §§ 7.04(15)(d), 7.09(15). Additional professional training can substitute for the experience requirement.

39. NAT'L CTR. ON EARLY CHILDHOOD QUALITY ASSURANCE, *supra* note 23, at 5.

abuse and neglect under state and federal laws.<sup>40</sup> Centers' documentation also provides information about at-risk children to the state's CPS system.

This wide-ranging standardization produces educationally beneficial care with inflexible hours. On the one hand, various studies find that attending high-quality center-based care after the age of three promotes children's school readiness by cultivating their collaborative and disciplined capabilities.<sup>41</sup> Experts conclude that this often translates into life improvements in adulthood.<sup>42</sup> On the other hand, standardizing the care process also produces rigid daily hours of business. Only 8 percent of centers operate during evenings, overnight, or on weekends.<sup>43</sup> Some educational care programs offer care service as short as three hours a day and are open only during school semesters.<sup>44</sup>

## 2. In-Home Nanny Care

I use the term in-home nanny care to describe the model in which childcare workers provide paid care in or around the *child's* home. The workers fall under the broader category of domestic workers and their work often entails other household labor, such as housekeeping. Under 4% of families use in-home nanny care, which is most common among upper-middle class families.<sup>45</sup>

Formal regulation of childcare providers or of the workplace almost always exempts nanny care. This sector's lack of legal supervision subserves the family privacy and state non-intervention ideologies historically associated with

40. CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH AND HUM. SERVS., MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT: SUMMARY OF STATE LAWS 1-2 (2008).

41. NICHD Early Child Care Research Network, *Type of Child Care and Children's Development at 54 Months*, 19 EARLY CHILD. RSCH. Q. 203, 203 (2004); DEBORAH PHILLIPS ET AL., BROOKINGS, PUZZLING IT OUT: THE CURRENT STATE OF SCIENTIFIC KNOWLEDGE ON PRE-KINDERGARTEN EFFECTS: A CONSENSUS STATEMENT, 22-27 (2017).

42. NICHD Early Child Care Research Network, *supra* note 41, at 226-27; PHILLIPS ET AL., *supra* note 41, at 25-27; *ECE Consensus Letter*, NAT'L INST. FOR EARLY EDUC. RSCH, <https://perma.cc/DRB4-KHFE> (archived Jan. 24, 2023). The latest large-scale longitudinal research shows enrollment in high-quality center programs has modestly boosted college attendance, SAT test-taking, and high school graduation; decreased juvenile incarceration; but did not impact test scores. Guthrie Gray-Lobe, Parag A. Pathak & Christopher R. Walters, *The Long-Term Effects of Universal Preschool in Boston 3-7* (Nat'l Bureau of Econ. Rsch., Working Paper No. 28756, 2021).

43. NSECE FACT SHEET, U.S. DEP'T OF HEALTH & HUM. SERVS, PROVISION OF EARLY CARE AND EDUCATION DURING NON-STANDARD HOURS 2 (2015).

44. ELIZABETH PALLEY & COREY S. SHDAIMAH, IN OUR HANDS: THE STRUGGLE FOR U.S. CHILD CARE POLICY 160-61 (2014). Centers' shorter hours partially serve the goal of child development. See generally Susanna Loeb, Margaret Bridges, Daphna Bassok, Bruce Fuller & Russell W. Rumberger, *How Much Is Too Much? The Influence of Preschool Centers on Children's Social and Cognitive Development*, 26 ECON. EDUC. REV. 52 (2007) (showing that too many hours in center care leads to more behavioral issues).

45. JOAN C. WILLIAMS & HEATHER BOUSHEY, CTR. FOR AM. PROGRESS, WORK LIFE L., THE THREE FACES OF WORK-FAMILY CONFLICT: THE POOR, THE PROFESSIONALS, AND THE MISSING MIDDLE 9 (2010).

middle- and upper-class homes. Under discourses likening the employer-worker-child relationship to a familial relationship, legislators entrust the supervising employers with the welfare of both the child and the worker.<sup>46</sup> Almost all states consistently exempt in-home nannies and babysitters from childcare work licensure requirements or other quality-oriented or workplace safety regulation.<sup>47</sup>

On the labor regulation side, this sector was totally exempted from the original Fair Labor Standard Act (FLSA) of 1938 and other New Deal labor legislation.<sup>48</sup> The 1974 amendment of FLSA extended some benefits to domestic workers, such as minimum wages and overtime payments.<sup>49</sup> Non-standard in-home care work remains exempted from these federal laws.<sup>50</sup> The National Labor Relations Act (NLRA) also denies domestic workers the right to unionize under federal law.<sup>51</sup> In recent years, ten states have passed a “Domestic Worker Bill of Rights” to extend standard workplace regulations to domestic workers.<sup>52</sup> Such state legislation provides domestic workers the right to overtime pay, a weekly rest day, access to unemployment insurance, and protections against abuses.<sup>53</sup> However, as an increasing proportion of workers in this sector are gig and/or immigrant workers, their other identities, such as independent contractors working for multiple employers, keep them excluded from formal workplace regulation.<sup>54</sup> Special immigration programs such as the *au pair* program further dilute their participants’ identities as workers and reinforce their status as part of employers’ families.<sup>55</sup>

This largely informal sector produces a flexible mode of care for those who can afford it. The flexibility benefits to the user family sometimes burden the

46. Premilla Nadasen, *Citizenship Rights, Domestic Work, and the Fair Labor Standards Act*, 24 J. POL’Y HIST. 74, 78 (2012).

47. *Family, Friend, and Neighbor Care*, U.S. DEP’T OF HEALTH & HUM. SERVS., OFF. OF CHILD CARE, <https://perma.cc/WVR8-7EPZ> (archived Jan. 24, 2023).

48. Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L.J. 95, 104-18 (2011).

49. Smith, *supra* note 10, at 317.

50. For example, FLSA’s overtime payment clause does not cover live-in domestic workers, who reside at their workplaces. WAGE & HOUR DIV., U.S. DEP’T OF LAB., FACT SHEET # 79D: HOURS WORKED APPLICABLE TO DOMESTIC SERVICE EMPLOYMENT UNDER THE FAIR LABOR STANDARDS ACT (FLSA) (2016). The FLSA protections also do not cover babysitters on a casual basis and workers providing companionship services. See 29 C.F.R. § 552.104.

51. Perea, *supra* note 48, at 12446.

52. *Domestic Workers Bills of Rights*, NAT’L DOMESTIC WORKERS ALL., <https://perma.cc/7EXG-Y56Z> (archived Jan. 19, 2023).

53. See, e.g., S. 2311E, 2009 Reg. Sess. (N.Y. 2010).

54. See generally Naomi Schoenbaum, *Gender and the Sharing Economy*, 43 FORDHAM URB. L.J. 1023 (2016) (finding that many jobs in the sharing economy involve intimate work); Shirley Lin, “*And Ain’t I a Woman?*”: *Feminism, Immigrant Caregivers, and New Frontiers for Equality*, 39 HARV. J.L. & GENDER 67 (2016) (analyzing the exclusion of immigrants from worker protections).

55. Janie A. Chuang, *The U.S. Au Pair Program: Labor Exploitation and the Myth of Cultural Exchange*, 36 HARV. J.L. & GENDER 269, 311-13 (2013).

provider in terms of long or erratic working hours.<sup>56</sup> Employers usually do not expect educational care from nannies and the law categorizes them as unskilled workers.<sup>57</sup> Nevertheless, the per hour cost remains high due to the high staff-to-child ratio. Despite its increasing spread beyond high-income families, nanny care is still far from affordable to low-income ones.

### 3. Family Child Care

Family Child Care (FCC) provides care services to unrelated children from multiple households in a family-like setting inside the *provider's* home. According to the 2012 National Survey of Early Care and Education, approximately 433,750 FCCs operate in the United States: 118,000 providers appear on the aforementioned state administrative lists and an estimated 315,600 unlisted ones recruit from other channels.<sup>58</sup> A 2007 study estimated that one-quarter of preschool children spent a considerable amount of time—about 30 hours per week—in an FCC.<sup>59</sup>

FCC and paid Family, Friends, and Neighbor (FFN) providers often share similar parent-provider-child dynamics. The major difference is their relationship with the state. Most states use a maximum number of nonrelated children to draw the boundary between FCC, a service business regulated as part of the market, and FFN, a quasi-family relationship that the state mostly relegates to informality.<sup>60</sup> Eleven states mandate licensure for providers caring for any nonrelated child, while three states do not require licensure for any home-based providers.<sup>61</sup> The rest exempt providers caring for a small number of unrelated children.<sup>62</sup> Some states (e.g., California) exempt unpaid arrangements, such as parent-sharing cooperatives.<sup>63</sup> Other states (e.g., North Carolina) further specify that license-exempt care cooperatives cannot house a legally protected employment relationship.<sup>64</sup>

56. LINDA BURNHAM & NIK THEODORE, NAT'L DOMESTIC WORKERS ALL., *HOME ECONOMICS: THE INVISIBLE AND UNREGULATED WORLD OF DOMESTIC WORK*, at vii (2012).

57. Peggie R. Smith, *Caring for Paid Caregivers: Linking Quality Child Care with Improved Working Conditions*, 73 U. CIN. L. REV. 399, 415 (2004).

58. DATTA, *supra* note 19, at 15.

59. TARYN W. MORRISSEY, RSCH. CONNECTIONS, *FAMILY CHILD CARE IN THE UNITED STATES 2* (2007).

60. NAT'L CTR ON EARLY CHILDHOOD QUALITY ASSURANCE, *TRENDS IN FAMILY CHILD CARE HOME LICENSING REGULATIONS AND POLICIES FOR 2014*, at 6 (2015).

61. State laws often define “relative” broadly. For example, California’s FCC regulation defines relative as “spouse, parent, stepparent, son, daughter, brother, sister, stepbrother, stepsister, half-brother, half-sister, uncle, aunt, nephew, niece, first cousin or any such person denoted by the prefix ‘grand’ or ‘great,’ or the spouse of any of the persons specified in this definition even after the marriage has been terminated by death or dissolution.” CAL. CODE REGS. tit. 22, § 101152(r)(2) (2003).

62. NAT'L CTR. ON EARLY CHILDHOOD QUALITY ASSURANCE, *supra* note 60, at 5-6.

63. CAL. CODE REGS. tit. 22, § 102358 (2016).

64. N.C. GEN. STAT. § 110-86 (2020).

Among the three home-based sectors, FCC is the most formal one. States are gradually reducing or eliminating exemptions, bringing the sector into formal quality regulation.<sup>65</sup> An increasing number of states also add specific guidelines to standardize the care process, such as documentation requirements.<sup>66</sup>

Nevertheless, states' increasing regulation of FCCs must deal with their location in homes. On the one hand, these sites are subject to a less-strict set of rules than centers. Most states' licensure focuses on certifying the provider and allows flexible institutional management. The periodic safety inspection also has to respect the privacy of the site.<sup>67</sup> On the other hand, the blurred family/business boundary may introduce more scrutiny. For example, in Massachusetts, a provider's household members and other adults dwelling in the home must go through a background check, even if they are not engaged in the paid care.<sup>68</sup>

Despite the increasing formalization of the business entity, the work relationship in FCC falls short of a formal employment relationship, and the workers (often operators themselves) lack standard workplace rights. As the providers often exercise considerable control over their work as solo practitioners, they are categorized as independent contractors serving multiple households. As a result, they are entitled neither to receive overtime pay under FLSA, nor to unionize under NLRA.<sup>69</sup> Spread across thousands of isolated homes, the hidden workforce also poses practical challenges to both labor inspection and organizing.<sup>70</sup> In practice, working inside their own homes, the providers find it challenging to establish a boundary between market and family labor by calculating working hours and hourly wages. As a result, providers tend to work for much longer hours at lower hourly rates compared to center-based workers.<sup>71</sup>

In comparison to centers, this sector offers more flexibility to both provider and user parents. The increased flexibility partially comes from the lack of a clear family/workplace boundary. Over 90 percent of home-based providers are parents, and more than one-third care for their own children in addition to others'.<sup>72</sup> As the providers are paid less and work for longer hours, they manage to provide long-hour and low-cost care.<sup>73</sup> They tend to provide more flexible policies such as weekend and overtime care, mixed-age groups, and negotiable

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65. NAT'L CTR. ON EARLY CHILDHOOD QUALITY ASSURANCE, *supra* note 60, at 5.

66. *Id.* at 13.

67. *Id.* at 19.

68. 606 MASS. CODE REGS. § 7.04(15)(d).

69. Peggie R. Smith, *The Publicization of Home-Based Care Work in State Labor Law*, 92 MINN. L. REV. 1390, 1391 (2007).

70. *Id.*

71. FCC workers' median hourly wage was \$10.35 in 2017, \$2 lower than center-based workers. This group's median weekly working hours are 53.7 hours, far exceeding the 40-hour marker. See DATTA, *supra* note 19, at 20; WHITEBOOK ET AL., *supra* note 36, at 6.

72. MORRISSEY, *supra* note 59, at 2.

73. Datta, *supra* note 19, at 20.

payments.<sup>74</sup> They are also more likely to serve children under the age of three.<sup>75</sup>

As FCC providers are often low-income women without college degrees, child development experts, and the state, both regard them as providing custodial rather than educational or high-quality care.<sup>76</sup> Yet qualitative research suggests that low-income families, especially mothers of color, find this arrangement satisfactory. The providers, typically residing in the same neighborhood, are more likely to share the user parents' ethnic and socio-economic background and to reinforce the community's cultural values and practices. In exchange, the providers may experience a sense of powerlessness as they open up their home and sometimes their parenting process to the scrutiny of the state and consumer parents.<sup>77</sup>

#### 4. Family, Friend, and Neighbor Care

The last category, Family, Friend, and Neighbor (FFN) care, covers a broad and flexible range of unregulated and often unpaid home-based caregivers, making this the most informal sector. The provider usually has a close personal relationship with the families for whom they are providing care.<sup>78</sup> Relative care, a significant component of FFN care, is the most common form of non-parental childcare in the United States. Surveys show that half to 78 percent of children with working parents spend at least some time in the sole care of a relative.<sup>79</sup> Moreover, the legal and statistical categorization of FFN care covers a considerable range of commercial home-based care that operates exempt from quality regulation.<sup>80</sup>

The state primarily perceives FFN care as a part or an extension of the family, making most forms of state scrutiny unnecessary and inappropriate. Almost all states exempt relatives from licensure.<sup>81</sup> The Department of Labor's interpretation of the FLSA does not exclude relatives from forming an employment relationship when publicly funded programs pay them. However, the employment relationship only extends to the written agreements as approved

74. MORRISSEY, *supra* note 59, at 2.

75. DATTA, *supra* note 19, at 16.

76. MORRISSEY, *supra* note 59, at 2.

77. *Id.* at 11.

78. Ellen E. Kossek, Shaun M. Pichlet, Darrell Meece & Marguerite E. Barrett, *Family, Friend, and Neighbour Child Care Providers and Maternal Well-being in Low-Income Systems: An Ecological Social Perspective*, 81 J. OCCUP. & ORG'L. PSYCH. 369, 370 (2008); AMY SUSMAN-STILLMAN & PATTI L. BANGHART, RSCH CONNECTIONS, QUALITY IN FAMILY, FRIEND, AND NEIGHBOR CHILD CARE SETTINGS 5 (2011); GUADALUPE GARCIA, LILY LINKE, DANIELLE MULLIGA, NICK PITTMAN & BROOKE SIGGERS, UNDERSTANDING FAMILY, FRIEND, AND NEIGHBOR CARE IN MASSACHUSETTS 12 (2019).

79. SUSMAN-STILLMAN & BANGHART, *supra* note 18, at 3.

80. NSECE FACT SHEET, *supra* note 43.

81. If they receive childcare subsidies, they may face more safety, health, and quality regulation. *See infra* Part V.

by the program. The residue of care falls in the range of “natural support,” with no minimum wage or overtime protection.<sup>82</sup> State legislation extending labor standards to domestic workers also excludes workers who are related to their employers.<sup>83</sup>

A relative care relationship may trigger a more active role for the state when it is economically compensated or when the relative acts as the child’s primary caregiver. If the relative is the only provider, the care arrangement is more likely to pull the caregiver out of paid work.<sup>84</sup> Those with limited economic resources are more likely to need and expect financial compensation.<sup>85</sup> Such an exchange may take alternative forms of payment and usually falls short of a minimum wage.<sup>86</sup> However, when they get too close to a familial bond, relative caregivers further blur the boundary between parents and non-parents.<sup>87</sup> When a relative acts as the most stable caregiver in the child’s life, they might have legal claims to custody against the biological parents under doctrines like *de facto* parent.<sup>88</sup> In practice, relative caregivers rarely exercise these. Instead, they seek legal parenthood only when CPS intervenes. When a child’s parent(s) experience a life crisis, the relative caregiver may seek status as a foster parent or even a legal parent to avoid the child’s removal and placement with strangers through CPS.<sup>89</sup> CPS systems, in their turn, prefer relative placements. This may position these providers in defense against the CPS, compared to center-based workers who function as reporters for the CPS.

The modes of care in this sector differ across different communities. Families across the population heavily use grandparent care while minority families are more likely to use care from other relatives and acquaintances.<sup>90</sup> Especially in majority-minority neighborhoods, this sector of informal care is often an integral part of social and economic life. Individuals often exchange financial resources and share caregiving responsibilities transcending the

82. WAGE & HOUR DIV., U.S. DEP’T OF LAB., FACT SHEET #79F: PAID FAMILY OR HOUSEHOLD MEMBERS IN CERTAIN MEDICAID-FUNDED AND CERTAIN OTHER PUBLICLY FUNDED PROGRAMS OFFERING HOME CARE SERVICES UNDER THE FAIR LABOR STANDARDS ACT (FLSA) (2014).

83. *See, e.g.*, S. 2311E, 2009 Reg. Sess. (N. Y. 2010), at 2.

84. KATHLEEN SNYDER, SARA BERNSTEIN & GINA ADAMS, URB. INST., CHILD CARE VOUCHERS AND UNREGULATED FAMILY, FRIEND, AND NEIGHBOR CARE 9 (2008); *see generally* Robin L. Lumsdaine & Stephanie J.C. Vermeer, *Retirement Timing of Women and the Role of Care Responsibilities for Grandchildren*, 52 DEMOGRAPHY 433 (2015) (finding that grandchildren’s care needs induce women’s early retirement).

85. Laufer-Ukeles, *supra* note 12, at 74-82.

86. SUSMAN-STILLMAN & BANGHART, *supra* note 18, at 6.

87. Murray, *supra* note 9, at 398-404; Laufer-Ukeles, *supra* note 12, at 50-51.

88. Laufer-Ukeles, *supra* note 12, at 50-51.

89. SNYDER ET AL., *supra* note 84, at 9.

90. SAIDA MAMEDOVA & JEREMY REDFORD, U.S. DEP’T OF EDUC., EARLY CHILDHOOD PROGRAM PARTICIPATION, FROM THE NATIONAL HOUSEHOLD EDUCATION SURVEYS PROGRAM OF 2012, at 5 (2015).



boundary of nuclear families.<sup>91</sup> Some Black feminists name this phenomenon “othermothering,” stressing Black women’s crucial caregiving role in the community.<sup>92</sup> Regional statistics also find that Asian and Hispanic families disproportionately rely on relative care in lieu of center care, even when their access to relatives does not differ from other families, suggesting cultural preferences.<sup>93</sup>

As both FCC and FFN care are more embedded in the community than centers, the quality of care is highly sensitive to the community’s conditions. Those in low-income communities cannot escape from the systematic harms of social and economic deprivation.<sup>94</sup> The care often happens in housing that violates habitability standards and is surrounded by violence, imposing safety risks to the child.<sup>95</sup> Caregivers might not have enough resources to meet the children’s basic nutrition and other needs. The increased stress from long isolation, especially when there is no access to outside resources, often translates into lower quality of care.<sup>96</sup>

Resources also make the difference between hyper-stable and “patchwork” care. When the parent and/or the provider have enough income to maintain the arrangement, FFN care is the most stable form of care. A child may stay with the same provider for years while both worker and child turnover at centers are counted by months.<sup>97</sup> However, when the FFN network cannot generate enough resources, the parents have to “patchwork” together childcare from multiple acquaintances. The child is handed over among multiple adults in different

91. GARCIA ET AL., *supra* note 78, at 25; *see generally* Cleo Jacobs Johnson, Jaime Thomas & Kimberly Boller, *Ecomapping as a Research Tool for Informal Child Care*, 28 EARLY EDUC. & DEV. 705 (2017) (finding parents and providers overlap in informal care).

92. PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT* 178 (2002).

93. Lindsay Daugherty, *Child Care Choices of Hispanic Families: Why Aren’t Families Using Center Care?*, at 87-115 (2010) (Ph.D. Dissertation, Pardee RAND Graduate School); Sung Min Yoon, *The Characteristics and Needs of Asian-American Grandparent Caregivers: A Study of Chinese-American and Korean-American Grandparents in New York City*, 44 J. GERONTOLOGICAL SOC. WORK 75, 75 (2005).

94. For a holistic picture of desperate conditions in poor urban communities, *see generally* MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* (2016).

95. Julia Wrigley & Joanna Dreby, *Fatalities and the Organization of Child Care in the United States, 1985-2003*, 70 AM. SOCIO. REV. 729, 729 (2005).

96. Julie C. Rusby, Laura Bracken Jones, Ryann Crowley & Keith Smolkowski, *Associations of Caregiver Stress with Working Conditions, Caregiving Practices, and Child Behaviour in Home-based Child Care*, 183 EARLY CHILD DEV. & CARE 1589, 1589 (2013); L. Corr, E. Davis, A.D. LaMontagne, E. Waters & E. Steele, *Childcare Providers’ Mental Health: A Systematic Review of Its Prevalence, Determinants and Relationship to Care Quality*, 16 INT’L. J. MENTAL HEALTH PROMOTION 231, 231 (2014) (inconclusive on the connection between quality and provider’s poor mental health conditions but finding higher quality care was consistently related to higher educator mental well-being).

97. SUSMAN-STILLMAN & BANGHART, *supra* note 78, at 9; GARCIA ET AL., *supra* note 78, at 26.

houses on an unreliable schedule.<sup>98</sup> The patchwork often has holes—the young child may be watched by strangers or other minors or, in the worst case, no one. The porosity of household boundaries can expose children to abusive adults. Especially in the poorest conditions, this form of care can lead to the child's serious injury or death.<sup>99</sup>

Most early childhood research shares a negative attitude toward the quality of FFN and home-based care in general but shows ambivalence in specifics.<sup>100</sup> Especially after the age of three, most home-based providers cannot generate the age-appropriate developmental care that stimulates and socializes the child. As a result, FFN care has produced lower school readiness in terms of math and vocabulary scores than centers.<sup>101</sup> Nevertheless, children attending FFN care have fewer behavioral problems.<sup>102</sup> Researchers also contest that the current measurement protocols fall short of reflecting FFN care's strengths in warm provider-child-parent relationships. For example, it counts the books on the site (centers have more) but not the hugs children get (FFN care provides more).<sup>103</sup>

Other than quality issues, informal FFN care lacks a public face.<sup>104</sup> The childcare arrangement grows out of a preexisting trust relationship within the quasi-family instead of from the marketplace. It might not be replicated for other children outside the small community.

## B. Characteristics and Distribution of Different Modes of Care

This Subpart analyzes the connection between families' usage of childcare and their employment, family, and income conditions.

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98. Ellen K. Scott, Andrew S. London & Allison Hurst, *Instability in Patchworks of Child Care when Moving from Welfare to Work*, 67 J. MARRIAGE & FAM. 370, 370 (2005).

99. Wrigley & Dreby, *supra* note 95, at 729.

100. See generally NICHHD Early Child Care Research Network, *supra* note 41 (finding that center care leads to better development results but the results differ depending on the age of center care); Chantelle J. Dowsett, Aletha C. Huston, Amy E. Imes & Lisa Gennetian, *Structural and Process Features in Three Types of Child Care for Children from High and Low Income Families*, 23 EARLY CHILDHOOD RSCH. Q. 69, 70-71 (2008) (discussing the difference between structural and process evaluation of childcare quality).

101. *ECE Consensus Letter*, *supra* note 42; Bruce Fuller, Sharon Lynn Kagan, Susanna Loeb & Yueh-Wen Chang, *Child Care Quality: Centers and Home Settings that Serve Poor Families*, 19 EARLY CHILDHOOD RSCH. Q. 505, 505 (2004) (finding centers have more intense structured learning but not more positive provider-children interaction); Kirstine Hansen & Denise Hawkes, *Early Childcare and Child Development*, 38 J. SOC. POL'Y 211, 211 (2009) (finding that formal care leads to higher school readiness).

102. SUSMAN-STILLMAN & BANGHART, *supra* note 78, at 13,

103. SUSMAN-STILLMAN & BANGHART, *supra* note 78, at 16.

104. See Harbach, *supra* note 3, at 670-72 (discussing the lack of information disclosure in the childcare market in general).

## 1. Formal/Informal and Market/Family

The taxonomy so far does not include the default childcare option for most families—unpaid home-based care performed by parents, especially mothers.<sup>105</sup> Meredith Harbach has used the notion of “outsourcing childcare” to describe parents’ decision-making between family and market options.<sup>106</sup> The decision is affected by both economic factors such as the respective costs of market options and parental care and incentives from government subsidies, and non-economic factors such as social expectations.<sup>107</sup> The above taxonomy shows that non-parental childcare options are themselves on a spectrum between clear market relationships, such as centers, and those with hybrid characteristics of both the family and the market, such as FCC and FFN. FCC turns the home into a small business, while FFN merges the extended family and sometimes multiple families into an informal exchange network.

In reality, most families have to rely on more than one arrangement to make childcare work.<sup>108</sup> Workers providing care in one sector might simultaneously use another sector’s care for their own children. This speaks to the profound interdependency among the sectors and between market and family institutions in the childcare economy.

Further, parents’ decision between parental care and market care, or, in the most desperate circumstances, no care, is contingent on the modes of care available in the childcare economy. The following Subpart explains how this decision plays out differently for families of different incomes and other characteristics.

## 2. The Distribution of Formality/Informality

June Carbone and Naomi Cahn have observed that family formation and employment patterns are diverging across high-, middle-, and low-income groups.<sup>109</sup> Women in different income groups face different, even opposite,

105. Feminist legal scholars have written extensively on this form of care labor. See, e.g., FINEMAN, *supra* note 9 (arguing for reconstructing the legal family to reflect the mother-child caregiving bonds); ROBIN WEST, *CARING FOR JUSTICE* (1999) (discussing the ethics of care); JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* (2001) (discussing the conflict between paid jobs and unpaid care duties); Philomila Tsoukala, *Gary Becker, Legal Feminism, and the Costs of Moralizing Care*, 16 COLUM J GENDER & L 357 (2007) (discussing the economic value of familial care).

106. Meredith Johnson Harbach, *Outsourcing Childcare*, 24 YALE J.L. & FEMINISM 254, 271-78 (2012).

107. *Id.* at 278-82; See also Shannon Weeks McCormack, *Postpartum Taxation and the Squeezed Out Mom*, 105 GEO. L.J. 1323, 1325 (2016).

108. LYNDA LAUGHLIN, U.S. CENSUS BUREAU, U.S. DEP’T OF COM., WHO’S MINDING THE KIDS? CHILD CARE ARRANGEMENTS: SPRING 2011, at 2 (2013).

109. See generally JUNE CARBONE & NAOMI CAHN, *MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY* (2014).

work/family struggles.<sup>110</sup> This Subpart explains how income, employment, and family conditions shape families' engagement with the childcare economy. The following table summarizes the volume and mode of childcare in different income groups.<sup>111</sup>

<b>Income Group</b>	<b>Government Subsidy Programs<sup>112</sup></b>	<b>Employment Conditions</b>	<b>Family Conditions</b>	<b>Childcare Sector Usage</b>	<b>Childcare Affordability</b>
Top 2 Quintiles	Child Tax Credit; Child and Dependent Care Tax Credit (except for the top 2%).	Paid and unpaid parental leaves; childcare subsidies or on-site childcare from employers.	More likely to be dual-earner marital family.	61-66% using formal care (center-based care or regulated FCC).	Childcare costs 7-10% of the household income if paying.
3rd and 4th Quintile	Child Tax Credit; Some Child and Dependent Care Tax Credit. For families on the lower end: Earned Income Tax Credit; Some CCDF subsidies.	Fewer parental leaves and subsidies from employers than the top group but more than the bottom. Mothers are more likely to work part-time or stay at home.	Parents are less likely married than the top but more than the bottom.	38-46% using formal care.	3rd quintile: 14% of household income when paying  4th and 5th quintiles: 35% of household income when paying.
Bottom Quintile	Child Tax Credit; Earned Income Tax Credit; CCDF subsidies; and Temporary Assistance for Needy Families.	More likely to be unemployed. If employed, long and non-stable work schedule; parental leaves scarce to non-existent.	More likely to be a single working mother than other groups.	33 % using formal care.	

110. Roberts, *supra* note 5; Harbach, *supra* note 106, at 283; Michael Selmi & Naomi Cahn, *Women in the Workplace: Which Women, Which Agenda?*, 13 DUKE J. GENDER L. & POL'Y 7, 7-8 (2006); WILLIAMS & BOUSHEY, *supra* note 45, at 1-3.

111. HHS defines "affordable childcare" as costing families no more than 7 percent of their monthly pretax income for the purpose of childcare subsidy distribution. Empirically, all families with children under five spend an average of 10 percent. I use both benchmarks for affordability. For debates over the applicability of this standard, see Linda Smith, Manami Suenaga & Megan Campbell, *Demystifying Child Care Affordability*, BIPARTISAN POL'Y CTR (Aug. 31, 2020), <https://perma.cc/S3DS-CVBE>.

112. See discussion *infra* Part III.A.

Upper- to upper-middle-income families can afford full-time formal childcare and enjoy subsidies in the form of tax benefits.<sup>113</sup> Indeed, most of them (75 percent of the top quintile and 60 percent of the top two quintiles) are paying for childcare. Their childcare expenses are also increasing at an unprecedented rate, both in aggregate and per hour of care.<sup>114</sup> This indicates these parents' increasing willingness and capacity to pay for more and higher-quality care.<sup>115</sup> This group's employment and family status also make them more compatible with center care. Their jobs are often structured so that they can deal with fixed pick-up times, or they can afford a paid nanny to do so. Wealthier parents are more likely to have access to paid leaves and other employment-based benefits.<sup>116</sup> Children in this group are more likely to be born into a stable marriage, and both parents are more likely to stay married and employed during their childhoods.<sup>117</sup> Even if both parents work for long hours, the two may still absorb more care in aggregate than a single-parent.

On the bottom of the income distribution, children from poor families in principle are eligible for means-tested public childcare programs, yet operational barriers complicate their access.<sup>118</sup> Roughly only one out of six children who qualify under federal eligibilities receives childcare subsidies.<sup>119</sup> In addition, they may also attend federally funded Head Start programs.<sup>120</sup> When they do not secure public funding, this group can hardly afford paid childcare. Less than 40 percent of this group pay for childcare.<sup>121</sup> When they do, it accounts for 35 percent of their family income, on average.<sup>122</sup>

113. Using the seven-percent marker, families with incomes more than 600% of the Federal Poverty Level (FPL) (or roughly \$150,000 for a family of four) can afford it comfortably. Twenty-two percent of the families fall into this bucket. Using the ten-percent marker, thirty-nine percent of families find childcare affordable. See analysis in MALIK, *supra* note 2, at 4.

114. See MALIK, *supra* note 21, at 2.

115. Chris M. Herbst, *The Rising Cost of Child Care in the United States: A Reassessment of the Evidence*, 64 ECON. EDUC. REV. 13, 13-14 (2018); James A. Gordon, Chris M. Herbst & Erdal Tekin, *Who's Minding the Kids? Experimental Evidence on the Demand for Child Care Quality* 80 ECON. EDUC. REV. 102076, at 6 (2021) (finding that parents "value both the quality and convenience attributes of childcare, and they behave in a manner consistent with a willingness to pay for them").

116. CHANTEL BOYENS, MICHAEL KARPMAN & JACK SMALLIGAN, URB. INST., ACCESS TO PAID LEAVE IS LOWEST AMONG WORKERS WITH THE GREATEST NEEDS 8 (2022) (showing that 80.5% of workers with family income more than 400% of FPL have access to paid leaves while 31.5% of those with family income under 100% of FPL do).

117. WILLIAMS & BOUSHEY, *supra* note 45, at 50-51.

118. *Infra* Part IV.A.

119. See NINA CHIEN, U.S. DEP'T OF HEALTH & HUM. SERVS., FACTSHEET: ESTIMATES OF CHILD CARE ELIGIBILITY AND RECEIPT FOR FISCAL YEAR 2015, at 1 (2019), <https://perma.cc/ZY5D-FA3E>.

120. *Infra* Part II.A. At discretion, Head Start institutions may also serve children from families below the 130% of FPL, *see* 45 C.F.R. § 1302.12(d).

121. MALIK, *supra* note 21, at 3.

122. *Id.*

Families in this group are often on the margins of both the formal employment market and the formal marriage system, leaving fewer resources and more demand for non-parental care. Low-income parents are often faced with dead-end employment, job insecurity, and inadequate employment-related benefits. Most of their jobs do not share the workers' cost of childcare via either parental leaves or subsidies. Just 9 percent of the lowest quartile of earners receive paid family leave, less than half of the percentage for all workers.<sup>123</sup> Meanwhile, public assistance programs such as Temporary Assistance for Needy Families (TANF) require them to participate in paid employment.<sup>124</sup> Moreover, children in this group are more likely to live in single-parent or non-marital families.<sup>125</sup> The current marriage-based family law system provides little positive guidance for non-marital parenthood and often actively undermines their tenuous bonds.<sup>126</sup> Families with the least income face higher risks of homelessness, violence, incarceration, and other hardships, all of which challenge the stability of their work and family life.<sup>127</sup>

Low-income parents' employment and marital status have implications for their demand for childcare. First, single mothers are more likely to work and to work for longer hours than married mothers, causing demands for custodial childcare of longer and odder hours.<sup>128</sup> Second, low-income nonmarital families face prevalent policing from the CPS, enhancing the legal significance of seamless custodial care to avoid loss of parental rights.<sup>129</sup> Their bleak career prospects also push low-income women to attach more value to their motherhood and to their tenuous autonomy in childrearing.<sup>130</sup> All of these factors make the flexibility and stability of childcare much more crucial to the group.

123. Deborah A. Widiss, *Equalizing Parental Leave*, 105 MINN. L. REV. 2175, 2176 (2020); U.S. BUREAU OF LAB. STAT., U.S. DEP'T OF LAB., BULLETIN 2793, NATIONAL COMPENSATION SURVEY: EMPLOYEE BENEFITS IN THE UNITED STATES, MARCH 2020, at 120 tbl. 31 (2020), <https://perma.cc/5PW7-MRVV> (finding that 21% of all workers have access).

124. Zatz, *supra* note 6, at 47; Anne L. Alstott, *Work vs. Freedom: A Liberal Challenge to Employment Subsidies*, 108 YALE L.J. 967, 969 (1999).

125. Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167, 186-87 (2015).

126. *Id.* at 202-11. Especially for poor mothers, the state conditions public assistance on the mother's cooperation with the state's aggressive child support enforcement. This further restricts mothers' ability to solicit informal monetary and labor support for childcare from the fathers. Tonya L. Brito, *Fathers Behind Bars: Rethinking Child Support Policy Toward Low-Income Noncustodial Fathers and Their Families*, 15 J. GENDER RACE & JUST. 617, 657 (2012).

127. See, e.g., Jung Min Park, Teresa Ostler & Angela Fertig, *Physical and Psychological Aggression Toward a Child among Homeless, Doubled-up, and Other Low-income Families*, 41 J. SOC. SERV. RSCH. 413, 413 (2015) (finding that housing instability increases the likelihood of physical and psychological aggression towards a child among low-income parents).

128. See CARBONE & CAHN, *supra* note 109.

129. See Wendy A. Bach, *The Hyperregulatory State: Women, Race, Poverty, and Support*, 25 YALE J.L. & FEMINISM 317, 345-48 (2013).

130. See Roberts, *supra* note 5, at 1056.

The families in the middle struggle to get full-time formal care from the consumer market.<sup>131</sup> They are ineligible for or at most marginally benefit from childcare subsidies.<sup>132</sup> However, the private market providers serving children from this group are more likely to participate in the childcare subsidy system than those serving upper-income families.<sup>133</sup> Thus, subsidy policies indirectly impact the supply and quality of middle-income families' childcare. Slightly more than half of this group pay for childcare, and for those who do it accounts for between 10 and 15 percent of their income.<sup>134</sup>

Different income groups' divergent demands and resources lead them to use different sectors of childcare. More than 66 percent of families in the top income quintile enroll children in licensed childcare, while only 33 percent of those in the bottom quintile do.<sup>135</sup> A large portion of low-income children in formal centers receive subsidies or enroll in Head Start institutions. In other words, without public funding, low-income children are very unlikely to get formal care. On the informal end of the childcare economy, families across socioeconomic groups rely on FFN caregivers, while low-income families are most likely to use them and to rely on them exclusively.<sup>136</sup> Moreover, nanny care is often used by upper-income and some middle-income families.<sup>137</sup> Other than family income, the child's age also drives the difference. Infants and toddlers are most likely to rely on FFN care as their only source of non-parental care, while older children tend to have FFN care as one of multiple forms.<sup>138</sup>

FCC and FFN care are more accessible to marginalized families for non-monetary reasons, such as schedule incompatibility. Over 58 percent of low-income children with working parents have all principal caregivers working on schedules outside 8 am to 6 pm. These parents' working hours are often unstable from day to day and week to week.<sup>139</sup> However, fewer than 8 percent of formal centers operate at all during evenings, nighttime, or weekends.<sup>140</sup> In contrast, the more informal and smaller scale the provider, the more likely it will offer flexible

131. Fifty-one percent of families with incomes between 200% and 399% of the federal poverty line pay for their childcare and when they do, they spend 14% of monthly income on childcare. For families with incomes between 400% and 500% of the federal poverty line, the percentages are, respectively, 63 % and 10%. See MALIK, *supra* note 21, at 4.

132. See KAREN SCHULMAN & HELEN BLANK, NAT'L WOMEN'S L CTR., RED LIGHT GREEN LIGHT: STATE CHILD CARE ASSISTANCE POLICIES 2016, at 6 (2016), <https://perma.cc/N6YJ-NNKB>.

133. See discussion *infra* Part V.B finding that childcare providers serving high-income neighborhoods are less likely to participate in the childcare subsidy system.

134. See MALIK, *supra* note 21, at 4.

135. See *id.* at 6.

136. See SUSMAN-STILLMAN & BANGHART, *supra* note 18, at 4.

137. See WILLIAMS & BOUSHEY *supra* note 45, at 9.

138. See SUSMAN-STILLMAN & BANGHART, *supra* note 18, at 3.

139. See JULIA R. HENLY & GINA ADAMS, URB. INST., INSIGHTS ON ACCESS TO QUALITY CHILD CARE FOR FAMILIES WITH NONTRADITIONAL WORK SCHEDULES 2 (2018), <https://perma.cc/VTG4-ZCFC>.

140. See NSECE FACT SHEET, *supra* note 43, at 2.



hours.<sup>141</sup> Geographic and age coverages also drive some families away from centers. Inner-city and rural communities are under-served by centers.<sup>142</sup> As geographic proximity plays an especially crucial role in low-income parents' childcare choices, this shortage substantially constrains their access. The same gap in center supply exists for more costly care, such as infant and toddler care.<sup>143</sup> Nevertheless, low-income parents living from paycheck to paycheck face more urgent needs to resume full-time work shortly after childbirth.<sup>144</sup> A further challenge is linguistic and cultural competency. Home-based caregivers, often community-based, are more likely to speak the user families' languages, which is especially important for immigrant parents to stay engaged in their children's care.<sup>145</sup>

Normalcy versus crisis also changes the distribution between sectors. During the COVID pandemic, home-based care, especially from informal providers, has been more essential than ever before. Because of public health threat and increased flexibility in work, center care has experienced the largest reduction in use. Home-based providers, in contrast, have seen less drastic reductions. Other than the dramatic rise of sole parental care, more families, including middle-class families, have moved from centers to smaller informal arrangements.<sup>146</sup>

On the provider side, women from the middle- and low-income groups are much more likely to work as paid childcare providers than women from higher-income households.<sup>147</sup> More than half (53 percent) of childcare workers enroll in one or more federal public support programs, more than double the rate for all workers.<sup>148</sup> Among childcare workers, the divide between center-based and home-based care is also class-based. Home-based caregivers are less likely to have a high school education or a bachelor's degree.<sup>149</sup> Fifty-nine percent of them

141. See Jing Tang, Susan Lewis, Laura Cutler, Rena Hallam & Zachary K. Collier, *Characteristics of Home-Based Child Care Providers Who Offer Non-Standard Hour Care*, 55 EARLY CHILDHOOD RSCH. Q. 284, 285 (2021).

142. See RASHEED MALIK, KATIE HAMM, MARYAM ADAMU & TARYN MORRISSEY, CTR. FOR AM. PROGRESS, *CHILD CARE DESERTS: AN ANALYSIS OF CHILD CARE CENTERS BY ZIP CODE IN 8 STATES* 3 (2016), <https://perma.cc/2W5A-WTMF>.

143. See *id.* at 14.

144. See Harbach, *supra* note 106, at 295.

145. See MAKI PARK & MARGIE MCHUGH, *MIGRATION POL'Y INST., IMMIGRANT PARENTS AND EARLY CHILDHOOD PROGRAMS: ADDRESSING BARRIERS OF LITERACY, CULTURE, AND SYSTEMS KNOWLEDGE* 2 (2014), <https://perma.cc/7GZ4-Q3CM>.

146. See Gina Adams, *Finding Solutions to Support Child Care during COVID-19*, URB. INST., URB. WIRE (Sept. 22, 2020), <https://perma.cc/RS33-A4DU>.

147. A 2014 survey shows that 36.7% of all childcare workers live in households below 200% of the FPL, compared to 21.1% of all other workers. See Elise Gould, *Child Care Workers Aren't Paid Enough to Make Ends Meet*, ECON. POL'Y INST. (Nov. 15, 2015), <https://perma.cc/5K3R-2XNJ>.

148. The public support programs include the Federal Earned Income Tax Credit, Medicaid and the Children's Health Insurance Program, Supplemental Nutrition Assistance Program, and Temporary Assistance for Needy Families. See WHITEBOOK ET AL., *supra* note 36, at 6.

149. Thirty-four percent of caregivers at listed home-based providers and forty-seven

live in households with incomes lower than the national median.<sup>150</sup>

This outline shows that different sectors, as constituted by the different yet interdependent regulatory regimes, produce different modes of childcare. All of them, interdependently, weave this web of the childcare economy.

## II. GOVERNMENT PROGRAMS SUBSIDIZING CHILDCARE

This Part outlines how government subsidies may reach different actors within the paradigm of the childcare economy surveyed above. Diverse policy goals, including anti-poverty, early childhood education, employment enablement, and childrearing support, call for different institutional designs of the subsidy program. The first Subpart examines how different policy goals lead to different subsidy programs and the second Subpart examines how the tension among these policy goals plays out in the design of one program, the Child Care and Development Fund (CCDF).

### A. Multiple Policy Goals in Subsidizing Childcare

Legal historians remark that childcare in legislative politics has been fragmented into multiple issues since the failed 1971 Comprehensive Child Development Bill.<sup>151</sup> Four common policy goals compete for the rationale for subsidizing childcare. First, the anti-poverty goal emphasizes the necessity to combat child poverty and counteract the structural inequality that low-income children face. The quality early education approach stresses the societal benefits if all children receive more developmentally beneficial care. The work support framing argues that working parents, especially working mothers, face challenges balancing childcare and employment duties, so state subsidies should aim to increase overall workforce productivity and improve gender equality at work. The final policy goal argues that childrearing is a socially beneficial activity and thus deserves support from the state, especially when the fertility rate is below the social ideal. Not everybody agrees on any of these goals, yet they are the common basis for subsidizing the childcare economy. They accordingly tilt the structure of government subsidies between payments to certain types of providers, or to cash transfers or tax benefits to parents.

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percent at unlisted ones have no more than a high school education, while less than twenty percent of them have a bachelor's degree. In contrast, only nineteen percent of center-based caregivers have no more than a high school education and thirty-five percent of them have a bachelor's degree. DATTA, *supra* note 19, at 16, 26.

150. LEA J.E. AUSTIN, BETHANY EDWARDS, RAÚL CHÁVEZ & MARCY WHITEBOOK, CTR. FOR THE STUDY OF CHILD CARE EMP., RACIAL WAGE GAPS IN EARLY EDUCATION EMPLOYMENT 3 (2019), <https://perma.cc/P3NF-4MA6>.

151. See PALLEY & SHDAIMAH, *supra* note 44; SONYA MICHEL, CHILDREN'S INTERESTS/MOTHERS' RIGHTS: THE SHAPING OF AMERICA'S CHILD CARE POLICY 13-18 (1999); Deborah Dinner, *The Universal Childcare Debate: Rights Mobilization, Social Policy, and the Dynamics of Feminist Activism, 1966-1974*, 28 L. HIST. REV. 577 (2010).

The four policy goals also interact differently along class, race, and age lines, producing fragmented subsidy programs. As a general trend, low-income families with children are eligible for more public assistance programs than families with higher incomes. Nevertheless, means-tested subsidies entail stricter requirements for recipients' employment and family life and carry a social stigma.<sup>152</sup> In contrast, subsidies targeting middle-income families or the general population, though with smaller amounts per child, have many fewer regulatory attachments to the parents. Some scholars attribute this paradox to the racial and class dimension of family privacy ideology.<sup>153</sup> Deference to family privacy is stronger for middle-income families, restraining the state from playing a more active role in their childcare arrangements. Paradoxically, the suspension of family privacy for poor families opens them to more government support and more state intervention.<sup>154</sup>

The table below summarizes the major subsidy programs along the axes of payment structure and income eligibility, with an annotation on the eligible age range.<sup>155</sup> The paragraphs below unpack the correlated policy goals.

	Payment to Providers	Voucher to Parents	Payment to Parents
Universal	(State) Pre-Kindergarten (age 3 and/or 4)		(Federal) Child Tax Credit (CTC) (under age 17)
For Middle- and High-Income			(Federal) Child and Dependent Care Tax Credit (CDCTC) (under age 13)
For Low-Income	(Federal) Head Start (age 3 and 4) Early Head Start (age 0-3) (Federal and State) CCDF subsidy programs (under age 13)	(Federal and State) CCDF subsidy programs (under age 13)	(Federal) Earned Income Tax Credit (EITC) (Federal and State) Temporary Assistance for Needy Families (under age 18)

152. Bach, *supra* note 129, at 331-34.

153. *See, e.g., id.* at 335; KHIARA M. BRIDGES, THE POVERTY OF PRIVACY RIGHTS 7-12 (2017).

154. Bach, *supra* note 129, at 331-334.

155. Some states and localities have other sporadic subsidies. One example is state income subsidies to childcare providers. *See* CAITLIN MCLEAN, MARCY WHITEBOOK & EUNICE ROH, CTR. FOR THE STUDY OF CHILD CARE EMP., FROM UNLIVABLE WAGES TO JUST PAY FOR EARLY EDUCATORS 33 (2019), <https://perma.cc/E234-RDAR>.

Both Head Start and the emerging state Pre-K programs share the goal of promoting children's early education.<sup>156</sup> Head Start, targeting low-income children, further advances educational benefits as a proactive anti-poverty instrument. Through providing educational services that their parents cannot afford in the market or offer at home, Head Start programs level the playing field for low-income children at school and aim to prevent them from living on welfare in the future.<sup>157</sup>

Subsidies in pursuit of quality early education serve a specific set of providers. Head Start imposes education-oriented requirements on the enrolled providers' programming design and mandates minimum educational attainments for workers in different roles.<sup>158</sup> It also mainly serves centers and rewards workers with higher education with higher payments.<sup>159</sup> Although subsidized providers may extend other services, their primary goal is the child's school-readiness.<sup>160</sup> Thus, these subsidized educational programs often provide care to a specific age group with shorter daily hours, fewer weekly days, and no services outside of school semesters.<sup>161</sup> These cutoffs are justified by child development research.<sup>162</sup>

In contrast to the educational programs, subsidies serving other policy goals tend to pay the parents, though the payment structure depends on the target population. Almost all of these programs took their current shape in the late 1990s.

The Child Tax Credit (CTC) and Child and Dependent Care Tax Credit (CDCTC) acknowledge the social benefits of childrearing and partially share its costs.<sup>163</sup> The CTC, which started in 1997 as a middle-income family program, reduces the tax obligations of families with children.<sup>164</sup> Recent revisions have

156. See generally ELIZABETH ROSE, *THE PROMISE OF PRESCHOOL: FROM HEAD START TO UNIVERSAL PRE-KINDERGARTEN* (2010).

157. *Id.* at 17-19.

158. 45 C.F.R. § 1302.91.

159. DATTA, *supra* note 19, at 13 (finding that workers at Head Start providers have higher degree premiums). A vast majority of the Head Start grants go to centers, while less than three percent go to qualified home-based providers. U.S. DEP'T OF HEALTH & HUM. SERVS., *HEAD START PROGRAM FACTS: FISCAL YEAR 2019* (2020), <https://perma.cc/K5F4-CCTN>.

160. See 42 U.S.C. § 9831 ("It is the purpose of this subchapter to promote the school readiness of low-income children by enhancing their cognitive, social, and emotional development"); MICHAEL PUMA, STEPHEN BELL, RONNA COOK & CAMILLA HEID, U.S. DEP'T OF HEALTH & HUM. SERVS., *HEAD START IMPACT STUDY: FINAL REPORT* (2010), <https://perma.cc/S7CQ-PN8N>.

161. See PUMA ET AL., *supra* note 160, at xxi; PHILLIPS ET AL., *supra* note 41, at 78; for an example of local Pre-K programs, see Gray-Lobe et al., *supra* note 42.

162. See PHILLIPS ET AL., *supra* note 41, at 46; Loeb et al., *supra* note 44, at 52.

163. See Shannon Weeks McCormack, *Overtaxing the Working Family: Uncle Sam and the Childcare Squeeze*, 114 MICH. L. REV. 559, 567-71 (2016).

164. See Taxpayer Relief Act of 1997, Pub. L. No. 105-34, 111 Stat. 788 (codified at 26 U.S.C. § 24).

extended its eligibility to low-income families by making part and then all of it refundable.<sup>165</sup> It also gives parents maximum autonomy in how to use the benefit. The CDCTC allows families to deduct dependent care expenses from the tax they owe, subsidizing families' use of paid childcare.<sup>166</sup> It has the additional goal of employment promotion. Targeting middle-income dual-earner families, the CDCTC aims to counterbalance the favorable tax treatment given to breadwinner-homemaker families that rely on unpaid parental care.<sup>167</sup> Besides using paid care, it sets almost no conditions on the provider.<sup>168</sup> As a result, it might reach the relatively informal sectors such as nanny care.

In contrast, means-tested programs, including Temporary Assistance for Needy Families (TANF), Earned Income Tax Credit (EITC), and CCDF, advance both anti-poverty and work support goals. Working together, they rigorously promote parents' paid employment and the use of nonparental childcare. TANF pays cash assistance to eligible low-income parents with the requirement that they have to participate in work or work-related activities.<sup>169</sup> EITC pays refundable tax benefits to low-income working parents in proportion to their employment income.<sup>170</sup> Although these programs acknowledge that destitute parents need the state's monetary assistance to keep the children fed, housed, and cared for, they are by no means designed to encourage or reward childrearing. Instead, their limited benefits and rigid regulations, especially in TANF, expressly aim to curb raising children, especially nonmarital children, on welfare.<sup>171</sup>

The current structure of the CCDF also took shape under the same Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) that created TANF.<sup>172</sup> The PRWORA consolidated multiple previous childcare

165. See ELAINE MAAG, *URB. INST., WHO BENEFITS FROM THE CHILD TAX CREDIT NOW?* (2018); Christopher Pulliam & Richard V. Reeves, *New Child Tax Credit Could Slash Poverty Now and Boost Social Mobility Later*, BROOKINGS INST. (Mar. 11, 2021), <https://perma.cc/2A3U-F3UD>.

166. See 26 U.S.C. § 21(b)(2)(A)(ii) (allowing for deductions for "expenses for the care of a qualifying individual").

167. See McCormack, *supra* note 163, at 585.

168. As the tax form requires the provider's taxpayer identification number, it functionally scrutinizes the paid provider's immigration status. See 26 U.S.C. § 21(e)(9) (providing rules on identifying information required with respect to service provider).

169. See 45 C.F.R. § 261.10(a)(1) ("[a] parent or caretaker receiving assistance must engage in work activities when the State has determined that the individual is ready to engage in work").

170. See 26 U.S.C. § 32(a)(1) (allowing a "credit against the tax imposed by this subtitle for the taxable year [of] an amount equal to the credit percentage of so much of the taxpayer's earned income for the taxable year as does not exceed the earned income amount.").

171. See 42 U.S.C. § 601.

172. Originally established in the CCDBG Act of 1990 (a component of the Omnibus Budget Reconciliation Act). The CCDBG was designed to support childcare for low-income families who were not connected to the Aid to Families with Dependent Children (AFDC) welfare system at the time. The 1996 PRWORA has consolidated it with other three AFDC-related childcare programs and repurposed the new program to prioritize TANF-related

subsidy programs into one CCDF block grant subsidizing the nonparental childcare of low-income families, especially families on, leaving, or at risk of receiving TANF.<sup>173</sup> The CCDF's plural institutional legacies contribute to its plural policy goals. In addition to sharing the TANF's agenda to alleviate poverty via supporting low-income parents' employment, the CCDF has inherited the previous programs' task to improve quality and supply in the general childcare market.<sup>174</sup>

The tensions between childcare's educational, work-enabling, and family-support benefits, between parental autonomy and state scrutiny, and between serving a particular population or all families, lead to different subsidy structures. The following Subpart explains how these tensions play out in the institutional design of CCDF subsidies.

## B. CCDF Subsidies' Policy Goals in Two Markets

The CCDF serves almost all childcare-related policy goals, and is expected to help working-poor parents, their children, and their families as a whole, as well as the overall childcare industry and all families they serve.<sup>175</sup> It seeks to reach all of these goals by strengthening two markets: the low-income employment market and the childcare service market. This Subpart first outlines the general structure of the CCDF subsidy program and then unpacks the program's policy choices in relation to its roles in the two different markets. As we will see in Parts IV and V, a re-balancing between CCDF subsidies' roles in the two markets led to the federal policy changes in 2014, which have induced profound redistribution across the childcare economy.<sup>176</sup>

The CCDF is jointly funded by federal and state governments. Each state qualifies to receive an amount of federal funds each year and can receive additional federal funds by spending state dollars.<sup>177</sup> Operating as a block grant, the CCDF gives significant discretion to the states in implementing the policies within certain mandatory federal parameters.<sup>178</sup> At the federal level, the Department of Health and Human Services (HHS) promulgates regulations and guidelines for state programs. Each state sets up a lead agency to manage the funds, to make state-wide subsidy policies, and to coordinate with other subsidy

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families. Omnibus Budget Reconciliation Act, 42 U.S.C. § 9858 (1990); Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 42 U.S.C.).

173. PRWORA § 603.

174. *Id.* § 607.

175. Child Care and Development Block Grant Act of 2014, Pub. L. No. 113-186, § 98.1, 128 Stat. 1971 (codified as amended in scattered sections of 42 U.S.C.).

176. *Id.* § 98.1.

177. Mandatory and matching funds were enacted by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) and are appropriated under Section 418 of the Social Security Act. 42 U.S.C. § 618 (1998); 45 C.F.R. § 98.60(d) (1998).

178. 45 C.F.R. § 98.1 (1998).

programs, such as Head Start.<sup>179</sup>

The state may designate a small percentage of its CCDF funds as a “quality set-aside” to improve the quality of care in the entire childcare economy. The remaining funds go to direct service assistance to low-income working families.<sup>180</sup> Federal regulations set limits on eligibility, which states can further restrict.<sup>181</sup> Under federal law, an eligible family must satisfy the following three conditions: have a child under thirteen years of age; have a family income not exceeding 85 percent of the State Median Income (SMI); and have parent(s) residing with the child and either working or attending work-related programs.<sup>182</sup> The state funds childcare services to eligible families via a mixture of grants and vouchers. It also establishes payment rates and a sliding fee scale to determine the family’s co-payment. Providers receiving CCDF funds via either a grant or vouchers must comply with the program’s regulatory and administrative requirements in addition to the regulation of private providers.<sup>183</sup>

In a typical scenario, an eligible family, whether referred by another social service department or entering the system on their own, needs to submit documentation to a childcare social worker in the local agency to establish its eligibility. The agency may put eligible families on a waiting list if it runs out of funding. Eligible parents, once funded, then choose an available childcare provider from those who participate in the subsidy program. In most circumstances, the agency directly transfers to the provider a portion of the family’s service costs on a state-designated schedule, and the family pays for the rest.<sup>184</sup> Eligibility is valid for twelve months, provided that the family’s conditions do not significantly change.<sup>185</sup>

I now turn to the CCDF subsidy’s roles with respect to the two markets. Maxine Eichner criticizes the means-targeted market-reliant design of the CCDF subsidy, calling it part of the “free-market family policy.”<sup>186</sup> Welfare law scholars also argue that welfare programs prioritize enhancing recipients’ participation in the labor market over actually improving their economic

179. *Id.* § 98.10.

180. *Id.* § 98.50.

181. *Id.* § 98.20.

182. Each condition has exceptions. An eligible child may be as old as nineteen if they are physically or mentally incapable of caring for themselves, or under court supervision. Families receiving or needing protective services can waive the income and work requirements. *Id.* § 98.20(a)(1)(ii).

183. *Id.* § 98.42.

184. States vary in payment structures. Forty-six states/territories directly pay the providers. Four states pay the parents, who are responsible for paying the providers, and other states have different payment structures depending on the provider type. KELLY DWYER, SARAH MINTON, DANIELLE KWON & KENNEDY WEISNER, U.S. DEP’T OF HEALTH & HUM. SERVS., OPRE REPORT 2021-17, KEY CROSS-STATE VARIATION IN CCDF POLICIES AS OF OCTOBER 1, 2019: THE CCDF POLICIES DATABASE BOOK OF TABLES 238 (2020).

185. The parents must report any changes impacting the family’s eligibility to the childcare social worker. 45 C.F.R. § 98.21 (1998).

186. EICHNER, *supra* note 2, at 135-38.



conditions.<sup>187</sup> Although they correctly identify markets, vis-à-vis fully state-owned childcare programs, as crucial to the subsidy programs, they do not sufficiently discuss the range of institutional choices and the resulting distributional consequences under the same market-oriented framework. Furthermore, they have understated the state's regulatory roles and norms driving subsidy legislation.

Indeed, the CCDF justifies government subsidies as facilitating families' participation in two markets, the low-income labor market and the childcare service market. The primary rationale for publicly subsidizing childcare for *working-poor* parents comes from the primacy of labor market participation as the family's legitimate way out of poverty. The subsidies help take children off poor mothers' hands so that they can work or look for jobs.<sup>188</sup> In return, parents can better provide for their children and themselves with market incomes. Secondarily, the CCDF funds states' efforts to strengthen the childcare market via regulation, information platforms, and other market infrastructure. The state aims to transform childcare from an often family-like, relational, private process that is neither visible nor accountable to outsiders, including the state, into a more standardized one that the public, including the state and market forces, can see, access, regulate, and evaluate. Consumer parents need information disclosure in order to entrust a market provider with their child and the state needs regulation and inspection to trust the industry. The parents and the state also need some quantifiable measurement to compare across multiple market providers. Thus, facilitating the marketization of childcare is fundamental to improving the quality of care for *all* families, including low-income ones.<sup>189</sup> Working together, the CCDF advances the ideology that the market is the primary and superior institution where families will meet their needs, for which the state's welfare program is a facilitator rather than a substitute.

Even though the CCDF's relations to the two different markets are ideologically compatible with each other, in practice, they often create tensions, tilting the program's designs in different directions. Indeed, the 2014 reform, which Part V further unpacks, has laid more emphasis on the CCDF's role with regard to the childcare market, sometimes at the cost of its role supporting parents' paid work and families' incomes. In other words, immense institutional indeterminacies exist under the same market-oriented framework, creating both cross-state and cross-era differences. Specifically, prioritizing the CCDF's role in either market leads to differences in family eligibilities, distribution mechanisms, and practical operation of the direct subsidies.

First, supporting the low-income employment market and facilitating the childcare service market tilt the subsidy program to set families' eligibility

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187. Roberts, *supra* note 5, at 1048-49; Zatz, *supra* note 6, at 48-50.

188. 45 C.F.R. § 98.1(a)(4), (b)(7) (1998). Like the PRWORA itself, the CCDF program disproportionately targeted unwed parents of color with a racialized stereotype of "welfare queens." See generally Roberts, *supra* note 5.

189. 45 C.F.R. § 98.1(a)(5) (1998).

according to their performance in two different markets. The employment-enabling side tends to impose stringent workforce participation requirements on the parents and closely links the childcare subsidy coverage to the parents' paid work.<sup>190</sup> It prioritizes the parents who are on the margin between paid work and dropping out of the workforce due to childcare reasons. In contrast, the childcare-quality side tends to set the criteria on low-income parents' consumption in the childcare economy, only subsidizing their childcare usage that falls into the market process. It prioritizes the parents who are on the margin between sending the child to a formal provider and an informal one.

Second, the CCDF program's relations to the two markets tilt the state programs' choices between the two common subsidy distribution mechanisms, vouchers versus grants, and accordingly, the types of providers that the subsidy may reach.

Only a minority of states adopt the grant/contractor approach as a subsidiary mechanism to disseminate subsidies. In 2018, only 7 percent of the childcare subsidies nationwide were distributed through grants.<sup>191</sup> A state may contract with providers to make available a certain number of care slots to eligible children. The contractor system reaches only centers and the few home-based providers who are attached to a larger network.<sup>192</sup> Instead of paying for specific children, the state commits to funding the contractor for a set period even if not enough eligible children fill the contracted slots. This approach can create a supply of care in a site where markets have not existed or are not sustainable.<sup>193</sup> Thus, states commonly use it to fix particular failures in the childcare service market, such as infant care, or care in inner-cities.<sup>194</sup> However, it is less responsive to the needs of individual low-income parents than vouchers. They may not benefit from the subsidy at all when contracted providers are not available in their neighborhood or when they need to use informal care.<sup>195</sup>

Meanwhile, almost every state has vouchers as part of its childcare subsidy system.<sup>196</sup> A voucher system enables care providers of all types to receive public funding to offset all or part of the costs of caring for an eligible child. Most states directly pay the providers while a few states transfer the subsidy money to the parents on receiving an invoice for childcare expenditures.<sup>197</sup> The state calculates

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190. Colleen K. Vesely & Elaine A. Anderson, *Child Care and Development Fund: A Policy Analysis*, 36 J. SOCIOLOGICAL & SOCIAL WELFARE 39, 40 (2009).

191. OFF. OF CHILD CARE, U.S. DEP'T OF HEALTH & HUM. SERVS., FY 2018 Final Data Table 2—Percent of Children Served by Payment Method (May 18, 2021), <https://perma.cc/3FS6-AAHB>.

192. OFF. OF CHILD CARE, U.S. DEP'T OF HEALTH & HUM. SERVS., CONTRACTING FOR CHILD CARE SERVICES FOR FAMILIES ELIGIBLE FOR SUBSIDY (2015), <https://perma.cc/X2F6-GUX5>.

193. *Id.* at 10.

194. *Id.* at 6.

195. *Id.* at 3.

196. DWYER ET AL., *supra* note 184, at 238.

197. *Id.*

a standard voucher rate based on the type and length of service, and it is up to the providers to decide whether to accept vouchers at all and whether to require a co-payment. The common basis for voucher rates is the market price, defined as the lowest rate a similar provider charges a privately funded client.<sup>198</sup> Attached to a specific eligible child, the voucher system gives more discretion to parents to arrange childcare according to their work and parenting needs, conditioned on the state agency's preferences and providers' participation in the subsidy programs. From the state's perspective, the voucher system, in comparison to grants, delivers the funds more accurately to eligible working families and maintains more budgetary flexibility to react to workforce changes over time.<sup>199</sup>

Third, within the predominant voucher system, enabling employment market participation and facilitating the childcare market favor different types of providers. Among all providers, informal FFN care, when available, is the most likely to fit working parents' need for flexible hours. Since FFN caregiving does not necessarily constitute a formal market relationship, the subsidy is calculated at a substantially lower rate and the providers often forgo co-payments.<sup>200</sup> With informal providers absorbing part of the costs, the state can maximize both the number of subsidized families and low-income workforce stabilization.<sup>201</sup> However, subsidizing FFN providers contributes the least to the marketization of childcare. Assistance to informal providers carries fewer regulatory measures to standardize the care process or integrate it into a more standardized market. Even if the subsidy improves the quality of care to a subsidized child, the services are not reliably available to the public through a public platform or an open market. In contrast, funding low-income children to attend formal care centers of larger scale ensures more state oversight of the subsidized child's early education. More importantly, it creates financial incentives to the market providers to abide by quality regulations and to integrate into other state-promoted standardization procedures, such as accreditation and listing. Thus, the specific subsidies deliver some universal goods of market infrastructure to the childcare industry and other families it might serve.

As noted above, different policy goals compete for institutional designs under the same market-oriented framework. Moreover, analyzing the CCDF subsidy's relations to the two markets reveals its highly regulatory nature. With regard to the overall childcare service economy, the CCDF aims to enable a childcare market to emerge and function optimally as a market through regulatory tools. When it comes to low-income families' childcare, the CCDF

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198. An alternative is to use provider costs as the calculation basis. SUZANNE MURRIN, U.S. DEP'T OF HEALTH & HUM. SERVS., STATES' PAYMENT RATES UNDER THE CHILD CARE AND DEVELOPMENT FUND PROGRAM COULD LIMIT ACCESS TO CHILD CARE PROVIDERS 4 (2019).

199. OFF. OF CHILD CARE, *supra* note 192, at 9.

200. SNYDER ET AL., *supra* note 84, at 28-29.

201. Lucie White, *Quality Child Care for Low-Income Families: Despair, Impasse, Improvisation*, in HARD LABOR: WOMEN AND WORK IN THE POST-WELFARE ERA 116, 124 (Joel F. Handler & Jay D. White eds., 2019).

programs are expressly paternalistic, governing childcare arrangements and sometimes putting the state in the position of directly purchasing care. But even this clear public role is intended to provide infrastructure for the low-income employment market. And programs peg subsidies to market prices for care, often bidding on the lower end to avoid crowding out private consumers or inflating prices. Thus, the programs are pervasively market-oriented *and* regulatory.

The plural policy goals and the plural institutional options make the CCDF the most complicated and contested program among all subsidies, with a broader reach across the childcare economy than other programs. Under the same framework, the CCDF programs could boost informal home-based care in low-income communities in the early 2000s while functioning to eliminate the same sector since 2014. The following two Parts investigate the political process that has given rise to this swing and its distributional consequences.

### III. DIVERGENCE AND CONVERGENCE IN CHILDCARE POLITICS

This Part maps childcare advocates' divergent approaches to leveraging the CCDF subsidies to reform the childcare economy and the strategic convergence among them. The next Part will investigate the resulting CCDF reform.

#### A. Three Advocate Approaches to Childcare Subsidies

Three groups, Early Childhood Education (ECE) experts, the National Women's Law Center (a major national feminist organization) and their local allies, and poverty policy thinktanks, continually advocate in the field of CCDF subsidies. All three groups align behind the belief that supporting low-income families' access to quality childcare is a public good worthy of government investment. They also share the ideal-world vision of universal childcare for all families.<sup>202</sup> Yet different policy priorities and divergent understandings of childcare lead them to different ways of balancing among supporting parents' workforce participation, better education for children, family poverty reduction, and other additional benefits such as neighborhood empowerment in their proposals.

The absence of some interest groups is worth noticing. Due to the fragmentation of childcare politics explained in Part III.A, some expected interest groups, such as other mainstream feminist and labor groups or business groups and cultural conservatives, have been largely absent from the field of means-tested childcare subsidies.<sup>203</sup> Most feminist groups have shied away in

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202. PALLEY & SHDAIMAH, *supra* note 44, at 161-63.

203. Mainstream feminist groups such as NOW have instead focused exclusively on care-related tax benefits and workplace policies, such as parental leave and anti-discrimination. In fact, family leave laws, which disproportionately impact middle-class jobs, have drawn the most attention from both mainstream feminist and labor groups, and business and cultural conservatives. *See generally id.*; Dinner, *supra* note 151.

avoidance of normalizing maternal care while conservatives have conceded that some public assistance for low-income families is necessary for work promotion.<sup>204</sup>

### 1. Early Childhood Education (ECE) Experts

ECE experts/advocates are the most active force among the three. They almost exclusively focus on the *quality* of childcare as the stakes for public investment. They assess quality through science-based expertise and promote quality by professionalizing the workforce. Childcare's single-dimensional product is the child's developmental results, which future school performance and other measurable indexes will reflect. They see the CCDF as not merely a support program to the recipient families but primarily as a vehicle of state-sanctioned information platforms and financial incentives to induce the entire childcare industry to enhance quality. The educational focus also leads them to take a more interventionist stance in low-income parents' care arrangements than the other two groups.

ECE advocates' focus on child development has wide support from academic and think-tank experts in education, neuroscience, and economics.<sup>205</sup> As a political agenda, it also has earned strategic success in shaping programs such as Head Start.<sup>206</sup> As CCDF took shape in 1998 under the anti-poverty and work/family policy framework, ECE advocates started as a rather peripheral group in the field. Yet, they were highly attentive to CCDF subsidies' impacts on the form, quality metrics, stability, and development results of subsidized care.<sup>207</sup> Since the early 2000s, the ECE advocates have actively promoted reengineering the program to directly address quality issues, critical of the welfare-reform approach that subordinates the child's development to the parents' employment.<sup>208</sup> Even if the education framework may sacrifice the tangible benefits of informal care in solving low-income parents' family/work dilemmas, ECE advocates argue that this downside is offset in the long run because better preparing poor children for school ultimately improves their life

204. PALLEY & SHDAIMAH, *supra* note 44, at 76-80, 89-93.

205. *See, e.g., ECE Consensus Letter, supra* note 44; PHILLIPS ET AL., *supra* note 42.

206. PALLEY & SHDAIMAH, *supra* note 44, at 84-88.

207. *See, e.g., Fuller et al., supra* note 101; Elizabeth Rigby, Rebecca M. Ryan & Jeanne Brooks-Gunn, *Child Care Quality in Different State Policy Contexts*, 26 J. POL'Y ANALYSIS. & MGMT. 887 (2007); Rebecca M. Ryan, Anna Johnson, Elizabeth Rigby & Jeanne Brooks-Gunn, *The Impact of Child Care Subsidy Use on Child Care Quality*, 26 EARLY CHILD. RSCH. Q. 320 (2011); Caroline Krafft, Elizabeth E. Davis & Kathryn Tout, *Child Care Subsidies and the Stability and Quality of Child Care Arrangements*, 39 EARLY CHILD. RSCH. Q. 14 (2017).

208. Gina Adams & Monica Rohacek, *More than a Work Support?: Issues Around Integrating Child Development Goals into the Child Care Subsidy System*, 17 EARLY CHILD. RSCH. Q. 418, 418 (2002). Also, as there exists no federal regulation over the childcare industry and little political will to implement any, the CCDF constitutes the best vehicle to standardize the states' regulation. *See Harbach, supra* note 3, at 701.

outcomes and the families' long-term economic prospects.<sup>209</sup>

Under ECE experts' understanding of childcare, two steps are key to transforming the childcare industry: quantifying the early educational process and qualifying the early educators. The first step is to establish a standardized measurement to score the care process. The experts have helped develop the Quality Rating and Improvement System (QRIS) as a part of the subsidy distribution mechanism.<sup>210</sup> QRIS is a rating system to assess, improve, and communicate the level of quality of early childhood programs. A typical QRIS gives significant weight to structural factors such as staff-child ratios and staff qualifications. It also has an observational part that rigidly evaluates staff-child interaction according to a checklist of dos and do-nots.<sup>211</sup> A contextually supportive interaction might fail the evaluation if it does not follow the ritualistic protocol. Beyond informing state subsidy rates, the quantitative information enables parents and providers on the private market to make purchasing and investing decisions based on published quality rankings rather than more obvious practical factors, such as hours and locations. Thus, it benefits all families using childcare beyond the subsidy recipients.

Secondly, ECE advocates promote state-supported professionalization to enhance the quality of childcare and to raise childcare workers' economic and social status in both private and public-funded sectors.<sup>212</sup> They contend that many early childhood workers are underpaid even when they have college degrees because society associates them with women's unpaid caregiving work at home.<sup>213</sup> Instead, early childhood work should constitute an extension or an integral part of the education system rather than paid assistance to parenting. While bodily care might be a skill that women learn from family life, high-quality developmental care requires knowledge-based expertise that caregivers can acquire only through formal training and education.<sup>214</sup>

ECE groups advocate for state licensure to mandate minimum training-based qualifications for all childcare workers and degree requirements for lead teachers at centers.<sup>215</sup> Instead of "childcare" and "caregivers," they prefer the terms "early education" and "teachers/educators."<sup>216</sup> They see these education requirements as the key to distinguishing high-skill care workers. By setting the expertise

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209. Adams & Rohacek, *supra* note 208, at 419.

210. Simon Workman, *QRIS 101: Fact Sheet*, CTR FOR AM. PROGRESS (May 11, 2017), <https://perma.cc/6VC7-2CR8>.

211. See, e.g., NAT'L CTR ON EARLY CHILDHOOD QUALITY ASSURANCE, QRIS COMPENDIUM 2016 FACT SHEETS, CURRICULUM AND CHILD ASSESSMENT INDICATORS 6 (2017).

212. AM. ACAD. OF PEDIATRICS, AM. PUB. HEALTH. ASS'N, NAT'L RES. CTR. FOR HEALTH & SAFETY IN CHILD CARE & EARLY EDUC., CARING FOR OUR CHILDREN: NATIONAL HEALTH AND SAFETY PERFORMANCE STANDARDS: GUIDELINES FOR OUT-OF-HOME CHILD CARE, 21-34 (2019); McLEAN ET AL., *supra* note 155, at 9.

213. McLEAN ET AL., *supra* note 155, at 5.

214. WHITEBOOK ET AL., *supra* note 36, at 12.

215. *Id.* at 67-70.

216. See, e.g., McLEAN ET AL., *supra* note 155.

threshold, they aim to tilt childcare from a remarkably elastic labor market into licensed middle-class work. Under this approach, even workers who have been practicing paid childcare for years will need to acquire entry-level knowledge and establish competency by earning an academic degree.<sup>217</sup>

In this care-to-education transformation, the ECE group has a strong preference for center-based formal care over home-based care and they especially discourage small-scale, informal FFN care that would struggle to participate in quality regulation. The QRIS is developed primarily on the model of centers and rarely reflects the common strengths of home-based care, such as shared cultural understandings and stable relations. Nor does it consider parents' satisfaction.<sup>218</sup> In practice, home-based providers find that the evaluation process is costly and that it rewards their efforts to participate with low ratings.<sup>219</sup> Circularly, most ECE research often uses the site of childcare and (non-)existence of regulation or accreditation as markers for quality, despite internal critiques. For example, if a group of children moves from FFN care to licensed centers participating in QRIS, common ECE research will mark this as quality enhancement without looking into substantial arrangements at either site.<sup>220</sup>

## 2. Feminist and Grassroots Labor Groups

In contrast to ECE experts' agenda, the National Women's Law Center (NWLC), the only feminist group continuously promoting childcare subsidies, emphasizes childcare's benefits to low-income working women as mothers and/or precarious workers. Instead of framing childcare as education, the NWLC places childcare subsidies among other care-oriented programs, such as tax and compensation strategies designed to benefit working mothers.<sup>221</sup> Socializing the costs of childcare duties ensures women's workplace equality and empowers women economically. The NWLC argues that subsidizing childcare will increase full-time employment and lifetime earnings for all women, but especially for women with less education and Black and Latina women. Thus, using childcare subsidies to support women's work fits the CCDF's anti-poverty goal.<sup>222</sup>

217. WHITEBOOK ET AL., *supra* note 36, at 69.

218. SUSMAN-STILLMAN & BANGHART, *supra* note 78, at 11-12 (finding that parent satisfaction of home-based care is generally high); Alison Hooper, Rena Hallam & Christine Skrobot, "Our Quality is a Little Bit Different": How Family Childcare Providers Who Participate in a Quality Rating and Improvement System and Receive Childcare Subsidy Define Quality, 22 CONTEMP. ISSUES EARLY CHILDHOOD 76, 84-85 (2019) (describing home-based providers providing parent support).

219. SUSMAN-STILLMAN & BANGHART, *supra* note 78, at 2; ERIN J. MAHER, RSCH CONNECTIONS, MEASURING QUALITY IN FAMILY, FRIEND, AND NEIGHBOR CHILD CARE: CONCEPTUAL AND PRACTICAL ISSUES 5-6 (2007).

220. Ryan et al., *supra* note 207, at 321-22.

221. Child Care & Early Learning Archives, NAT'L WOMEN'S L. CTR., <https://perma.cc/K3PZ-SR3K> (archived Jan. 24, 2023).

222. ROBERT PAUL HARTLEY, AJAY CHAUDRY, MELISSA BOTEACH, ESTELLE MITCHELL



Among different sectors, the NWLC has long promoted public investment in more informal home-based care. NWLC contends that home-based care perfectly fits the CCDF's purposes and will benefit the most from its subsidies. The flexibility that FCC and FFN care offer, such as convenient locations, flexible hours, and the possibility of keeping siblings together, is crucial to low-income parents, especially single working mothers, if they are to balance wage jobs with family duties. The high trust and frequent provider-mother communication also make the care process more like an extension of women's family lives, a strong contrast to centers.<sup>223</sup>

Not unaware of the ECE experts' quality critique of home-based care, the NWLC, working together with local labor and neighborhood organizations, promotes training and technical support to home-based providers without sacrificing their unique quality aspects.<sup>224</sup> They contend that many home-based providers score poorly in quality measurements because of the lack of public investment rather than anything intrinsic to the sector.<sup>225</sup> These providers often have a strong interest, sometimes stronger than center workers, in participating in quality-enhancement activities.<sup>226</sup> Some quality-enhancement interventions organized by local groups collaborating with the NWLC have shown promising successes. For example, All Our Kin, a Connecticut-based organization, organized professional consultations, business development funds, and peer training workshops for FCCs and FFNs. The initiative improved participating home-based providers' quality performance, induced more supply of home-based care, and secured more public funding for the sector.<sup>227</sup>

In addition to the benefits to parents, the NWLC also promotes childcare subsidies as an economic empowerment initiative to home-based providers, who are almost always women working in their homes in exchange for low earnings. Especially for the most informal FFN providers who are not under regulation or

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& KATHRYN MENEFEE, NAT'L WOMEN'S L. CTR., CTR. ON POVERTY & SOC. POL'Y, A LIFETIME'S WORTH OF BENEFITS: THE EFFECTS OF AFFORDABLE, HIGH-QUALITY CHILD CARE ON FAMILY INCOME, THE GENDER EARNINGS GAP, AND WOMEN'S RETIREMENT SECURITY 4 (2021).

223. NAT'L WOMEN'S L. CTR., STRATEGIES FOR SUPPORTING FAMILY, FRIEND, AND NEIGHBOR CARE PROVIDERS 1 (2016).

224. *Id.*

225. *Id.*

226. RICHARD N. BRANDON, HUM. SERVS. POL'Y CTR., ENHANCING FAMILY, FRIEND, AND NEIGHBOR CAREGIVING QUALITY: THE RESEARCH CASE FOR PUBLIC ENGAGEMENT, 22 (2005); Anne Douglass, Kira Taj, Mary Coonan & Donna Haig Friedman, *Lessons from an Urban School Readiness Initiative: Including Family, Friend, and Neighbor Care Providers*, 28 EARLY EDUC. DEV. 640, 651 (2017).

227. CHRISTINA NELSON, TONI PORTER & KAYLA REIMAN, ALL OUR KIN, EXAMINING QUALITY IN FAMILY CHILD CARE: AN EVALUATION OF ALL OUR KIN, 1-2 (2016). The Arizona Kith and Kin program has also successfully recruited FFNs to bilingual developmental-care-oriented training programs via community-based partners and childcare-related material rewards. See generally Sarah Ocampo-Schlesinger & Vicki McCarty, *The Arizona Kith and Kin Project*, OCCASIONAL PAPER SERIES, Dec. 2005, at 22.

other legally recognized relationships, the subsidy constitutes the only bond between them and the state, making their work visible to the public.<sup>228</sup> Thus, subsidies are especially important to these providers.

Beyond pumping financial resources into the sector, government subsidies also carry the potential to transform these home-based providers' relationship with labor law and enable them to unionize. In this cause, the NWLC also finds allies in grassroots labor organizers who are looking for new frontiers for unionizing female workers in non-traditional industries, who often suffer from physical and legal isolation from other similarly situated workers.<sup>229</sup>

Home-based childcare providers fall under different categorizations, ranging across self-employed small businesses, independent contractors, relative employees, and non-employees. However, they share the same plight of lacking any legal status that permits them to organize under federal labor laws governing the private sector. In addition, the antitrust laws prohibit FCCs and FFNs—as self-employed businesses—from coordinating on matters like rates unless their activities are exempt under the “state action” doctrine.<sup>230</sup> This doctrine exempts anticompetitive activities that are authorized or “supervised” by the state from antitrust scrutiny. Thus, labor unions have developed a new model of organizing that relies on the provider's relationship with the state—receipt of subsidy payments. With this nexus, the state government, via executive order or legislation, may establish itself as an “employer of record” to bargain with and grant home-based providers state-action antitrust immunity. This allows the subsidized providers to bargain for higher subsidy reimbursement rates and better compensation policies.<sup>231</sup> Despite this organizing model's limitations under state and federal laws, subsidized home-based childcare providers in eight states have used it to gain the right to collective bargaining.<sup>232</sup>

This model of organizing also focuses on seeking more resources from state governments instead of consumer families. The labor unions recognize that these low-income families cannot afford higher prices but that the state can.<sup>233</sup> Thus, the NWLC and local unions contend that all actors engaged in the sector, parents, children, and providers, benefit from organizing. They further contend that the benefits can spread to the rest of the childcare economy and/or to low-income neighborhoods. The grassroots organizations often engage unpaid or privately

228. DEBORAH CHALFIE, HELEN BLANK & JOAN ENTMACHER, NAT'L WOMEN'S L. CTR., *GETTING ORGANIZED: UNIONIZING HOME-BASED CHILD CARE PROVIDERS* 5-6 (2007).

229. *Id.* at 7-8.

230. *Id.* at 6-7.

231. Smith, *supra* note 69, at 1419; CHALFIE ET AL., *supra* note 228, at 12-22.

232. States often narrowly recognize home-based providers' right to collective bargaining without recognizing their employee status for other benefits. CHALFIE ET AL., *supra* note 228, at 12-20. After the adjudications of *Harris v. Quinn*, 573 U.S. 616 (2014) and *Janus v. Am. Fed'n of State, Cnty., and Mun. Emps., Council 31*, No. 16-1466, 585 U.S. (2018), public-sector unions might not collect fees from non-union members. Similar restraints also apply to unions representing subsidized FCCs and FFNs.

233. Smith, *supra* note 69, at 1400.

funded FFN caregivers in their outreach efforts and provide them with care-related union benefits such as technical assistance. Beyond labor-related benefits, these organizations also connect families and providers with other public assistance programs.<sup>234</sup> Thus, childcare subsidies' continual investment in home-based providers is not only transforming the sector but also effectively channeling resources into low-income communities.

### 3. Poverty Policy Advocates

In yet another framework, poverty policy think tanks such as the Urban Institute advance childcare subsidies as a pillar of the overall poverty-relief regime, in which childcare is important for both low-income parents' employment and their children's education.<sup>235</sup> Rather than focusing exclusively on either, they prioritize maximizing poor families' law-in-action *access* to the public subsidies, which they see as the prerequisite of both.<sup>236</sup>

Like other public assistance programs, the CCDF features underfunded budgets, strict eligibility, and burdensome procedures, which make it less effective in assisting the targeted population. As federal law has not given eligible families a guaranteed right to receive the subsidy, they often fall through the many gaps.<sup>237</sup> Consequently, only a small portion of eligible families actually receive childcare subsidies.<sup>238</sup>

Poverty advocates identify various barriers to access and propose both sweeping and technical fixes. To start with, since CCDF is a block grant, the state's discretion to set income eligibility thresholds under the federal limit (85 percent of the SMI) halves the number of eligible children.<sup>239</sup> In addition, many states' childcare subsidies and workforce development programs leave out parents who are in training or educational activities, which constitutes another gap.<sup>240</sup> The burdensome administrative process further makes it difficult for low-income families to get and keep childcare benefits.<sup>241</sup>

CCDF programs' policies regarding providers also narrow the path to

234. NAT'L WOMEN'S L. CTR., *supra* note 224, at 4.

235. For example, in Urban Institute's framing, CCDF-related reports belong to multiple policy centers, including the Center on Education Data and Policy, the Center on Labor, Human Services and Population, and the Income and Benefits Policy Center.

236. *See generally* LINDA GIANNARELLI, GINA ADAMS, SARAH MINTON & KELLY DWYER, URB. INST., WHAT IF WE EXPANDED CHILD CARE SUBSIDIES? (2019).

237. *See* White, *supra* note 5, at 134.

238. *See* CHIEN, *supra* note 119, at 2.

239. *See* GIANNARELLI ET AL., *supra* note 236, at 1.

240. GINA C. ADAMS, SHAYNE SPAULDING & CAROLINE HELLER, URB. INST., BRIDGING THE GAP: EXPLORING THE INTERSECTION OF WORKFORCE DEVELOPMENT AND CHILD CARE 32 (2015).

241. GINA ADAMS, URB. INST., CONFRONTING THE CHILD CARE ELIGIBILITY MAZE: SIMPLIFYING AND ALIGNING WITH OTHER WORK SUPPORTS 4 (2013), <https://perma.cc/57U6-LAZX>.

subsidized childcare. On the one hand, some states' reimbursement policies categorically exclude informal caregivers from parents' options.<sup>242</sup> On the other hand, low reimbursement rates and onerous payment policies also deter high-quality centers from caring for subsidized children. Conversely, only low-quality centers that cannot recruit enough children in the private market stay in subsidy systems.<sup>243</sup> In other words, the low quality of subsidized care results from low subsidy payments, not the lack of accountability mechanisms in subsidy policies. Thus, fewer providers are willing and able to serve subsidized children.

Identifying all of the gaps listed above, poverty advocates find that access to subsidized childcare is low and inequitable across states and racial and ethnic groups.<sup>244</sup> In response, they propose a massive expansion of the CCDF budget and simplification of the distribution policy. Instead of insisting on the intrinsic value of any childcare sector, they support engaging all types of providers to deliver subsidized childcare to as many marginal families as possible.<sup>245</sup> They also propose better compensation policies across the board, such as higher and swifter payments, to attract more and better providers to the system.<sup>246</sup>

## B. Divergence and Convergence in Advocate Politics

This Subpart compares the three groups' divergent understandings of childcare. It further maps the three groups' strategic convergence in advocacy politics.

In the ECE experts' educational framing of childcare, professional childcare workers' interest in being respected and paid as qualified educators aligns with children's interests as individual students and future adults. They are also in line with schoolteachers because preparing the children earlier in similar settings alleviates future teachers' tasks.

However, this understanding of quality childcare assigns a very marginal role for parents, especially low-income ones. An early educator is not assisting parents' paid work. Nor is she substituting for their parenting work. On the

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242. Gina Adams, Peter Willenborg, Cary Lou & Diane Schilder, *To Make the Child Care System More Equitable, Expand Options for Parents Working Nontraditional Hours*, URB. INST., URB. WIRE (2021), <https://perma.cc/SC3H-2PS7>.

243. MONICA ROHACEK & GINA ADAMS, URB. INST., PROVIDERS IN THE CHILD CARE SUBSIDY SYSTEM: INSIGHTS INTO FACTORS SHAPING PARTICIPATION, FINANCIAL WELL-BEING, AND QUALITY, at V (2017).

244. CHRISTINE JOHNSON-STAU, CTR. FOR L. & SOC. POL'Y, EQUITY STARTS EARLY: ADDRESSING RACIAL INEQUITIES IN CHILD CARE AND EARLY EDUCATION POLICY 6 (2017), <https://perma.cc/Q4SS-UNUJ>; REBECCA ULLRICH, STEPHANIE SCHMIT & RUTH COSSE, CTR. FOR L. & SOC. POL'Y, INEQUITABLE ACCESS TO CHILD CARE SUBSIDIES 2 (2019), <https://perma.cc/45VC-U8GV>.

245. See ADAMS ET AL., *supra* note 242; ULLRICH ET AL., *supra* note 244, at 2; ERICA GREENBERG, JULIA B. ISAACS, TERESA DERRICK-MILLS, MOLLY MICHIE & KATHRYN STEVENS, URB. INST., ARE HIGHER SUBSIDY PAYMENT RATES AND PROVIDER-FRIENDLY PAYMENT POLICIES ASSOCIATED WITH CHILD CARE QUALITY 13 (2018), <https://perma.cc/ZDK3-VRG6>.

246. See GREENBERG ET AL., *supra* note 245, at 27.

contrary, qualified educators' value comes from their *difference* from these children's mothers. The educators introduce low-income children to the developmentally beneficial care that their parents cannot provide at home. This process makes low-income children *different* from their parents, saving them from the cycle of poverty. Thus, some distance from the home is necessary. Instead of facilitating the family's income plan or executing what the parents want for the child, ECE professionals expect the parents to facilitate their educational plan for the child.<sup>247</sup> Furthermore, the parents themselves need some consumer education to understand the value of quality care. Otherwise, their self-interest or ignorance will obstruct their children's future development.

ECE advocates' understanding of quality childcare also justifies subsidizing professional childcare providers. Since early childhood educators are better equipped to provide quality care than other actors and work well with public educational institutions, the state should support them both as individuals and as a professional community to advance children's interests.

In the NWLC and their local allies' account, childcare is a nurturing, family-like, relational activity. The primary alliance is among similarly situated low-income working women in the same community who are sometimes mothers, sometimes providers, and often both. The home-based provider fulfills the mother's duties to the children when the mother is busy earning income or experiencing personal struggles. In exchange, the mother pays the provider some money with the help of government subsidies. This arrangement alleviates income and parenting stress for both women and their families. As a bonus, the low-income women control the process. Subsidies, moreover, bring public resources into the community.

Community-based care's value comes from the provider's *sameness* to the mothers. The providers are doing what the mothers would do if they had the time or resources. Because it replicates motherhood, the boundary of this care labor, as measured by either time or money, becomes vague. Also, the providers raise the children into the *same* or a better version of the parents. In return, children benefit from forming bonds with providers and a group of related or neighbor children with the same provider. As to family and community members, the child also benefits from the family's and the community's increased income and reduced distress.

This understanding of childcare justifies subsidizing the home-based, often informal providers. As resources are fluid among the parties, the state will effectively pump resources into the community if it hands over subsidies and other assistance to the community-based providers or gives the mothers more autonomy in picking the provider.

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247. Although the QRISes measure family partnership as one of the factors, the purpose is to promote parents' engagement in the ECE programs, not the other way around. See NAT'L CTR ON EARLY CHILDHOOD QUALITY ASSURANCE, FAMILY AND STAKEHOLDER ENGAGEMENT IN QRIS 2017 FACT SHEET 1 (2019), <https://perma.cc/HZ96-FM46>.

Both accounts are ideal types of childcare but sometimes mirror the micro-dynamics in the real-world childcare process. For example, a center-based educator's critical attitude towards a child's parents increases her engagement with the child as she perceives that the child needs more intervention. As proper professionals, these providers do not interact much with either parents or the child outside the center.<sup>248</sup> In contrast, home-based providers often speak positively of the child's family and believe they want what is best for the child, even when the family struggles to provide for the child. Some providers care for the children outside negotiated hours and provide material support to the children or even their parents.<sup>249</sup> Low-income mothers also trust providers from within their social networks much more than those with professional qualifications.<sup>250</sup>

Exceptions also exist to both ideal types of interest alignment. For example, some low-income mothers deliberately search for professional care and seek to send their children away from the community.<sup>251</sup> Thus, their interest may align with center-based educators, not other women in the neighborhood. On the other hand, a developing minority view among ECE experts challenges the common quantitative, ritualistic quality measurements. Rather, they give more weight to relational satisfaction or the local community's perception of quality.<sup>252</sup>

Unlike the other two groups, poverty-policy think tanks do not see childcare providers or their workers in any or all sectors as the direct clients of their advocacy. Instead, they see them instrumentally as factors that determine low-income families' access to childcare subsidies. Nor do they want to reform the childcare economy as a whole. Instead, they focus on the services that subsidized children get in comparison to privately funded ones. As long as the state's subsidy agencies act as good enough consumers, subsidized children can get good enough services from the *status quo* childcare economy. Their ultimate goal is to maximize the childcare subsidies' positive impacts, which is the aggregate of increased incomes for subsidized parents and increased developmental benefits for subsidized children. To reach this goal, the poverty-policy advocates prioritize maximizing government subsidies first, including the number of families receiving the subsidies and the subsidy amount each family receives.

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248. Noam Shpancer, *Caregiver-Parent Relationships in Daycare: A Review and Re-Examination of the Data and Their Implications*, 9 EARLY EDUC. & DEV. 239, 251-52 (1998).

249. See Hooper et al., *supra* note 218, at 89.

250. Kaitlin K. Moran, *Perspectives on the Child Care Search Process in Low-Income, Urban Neighbourhoods in the United States*, 191 EARLY CHILD DEV. & CARE 655, 664 (2021).

251. *Id.* at 662.

252. See generally, e.g., Hooper et al., *supra* note 218 (proposing alternative quality frameworks that consider parties' experiences); Junlei Li & Megan M. Julian, *Developmental Relationships as the Active Ingredient: A Unifying Working Hypothesis of "What Works" Across Intervention Settings*, 82 AM. J. ORTHOPSYCHIATRY 157 (2012) (emphasizing that good developmental relationships are foundational to successful early-childhood intervention); Holli A. Tonyan, *Opportunities to Practice What Is Locally Valued: An Ecocultural Perspective on Quality in Family Child Care Homes*, 28 EARLY EDUC. & DEV. 727 (2017) (proposing to add community values to quality measurements).

Utilitarian calculations lead the poverty policy think tanks' opinions on sectoral usage. Between the two competing accounts of children's benefits, they are much more inclined to adopt the ECE experts' quantifiable evaluations since such evaluations are more widely accepted than the qualitative descriptions of community values. They only take into consideration the most visible aspects of cultural differences among communities, such as linguistic differences. Nevertheless, they value the home-based sectors' pragmatic benefits when such benefits show in the numbers, such as through flexible hours, low costs, and higher stability. On balance, the policy think tanks conclude that centers in general work better for children's development and work well enough to support some parents' work. Although home-based sectors in general work less effectively in providing developmental benefits, they are the only options for some parents who cannot or will not send their children to centers. If the subsidies do not give these parents the autonomy to choose home-based care, their families will not benefit from the subsidies at all. Thus, the poverty advocates support centers in general and home-based care as supplementary.<sup>253</sup>

The ECE agenda to promote developmental care is the most sweeping among the three. Even advocates who frame childcare subsidies as employment or parenting support policies incorporate the language of early education and draw on ECE research in their advocacy for spending expansion. All three groups' shared feeling that childcare is marginalized in politics further brings them into collaboration rather than public conflict.

The advocates further share the belief that framing childcare as education is a good strategy to garner more support from the electorate and from business groups. Public opinion more readily accepts education as a public good, while care still suffers from its association with the private family's responsibility and women's devalued labor. Moreover, emphasizing children's benefits also boosts public spending programs' popularity because low-income children are seen as a more innocent, deserving group than their parents.<sup>254</sup> The ECE group's account of developmental care also carries the promise that public spending, as an investment, will pay off in the future.<sup>255</sup> Similarly, business groups may see education as an investment in their future workforce even if they dismiss the value of "mere babysitting."<sup>256</sup> The early-education rhetoric is so prevalent in childcare politics that politicians shun its custodial aspects when they promote more funding for childcare.<sup>257</sup>

However, the educational quality framing of childcare fails to address working families' pragmatic need for seamless adult supervision. The mismatch is the most significant in formal care's three gaps, infant and toddler care, non-

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253. See HENLY & ADAMS, *supra* note 139, at 1-2.

254. See DAVID L. KIRP, *THE SANDBOX INVESTMENT: THE PRESCHOOL MOVEMENT AND KIDS-FIRST POLITICS*, 261 (2009).

255. ECE Consensus Letter, *supra* note 42.

256. See PALLEY & SHDAIMAH, *supra* note 44, at 90.

257. See *id.* at 161.



traditional-hour care, and non-English-language care.<sup>258</sup> As Part II.B has explained, low-income families disproportionately demand these types of care. Especially for low-income parents with long and irregular working hours, early education centers operating only during business hours on the weekdays are nearly useless.<sup>259</sup> Not only do centers fail in supplying those three types of care, but the educational framing also has trouble articulating their benefits. Much less research establishes quality measurements of infant care than pre-school-age care, and some research finds evidence against putting infants in centers or educational programs, or putting children in centers for too many hours per day.<sup>260</sup> The current quality measurements also do not sufficiently take into account the educational value of linguistic diversity.<sup>261</sup>

Again, the advocate groups converge on acknowledging the gaps but diverge on how to address them. Women's groups and poverty groups promote expanding the types of providers eligible for childcare subsidies and giving more discretion to parents.<sup>262</sup> Specifically, the two promote including FFN and FCC providers in subsidies since they are already responding to these gaps. Not unaware of the developmental quality concerns, both groups, one more eagerly than the other, consider subsidizing home-based providers a worthwhile compromise for broader and more equitable coverage. In contrast, a professionalization-based ECE approach proposes to reform and expand the supply of center care. Specifically, they propose to use CCDF's quality set-asides to reward formal providers who operate during the nighttime, enroll infants or children with special needs, and hire workers with diverse linguistic capacities. The incorporation process may not always be smooth. Diverse linguistic and cultural fluency helps children bridge between home and school, visibly contributing to their development.<sup>263</sup> In comparison, infant care and nighttime care almost inevitably divert the focus to custodial care.

In addition, the NWLC and its local allies emphasize the importance of

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258. See HENLY & ADAMS, *supra* note 139, at 2; PATTI BANGHART ET AL., CHILD TRENDS, A REVIEW OF THE LITERATURE ON ACCESS TO HIGH-QUALITY CARE FOR INFANTS AND TODDLERS 19-21 (2020), <https://perma.cc/YKL4-MD2X>; HEATHER SANDSTROM & JULIA GELATT, URB. INST., CHILD CARE CHOICES OF LOW-INCOME, IMMIGRANT FAMILIES WITH YOUNG CHILDREN 18 (2017), <https://perma.cc/WC33-J2LG>.

259. See HENLY & ADAMS, *supra* note 139, at 2.

260. See Loeb et al., *supra* note 44, at 64-65 (finding starting attending center care before age two is related to negative social effects and more than thirty weekly hours of center care has mixed effects on children compared to attending centers between fifteen and thirty hours).

261. JULIE SUGARMAN & MAKI PARK, MIGRATION POL'Y INST., QUALITY FOR WHOM? SUPPORTING CULTURALLY AND LINGUISTICALLY DIVERSE CHILDREN AND WORKERS IN EARLY CHILDHOOD QUALITY RATING AND IMPROVEMENT SYSTEMS 1-2 (2017), <https://perma.cc/4L29-B6MR>.

262. KAREN SCHULMAN & DARIA CRAWFORD, NAT'L WOMEN'S L. CTR., HELPING FAMILY, FRIEND, AND NEIGHBOR CARE PROVIDERS MEET NEW REQUIREMENTS UNDER THE CHILD CARE AND DEVELOPMENT BLOCK GRANT REAUTHORIZATION LAW 6-7 (2018), <https://perma.cc/Y4E8-ZHNT>; ADAMS ET AL., *supra* note 242, at 13.

263. See SUGARMAN & PARK, *supra* note 261, at 7.

home-based care's relational values, which centers cannot replicate.<sup>264</sup> The close-to-family providers function as a support network that the parent and the child can trust in crises. They also nurture the community's culture and well-being. The other two groups do not join them on this point. Poverty policy advocates cannot find measurements to incorporate home-based care into their utilitarian calculations, while the ECE experts may see distancing low-income children from the community as a benefit.

In conclusion, the ECE experts' framework is increasingly expanding in the field and infiltrating other competing advocacy agendas. Under their framework, educational care is superior to custodial care, an individual child's cognitive development comes before their bond with a group, center-based outperforms home-based care, and trained teachers are more qualified than aunts next-door. As the next Part shows, these hierarchies are also transforming the childcare subsidy systems.

#### IV. FORMALIZATION THROUGH SUBSIDIES AND ITS (UN)INTENDED CONSEQUENCES

As a result of the childcare expert/advocate politics, the CCDF-funded state subsidy systems have swung from a work-oriented poverty relief program—the dominant framework in the immediate aftermath of PRWORA/TANF—to a more systematic incorporation of the ascendant educational framework of childcare. Both federal policies and state agencies' practices increasingly leverage the subsidies to advance a market-formalization plan for the childcare economy. The Child Care and Development Block Grant Act of 2014 (hereinafter CCDBG or the Act) formalized and federalized this trend.<sup>265</sup> This transformation increasingly excludes home-based providers and subordinates low-income parents' work/care arrangements.

##### A. The Formalization Reform at State and Federal Levels

In the first few years after taking its current shape in 1998, the federal CCDF guidelines and state programs emphasized the work support goal, with few restraints on providers. As the PRWORA pushed for a massive transition of welfare recipients from welfare to work, the states prioritized securing work-compatible childcare arrangements, leaving child development goals to educational programs like Head Start.<sup>266</sup> Subsidy distribution focused on parents who were on the margin between employment and welfare, without regard for the child's characteristics.<sup>267</sup> This workforce-support orientation led to a boom

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264. See NAT'L WOMEN'S L. CTR., *supra* note 224, at 1.

265. See Child Care and Development Block Grant Act of 2014, Pub. L. No. 113-186, 128 Stat. 1971, § 5(B)(2)(T).

266. See Adams & Rohacek, *supra* note 2088, at 419.

267. Zatz, *supra* note 6, at 55.

of subsidized home-based providers, including FCCs and FFNs.<sup>268</sup> During that time, the number of home-based providers in the entire childcare economy increased at a higher rate than center-based care.<sup>269</sup> Some states placed a majority of subsidized children with low-cost FFN providers.<sup>270</sup>

Since the early 2000s, in alignment with the ECE groups' zealous participation at all levels of government programs and policy articulation, a general trend emerged among states to systematically integrate quality-enhancement goals.<sup>271</sup> First, states increased the set-aside proportion of CCDF that they invested in the childcare industry, shifting it away from direct subsidies. They typically spent the quality set-aside funds on staffing licensing systems; launching reference, training, and technical assistance networks; and developing professional-development programs.<sup>272</sup> Second, ECE professionals increasingly staff the childcare subsidy programs, bringing in more quality-oriented regulatory guidelines for subsidized providers.<sup>273</sup> Third, state officials and caseworkers started to encourage eligible parents to choose formal centers. They have also exercised great discretion in subsidy distribution in favor of those who are more likely to enroll the children at centers.<sup>274</sup>

In 2014, the bipartisan CCDBG federalized the state-level trend to emphasize formality and quality in subsidy allocation.<sup>275</sup> The Act also systematically integrated the developmental quality goals into the CCDF's purposes and designs.<sup>276</sup> This statute confirms the decade-long transition moving CCDF from a low-income workforce support program to a set of regulatory and public transfer measures to improve the quality of care delivered on the childcare market, subsidized or entirely private.<sup>277</sup>

268. See Smith, *supra* note 69, at 1391.

269. See *id.*

270. See Adams & Rohacek, *supra* note 2088, at 421; U.S. DEP'T OF HEALTH & HUM. SERVS., *supra* note 1911, at 2.

271. See PALLEY & SHDAIMAH, *supra* note 44, at 84-89; Adams & Rohacek, *supra* note 2088, at 428; GINA ADAMS & MICHAEL KATZ, URB. INST., BALANCING QUALITY EARLY EDUCATION AND PARENTS' WORKFORCE SUCCESS: INSIGHTS FROM THE URBAN INSTITUTE'S ASSESSMENT OF THE MASSACHUSETTS SUBSIDIZED CHILD CARE SYSTEM 9 (2015) (finding that ECE experts heavily staffed the state's childcare subsidy agency).

272. See Adams & Rohacek, *supra* note 2088, at 424.

273. See PALLEY & SHDAIMAH, *supra* note 44, at 84-89.

274. See ULLRICH ET AL., *supra* note 2444, at 11.

275. See Child Care and Development Block Grant Act of 2014, Pub. L. No. 113-186, 128 Stat. 1971, § 6.

276. For example, the CCDBG has added two additional goals including "to improve child care and development of participating children" and "to increase the number and percentage of low-income children in high-quality child care settings" to the purposes of CCDF. *Id.* § 2(b)(6)-(7). It has also added language such as "high-quality" and "education services" to other goals. Compare 63 Fed. Reg. 39981, 39982 (July 24, 1998) (to be codified at 45 C.F.R. § 98.1) with 81 Fed. Reg. 67573, 67573 (Sept. 30, 2016) (to be codified at 45 C.F.R. § 98.1).

277. HANNAH MATTHEWS, KAREN SCHULMAN, JULIE VOGTMAN, CHRISTINE JOHNSON-STAUER & HELEN BLANK, CTR. FOR L. & SOC. POL'Y, IMPLEMENTING THE CHILD CARE AND

The statute, with the subsequent amendments to federal regulations, includes a set of rules over providers receiving subsidies while some also extend to those on the private market. First, it introduces background check requirements. All childcare workers connected to any aspect of formal providers (licensed, regulated, or listed) and all non-relative providers receiving CCDF subsidies must pass a comprehensive background check covering criminal and child-abuse-and-neglect records. The background check must extend to all adults residing on the site for home-based providers, including the provider's family members who do not provide care.<sup>278</sup> Second, the Act requires health and safety training, including first aid, CPR, and child abuse and neglect recognition, for all subsidized providers.<sup>279</sup> States must institutionalize at least one annual safety inspection of any subsidized non-relative provider.<sup>280</sup> Third, the Act also requires the states to set minimum provider-to-child ratios and maximum group sizes for regulated providers, preferably but not mandatorily according to a guideline published by ECE professional associations.<sup>281</sup> Fourth, the Act requires states to establish official information mechanisms for families and providers to communicate the quality of care delivered, including consumer education websites and a hotline for parental complaints.<sup>282</sup> It also increases the mandatory quality set-aside portion of CCDF funding.<sup>283</sup>

Furthermore, the Act contains optional quality-enhancement provisions via the subsidy payment rate. It strongly encourages the states to institute a QRIS to accredit and evaluate subsidized providers.<sup>284</sup> It also encourages states to institute a tiered calculation of subsidy reimbursement rates based on QRIS ratings and to assign those without an accreditation to the lowest tier.<sup>285</sup>

The Act mostly adds new priorities to the existing system without upending existing arrangements. Thus, the system ends up with an amalgam of conflicting priorities, resulting in more restraints on families' access.<sup>286</sup> At one end, the CCDBG restricts the pool of subsidized providers. At the other end, it only makes two minor exceptions to the parents' work requirements. First, it enables states to make exceptions for families in crisis, such as homeless children and teenager parents.<sup>287</sup> Second, the statute extends the default duration of the subsidy. Once a state agency grants a child a subsidy slot, the child will remain

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DEVELOPMENT BLOCK GRANT REAUTHORIZATION: A GUIDE FOR STATES 7-8 (2015), <https://perma.cc/2W3W-P9YQ>.

278. 45 C.F.R. § 98.43(a)(2)(B).

279. 45 C.F.R. § 98.41.

280. 45 C.F.R. § 98.42(b)(2)(i)(B).

281. 45 C.F.R. § 98.41(d)(1)-(2); *see also* MATTHEWS ET AL., *supra* note 2777, at 19-20.

282. 45 C.F.R. §§ 98.32-33.

283. 45 C.F.R. § 98.50(b)-(c)

284. 45 C.F.R. § 98.33(d).

285. 45 C.F.R. § 98.45(f)(2)(iii).

286. *See* ADAMS & KATZ, *supra* note 271, at 4.

287. 45 C.F.R. § 98.51.

eligible for 12 consecutive months even if their parents temporarily drop out of paid work or their income slightly increases (as long as the family income remains below the federal eligibility limit).<sup>288</sup> This change aims to enhance childcare stability. However, the statute does not loosen the work requirement for parents on the waitlist. Thus, parents still need to remain active in the workforce, sometimes for months, before the state authorizes subsidies to them. As a result, the parents, except for those in the most destitute circumstances, need to both earn a particular amount from the employment market and choose the correct type of providers from the childcare market in order to access the subsidies.

The CCDF's federalist nature further poses risks to families' access. Although the Act has introduced more federal oversight over the state-managed systems, it continues to offer broad discretion to the states for implementation, except for the aforesaid safety and training regulation.<sup>289</sup> In other words, the federal program requires the states to enhance the quality of care for each subsidized child but permits the state to cut back on eligibility or the number of subsidized children. Nor has the federal program set up any process to evaluate states' compliance with the goal of equitable access.<sup>290</sup> Not surprisingly, multiple states have cut back availability or restricted provider types in order to comply with the CCDBG rules.<sup>291</sup>

## B. A Distributional Analysis of the Formalization Reform

Childcare subsidy programs, influenced by the federal CCDF policies, continuously reallocate resources from home-based care to formal center care, enhance regulatory and administrative requirements to subsidized providers, and incorporate quantitative quality measurements into subsidy calculations. The interactions among the three factors constitute a formalization reform in the subsidized market and the childcare economy at large.

As Table 3 summarizes, the formalization trend benefits large-scale centers and center-based workers but makes public resources less accessible to small centers and home-based providers. Its professionalization efforts invest in childcare workers with more credentials but devalue workers with more experience but less formal education. On the recipient end, it advances early development of children attending subsidized centers, but disadvantages families falling out of subsidized childcare. Among the many societal values of childcare, it elevates children's educational gains but underplays children's bonds to the community and childcare's employment and family support roles.

This Subpart first outlines the dynamics of the formalization reform and then

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288. 45 C.F.R. § 98.21(a)(1).

289. See MATTHEWS ET AL., *supra* note 2777, at 9.

290. See MURRIN, *supra* note 1988, at 12-13.

291. See MATTHEWS ET AL., *supra* note 2777, at 3.

unpacks its distributive effects. The analysis below predominantly uses the CCDF statistical data produced by the federal Department of Health and Human Services (HHS).<sup>292</sup>

Childcare Providers and Workforce		Low-Income Parents and Children	
Winners	<ul style="list-style-type: none"> <li>• Large-scale centers</li> <li>• Professional workers</li> </ul>	Winners	<ul style="list-style-type: none"> <li>• Families in crises (e.g., protective service involved)</li> <li>• Low-income children in subsidized centers: enhanced school-readiness</li> <li>• Privately funded children in subsidized centers</li> </ul>
Losers	<ul style="list-style-type: none"> <li>• Small centers</li> <li>• Most home-based providers</li> <li>• Workers without college degrees</li> </ul>	Losers	<ul style="list-style-type: none"> <li>• Families who need infant, nontraditional hours, or non-English care</li> <li>• Working-poor parents</li> <li>• Low-income children in subsidized centers: lost community bonds</li> <li>• Privately funded families in need of home-based care</li> </ul>

### 1. The Formalization Dynamics

The formalization reform has succeeded in concentrating subsidized children into relatively formal care providers, especially centers. Seventy-five percent of subsidized children attended regulated care (including centers and regulated FCCs) and 57 percent of subsidized children attended center care in 2006. These percentages had increased to 87 percent and 75 percent in 2018.<sup>293</sup>

Multiple dynamics contribute to this trend.<sup>294</sup> First is plainly the programs' selection of families. The state CCDF personnel tend to solicit and approve applications from families who are likely to place their children with formal providers. If a qualified child receives care from multiple nonparent childcare providers, the program subsidizes only the hours with a formal one. The state

292. HHS collects statistics based on fiscal years. Thus, the years in this Part all refer to fiscal years.

293. See U.S. DEP'T OF HEALTH & HUM. SERVS., *supra* note 1911.

294. See generally Holli A. Tonyan, Joce Nuttall, Jeannette Torres & Jessie Bridgewater, *Engaging with Quality Improvement Initiatives: A Descriptive Study of Learning in the Complex and Dynamic Context of Everyday Life for Family Child Care Providers*, 28 EARLY EDUC. & DEV. 684 (2017) (discussing providers changing their operation models to align with state policies); ANITHA MOHAN, CTR. FOR L. & SOC. POL'Y, FEWER CHILDREN, FEWER PROVIDERS: TRENDS IN CCDBG PARTICIPATION (2017) (finding a significant drop in the numbers of home-based providers and children attending home-based care receiving subsidies); ILL. ACTION FOR CHILD., NEW RESEARCH ON SUBSIDIZED FAMILY, FRIEND AND NEIGHBOR PROVIDERS: IMPLICATIONS FOR INVESTING IN QUALITY (2019) (reporting FFNs leaving subsidies due to burdensome training requirements).

program may categorically refuse to subsidize home-based care. Moreover, the subsidy policies induce the parties into formality. On the demand side, the availability of subsidies alters the parents' preferences among different types of providers. The subsidy, accompanied by consumer education programs and state officials' nudging, steers some parents to center care. On the supply side, the subsidies, together with shrinking regulatory exemptions for non-relative providers on the private market, incentivize some home-based providers to convert from informal family-like entities into more standardized market players if the subsidy income justifies the compliance cost.

Numbers show that the formalization of home-based care has played a minimal role in the changing landscape of the subsidized market. Instead, due either to state officials' selection or parents' switching preferences, home-based providers are departing from subsidy systems. From 2006 to 2018, 78 percent fewer FCCs and 71 percent fewer FFNs received CCDF subsidies nationwide. The exodus caused a 63 percent decrease in the total number of providers receiving subsidies (see Graph 1).<sup>295</sup> While the state CCDF agencies had started dropping home-based providers before the CCDBG, both aggregate statistics and state-level dynamic research confirm that the new Act has expedited this process.<sup>296</sup> What remains unclear is whether the children who had been cared for in these settings have transitioned to subsidized formal care or have left the subsidy system, presumably to even more informal and cheaper care options.<sup>297</sup> At least some state-level research suggested that these children were not switching to formal care but leaving subsidies altogether for unsubsidized FFN settings.<sup>298</sup>

During the same period when the mass of home-based providers left the subsidy systems, childcare subsidies have become less available for low-income families. The number of subsidized children has decreased dramatically since 2006. So has the percentage of subsidized children among eligible ones. As a result, only 1.34 million children received CCDF-funded childcare in 2018 in an average month. This is a 24 percent drop from the program's peak of 1.77 million in 2006 (see Graph 2). As the decrease of CCDF funding and the formalization

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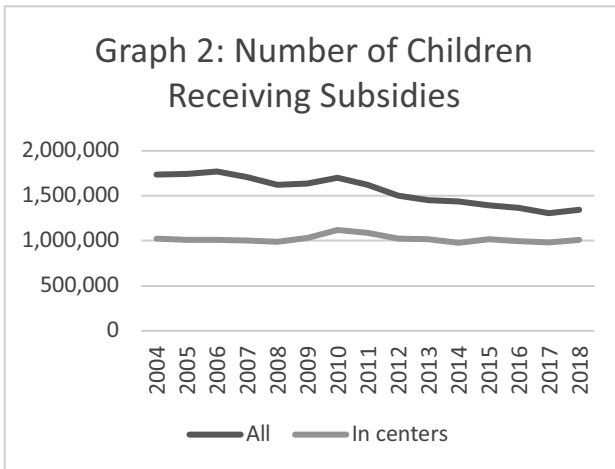
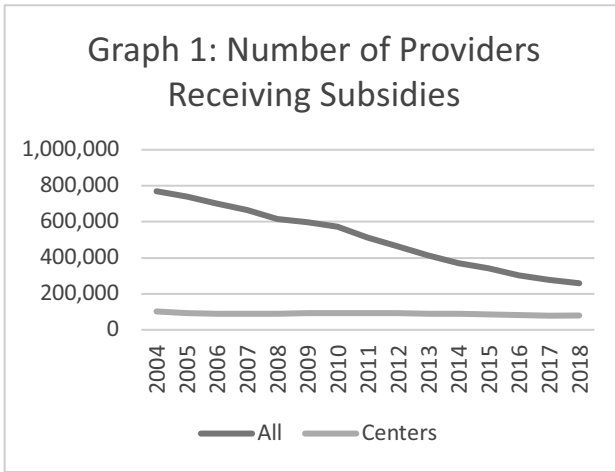
295. See U.S. DEP'T OF HEALTH & HUM. SERVS., *supra* note 1911.

296. In 2006, 46 (out of 56) states and territories had more than 20 percent of subsidized children placed with home-based providers. This number decreased to 34 state and territories in 2014 (the year before the CCDBG's implementation) and to 27 in 2018. *Id.* For state-level research, see SCHULMAN & CRAWFORD, *supra* note 2622; ILL. ACTION FOR CHILD., *supra* note 2944, at 12.

297. See MOHAN, *supra* note 2944, at 3.

298. See ILL. ACTION FOR CHILD., *supra* note 2944, at 12.





of subsidy policies has happened simultaneously, we cannot discern which factor has played a more significant role in the childcare subsidies’ shrinking coverage.

Beyond recipients of direct subsidies, the formalization measures, including reallocating subsidies, enhancing regulation, and incorporating quality measurement, have universalist aspirations to formalize the childcare market for all families. The enhanced regulation and the quality measurement directly apply to providers on the private market. The Act requests the states to divert an increasing proportion of funding from direct subsidies to extending inspection, regulation, and information platforms to all childcare providers. The programs also aim to induce positive spillovers of quality improvement to some privately funded children by reallocating subsidized children to formal centers. If the subsidy system successfully induces quality improvement among subsidized centers, unsubsidized children attending these institutions will also enjoy the benefits.<sup>299</sup>

299. Child Care and Development Fund (CCDF) Program, 81 Fed. Reg. 67438, 67441

Specifically, incorporating quality measurement has shown a moderate effect in both the subsidized and general childcare markets. The tiered rate systems tying the subsidy rates to accreditation ratings, which 42 states had instituted by 2019, successfully motivated subsidized providers to raise their quality ratings, according to some state-level research.<sup>300</sup> Outside the subsidized market, measurement incentivizes quality improvement where (and only where) the statewide measurement system manages to engage enough providers. For example, in North Carolina, where QRIS participation is mandatory for all non-religious licensed providers, low ratings effectively motivate centers to improve classroom quality and enrollments at lower quality ones decrease.<sup>301</sup> However, comprehensive engagement is the exception on a national scale. Most states' information platforms struggle to engage all parents or providers. Statistics show that home-based providers are less likely to participate in QRIS ratings.<sup>302</sup> Qualitative research shows that low-income mothers seldom look to these professional ratings for information.<sup>303</sup>

## 2. Effects Across Childcare Providers and the Workforce

For providers, the formalization reform is threatening home-based providers' survival in or outside the subsidized market while benefiting a specific set of centers that are relatively large and have good-enough yet not top performance levels.

All of the three formalization measures, including subsidy reallocation, enhanced regulation, and quality measurements, disfavor home-based providers. The first two directly push them away from the subsidy system. The current quality accreditation and the tiered subsidy rates justify assigning them lower rates. The participation rates and the measurements' biases contribute to this disparity. In all but seven states, home-based childcare providers' accreditation participation rates lag behind those of center-based ones.<sup>304</sup> Providers without an accreditation rating often receive the lowest tier in a tiered system. Even when home-based providers participate, the accreditation systems designed for centers

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(Sept. 30, 2016) (codified at 45 C.F.R. § 98).

300. MURRIN, *supra* note 1988, at 2; Kate Giapponi Schneider, Marji Erickson Warfield, Pamela Joshi, Yoonsook Ha & Dominic Hodgkin, *Insights into the Black Box of Child Care Supply: Predictors of Provider Participation in the Massachusetts Child Care Subsidy System*, 79 CHILD. & YOUTH SERVS. REV. 148, 157 (2017); Erica S. Lee, *A Mixed Methods Study of Maryland's Monetary Incentives to Improve Child Care* 105 (2019) (Ph.D. dissertation, University of Maryland, College Park) (Proquest) (reporting conflicting results on whether tiered subsidy rates motivate accreditation).

301. DAPHNA BASSOK, THOMAS S. DEE & SCOTT LATHAM, STAN. CTR. FOR EDUC. POL'Y ANALYSIS, *THE EFFECTS OF ACCOUNTABILITY INCENTIVES IN EARLY CHILDHOOD EDUCATION 3* (2017) (finding centers changing behaviors following lower ratings).

302. Schneider et al., *supra* note 300, at 157.

303. Moran, *supra* note 25050, at 664.

304. Workman, *supra* note 21010, at fig. 2.

often assign them lower rankings and thus lower subsidy rates.<sup>305</sup> Thus, even when relatively more formalized home-based providers are eligible for subsidies, they often receive fewer resources than subsidized centers.

For similar reasons, home-based providers do not benefit much from the CCDF quality set-asides. Exclusion from and under-participation in CCDF subsidies and quality accreditations leave most of them ineligible for supply-side subsidies, the associated quality-enhancement benefits, and their knock-on effects on eligibility for subsidies.<sup>306</sup> Similarly, additional state programs tied to subsidy participation also exclude them.<sup>307</sup> Nor do the professionalization reward programs consider most home-based operators professional workers when they do not have the right degrees.<sup>308</sup> Undoubtedly, a few home-based providers align their businesses with the regulation and accreditation guidelines, stay in the subsidy systems, and receive some supply-side quality awards.<sup>309</sup> However, the predominant majority fall short. Not surprisingly, the NWLC warned that the CCDBG reform was marginalizing home-based care in the subsidized market.<sup>310</sup>

Pushing home-based care away from the subsidy system hurts its performance in general. Home-based providers basically face three choices on leaving subsidies: demand higher payments from parents, cut back quality (such as by taking in more children during the same hours), or cut back supply to save costs (such as by reducing hours). They may have to seek additional income elsewhere or even quit providing home-based care as a full-time job. Interviews with subsidized FFN providers in the past showed that losing the subsidies would dissuade most of them from regular care provision as they faced financial stresses themselves.<sup>311</sup> In other words, some stable home-based care will deteriorate into “patchwork” arrangements with reduced stability. Some providers might seek paid childcare jobs elsewhere, such as being a live-in nanny for a high-income family or a low-rank assistant at a center. Losing the opportunity to simultaneously work in her own home and care for her own child, the provider will incur new work/care struggles and, possibly, enter the childcare subsidy system as a parent.

When it happens on a larger scale, concentrating public subsidies in centers while excluding home-based providers might be catastrophic to the home-based sector’s survival altogether. Home-based providers usually enroll a mixed-age group. Since infants and toddlers demand more labor-intensive care, the per-child charge differences between younger and older children are usually smaller

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305. SUSMAN-STILLMAN & BANGHART, *supra* note 78, at 16.

306. For a list of these subsidies, see MCLEAN ET AL., *supra* note 155, at 33-35.

307. Some state programs even explicitly exclude home-based providers, regardless of subsidy participation. *See id.* at 37.

308. *Id.* at 36.

309. *Id.* at 36-39; Hooper et al., *supra* note 2188, at 80.

310. SCHULMAN & CRAWFORD, *supra* note 2622, at 2-4.

311. SNYDER ET AL., *supra* note 84, at 9-10.

than the actual cost differences to keep fees in an acceptable range that low-income families can afford. In other words, home-based providers, like mixed-age centers, cross-subsidize from older children to younger ones. If public subsidy programs channel a large proportion of 3- and 4-years-olds into centers that are more ready to serve older children, the home-based providers will struggle to reach a cost-balancing charge for infants that their customers can afford. Thus, even if the demand for home-based infant and toddler care remains high, many home-based providers serving low-income parents will still fail. Paradoxical consequences like this have already happened in some local universal preschool programs.<sup>312</sup>

Among centers, the combination of low subsidy rates and increasing compliance costs draw a specific set of providers who are large enough to absorb the administrative costs yet not at the top of the market. Across states, 44 to 80 percent of centers accept public funding.<sup>313</sup> On one side, increasing compliance costs sharply deter small-scale centers from participating, with some attributing their non-participation to the fact that dealing with the subsidies' administrative process would require extra staff.<sup>314</sup> On the other side, most states only pay the lower end of market rates for services of a similar kind and thus fail to attract centers of the highest quality.<sup>315</sup> Studies show that providers serving high-income families are much less willing to accept subsidies.<sup>316</sup> The increased compliance costs are further pushing away providers who have enough private customers and only take subsidized children sporadically.<sup>317</sup> In other words, the market of center care has increasingly segregated into a heavily subsidized sector and a privately-funded one.

Among the centers that continue to receive subsidies, the quality-linked policies are likely to drive the better centers into an upward spiral and the worse ones into a downward one. In the upward spiral, a center's high-quality credentials earn it higher subsidy rates and more supply-side subsidies, and its workers also receive more support for professionalization. This further improves the center's appeal to both subsidy recipients and privately funded clients. The reverse is true for the low-quality centers.

For the childcare workforce, the formalization reform invests more resources in professional childcare workers in subsidized centers while the professionalization process makes the workforce more hierarchical. Most states have spent an increasing portion of the quality set-asides to raise childcare

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312. See generally Jessica H. Brown, *Does Public Pre-K Have Unintended Consequences on the Child Care Market for Infants and Toddlers?* (Princeton Univ. Indus. Rel. Section, Working Paper No. 626, 2018) (finding that New York City's public pre-k programs adversely impact the quantity of infant and toddler care).

313. Schneider et al., *supra* note 300, at 149.

314. *Id.*; MURRIN, *supra* note 1988, at 15-16.

315. MURRIN, *supra* note 1988, at 13.

316. ROHACEK & ADAMS, *supra* note 243, at V; Schneider et al., *supra* note 300 at 157.

317. MURRIN, *supra* note 1988, at 16.

workers' compensation and reward their professionalization efforts.<sup>318</sup> These subsidies are usually conditioned on or tiered with a worker's educational attainment and career position, the number of subsidized children at their workplace, and the workplace's QRIS rating. Some states also have additional state-funded compensation policies, such as early educator tax credits, tied to childcare subsidy participation.<sup>319</sup> All of these measures increase the incomes of center-based workers, especially those with degrees and training credentials. The better compensation also incentivizes better-educated workers to work for centers serving low-income children.

At the same time, state-supported professionalization institutes more hierarchy into the childcare workforce, dividing workers into educators and staff according to their educational credentials instead of work experience.<sup>320</sup> This follows the ECE experts' understanding of childcare quality. If a home-based provider with a decade of childcare experience switches to working at a center, she is likely to find herself at the bottom of the workforce. On a large scale, the professionalization reform has created a mismatch between childcare labor supply and demand. Centers are struggling to fill the roles that require college degrees while workers who have been in the field for decades—disproportionately older women of color—cannot find good placements.<sup>321</sup>

### 3. Effects Across Low-Income Families

The formalization reform and its re-orientation from supporting the low-income employment market to strengthening the childcare market distribute subsidy eligibilities among low-income families of different conditions and, additionally, distribute the benefits of childcare from parents to children within low-income families.

First, the CCDBG's focus on childcare quality enables states to redistribute more CCDF resources from low-income families to impoverished families in crises. This involves a shift from TANF-style work-support subsidies to subsidies for families in crisis, often due to homelessness or CPS involvement. The latter does not involve work requirements. In 2006, only 4 percent of subsidized families received subsidies for CPS-related reasons. In 2018, 11 percent did.<sup>322</sup> The state often enrolls these children at subsidized centers with less deference to their parents' preferences.<sup>323</sup> Subsidized childcare often gives these children guaranteed nutrition and safe shelter during the day. It may also

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318. MCLEAN ET AL., *supra* note 153, at 18.

319. *See, e.g., id.* at 34.

320. *See, e.g., id.* at 33.

321. Stephanie Ebbert, *Child-Care Providers Are Facing a Staffing Crisis, Forcing Some to Close with Little Notice to Parents*, BOS. GLOBE (Aug. 17, 2021, 12:21 PM), <https://perma.cc/FV9A-7WLS>.

322. U.S. DEP'T OF HEALTH & HUM. SERVS., *supra* note 1911.

323. *See, e.g.,* 606 MASS. CODE REGS. § 10.06 (2022).

mitigate the need to separate the child from the parents permanently.

Second, among low-income families, the formalization reform is pushing away those who cannot or do not want to send their children to subsidized centers. Families who rely the most heavily on informal childcare arrangements, such as Hispanic and Asian populations and rural families, are especially underserved by the childcare subsidies.<sup>324</sup> Leaving or not able to join the subsidy system, they have a few suboptimal choices: resorting to unsubsidized informal care, leaving the child uncared for, or caring for the child themselves. In other words, the family has to choose among higher childcare payments, worse childcare quality, and/or lower employment income. Whichever choice they make, their work/care struggles and the family's economic situation worsen.

Third, the formalization reform is benefiting families with preschoolers at the expense of those with infants and toddlers and/or children with special needs. For children falling into the three supply gaps of center care (infant care, non-traditional-hour care, and non-English care), the current system essentially takes the "special quality" approach promoted by the ECE group, altering center supply with quality grants. Yet it fails to resolve much. The insufficiency of this approach is most acute in infant care. The HHS 2019 report found that 59 percent of infant care providers in the market charge more than states' subsidy rates—a premium that an eligible family has to pay in addition to any required co-payment. The low subsidy rates are also not enough to incentivize many centers to start infant care. As a result, subsidized infant care is still both unaffordable and in short supply.<sup>325</sup>

Finally, the CCDBG's changes to eligibility have redistributed *de facto* access from eligible children on the waiting lists to children who have already started receiving subsidies. On the one hand, this makes subsidized children's lives more stable. Before its passage, data showed that subsidized children often switched among providers frequently due to the short duration of subsidies—the national average of which was six months—and incurred mental distress.<sup>326</sup> The new 12-month default duration in the CCDBG should enable low-income children to stay with the same subsidized provider for a longer time and live a more stable life. On the other side, longer guaranteed durations for subsidized children also mean longer wait times for families who are on waitlists, which

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324. ULLRICH ET AL., *supra* note 2444, at 2; MOHAN, *supra* note 294, at 3.

325. MURRIN, *supra* note 1988, at 9.

326. Deana Grobe, Roberta B. Weber & Elizabeth E. Davis, *Why Do They Leave? Child Care Subsidy Use in Oregon*, 29 J. FAM. ECON. ISSUES 110, 124 (2008); GINA ADAMS & MONICA ROHACEK WITH ASSISTANCE FROM ANNA DANZIGER, *URB. INST., CHILD CARE INSTABILITY: DEFINITIONS, CONTEXT, AND POLICY IMPLICATIONS* 16-17 (2010); KENDALL SWENSON, U.S. DEP'T OF HEALTH & HUM. SERVS., *CHILD CARE SUBSIDY DURATION AND CASELOAD DYNAMICS: A MULTI-STATE EXAMINATION* 12 (2014); Julia R. Henly, Jaesung Kim, Heather Sandstrom, Alejandra Ros Pilarz & Amy Claessens, *What Explains Short Spells on Child-Care Subsidies?*, 91 SOC. SERV. REV. 488, 490 (2017).

reduces the parents' employment rates.<sup>327</sup> A longer waiting list might also deter more potential parents from seeking the subsidies.

There are gains and losses even among the families who successfully receive subsidized center care. Children who are switched from informal care to subsidized centers, especially those above the age of three, are likely to receive more developmental gains.<sup>328</sup> Children can receive the intellectual stimulation and socialization that they do not receive under parental or home-based care. Nevertheless, the increased developmental gains are moderate. The tight budgets and amalgam of policy goals constrain CCDF from providing subsidized children the highest-quality care available in the childcare economy.<sup>329</sup> Meanwhile, the children are removed from a care process immersed in their family's neighborhood and lose their bonds to the providers and other children in the same community.

Parents' gains and losses are also complicated. Indeed, some might appreciate the better care that they could not afford on their own or did not have enough information to find before. The family might feel the long-term benefits some years later when the child performs well in school. Yet, for those families switching to centers, parents face more stress in managing centers' non-negotiable hours and co-payment schedules. One missed payment can get the child expelled, adding more abrupt transitions to already-tumultuous family life.<sup>330</sup> Parents with minor time conflicts between center care and work schedules have to cut back work or pay out of pocket for other providers to compensate for centers' shorter hours. Others have to look for new jobs with more standard schedules, which are rare on the low-income employment market and often have lower pay. Mothers, especially, will lose the parent-support element of home-

327. HANNAH MATTHEWS,CTR. FOR L. & SOC. POL'Y, CHILD CARE ASSISTANCE HELPS FAMILIES WORK: A REVIEW OF THE EFFECTS OF SUBSIDY RECEIPT ON EMPLOYMENT 4 (2006).

328. Although not all ECE studies agree on the subsidy-quality link, the most recent ones agree that children receiving CCDF subsidies are placed with providers of higher quality compared to non-subsidized children from the same income bracket or eligible children on the waitlist. *See, e.g.*, Ryan et al., *supra* note 207; Julie A. Jones-Branch, Julia C. Torquati, Helen Raikes & Carolyn Pope Edwards, *Child Care Subsidy and Quality*, 15 EARLY EDUC. & DEV. 327 (2004); Chris M. Herbst & Erdal Tekin, *Child Care Subsidies and Child Development*, 29 ECON. EDUC. REV. 618 (2010); Anna D. Johnson, Rebecca M. Ryan & Jeanne Brooks-Gunn, *Child-Care Subsidies: Do They Impact the Quality of Care Children Experience?*, 83 CHILD DEV. 1444 (2012); Nancy L. Marshall, Wendy Wagner Robeson, Allison J. Tracy, Alice Frye & Joanne Roberts, *Subsidized Child Care, Maternal Employment and Access to Quality, Affordable Child Care*, 28 EARLY CHILDHOOD RSCH. Q. 808 (2013).

329. Research finds that centers receiving CCDF subsidies still have lower quality ratings than Head Start programs. *See, e.g.*, Johnson et al., *supra* note 3288; Marshall et al., *supra* note 3288. HHS's study also shows that even Head Start programs' long-term benefits to low-income children are moderate due to budget constraints. PUMA ET AL., *supra* note 16060.

330. Kaitlin K. Moran, *Examining Childcare Instability and Transition Patterns in Low-Income, Urban Neighborhoods in the United States: A Qualitative Study*, 27 CHILD CARE PRAC. 35 (2021).



based childcare, while feeling more pressure to live up to a higher—or, they may think, whiter—standard of motherhood. They might be more anxious that childcare workers will report any sign of even minor motherhood failure to the CPS. The increased financial and mental stress on parents might further negatively impact their children's well-being or school performance.

#### 4. Effects on Lower-Middle-Income Families

Beyond subsidy recipients, the CCDF's formalization also affects the lower-middle-income families who often occupy the same childcare sector as subsidized families do. Privately funded children attending subsidized providers benefit from the subsidy's quality enhancement measures. However, the benefits to them are more contingent than the ones to the subsidized children. If subsidized providers enhance the quality of their service but stop serving privately funded children or drive them away with higher charges, these families will not benefit from the improved center care or may even be harmed by the reduced supply. On the other end of the market, if the formalization reform pushes a large percentage of home-based providers out of operation, it will hurt lower-middle-income families who are not eligible for the subsidy but use home-based care on the private market for reasons like flexibility and cost. These families are likely to swirl into more intense work/care struggles, which might drag them into a lower-income bracket.

In summary, the CCDF subsidies' formalization reform benefits large-scale centers at the expense of home-based and small-center providers, benefits better-educated childcare workers at the expense of workers with more experience but less education, benefits children at subsidized centers at the expense of those who are pushed out of the subsidy system, and benefits children's educational gains at the cost of their bonds to the community and their parents' employment and family support.

### V. POSSIBLE POLICY ALTERNATIVES

The formalization reform's drastic constraint on home-based care comes with huge losses. The mode of care produced in those sectors—flexible-hour, community-based, culturally compatible care for children of all ages at low cost—is especially essential to low-income women's livelihoods. When these sectors have adequate resources, they provide more stability to low-income families and children. Formal settings cannot replicate some of their benefits, such as a family-like texture and being embedded in the neighborhood. Other benefits, like affordable infant care and nighttime care, cannot be replicated without high costs. This last Part lays out the potential policy responses to this formalization reform's drastic losses and then gives some concrete policy suggestions.

## A. Possible Policy Responses

There are three general approaches in response to the subsidy policies' toll on home-based care. One approach is to accept the inevitable large-scale switch to professional center care, with accompanying policies addressing the losses to low-income families and home-based providers. To make center care work for low-income parents, either center care or low-income employment needs serious restructuring. Centers have to operate for much longer hours with much more flexible policies, hire and retain workers with diverse linguistic and cultural literacies, and expand their support to parents and communities.<sup>331</sup> As low-income or even middle-income parents will not be able to pay for such costly restructuring, more government subsidies are necessary to support it. Simultaneously, the state should provide livelihood alternatives or compensation for home-based providers who lose their income sources in this transformation.

An opposite response is to fully upgrade all home-based care to make it more compatible with the child-development-oriented quality protocols and more scalable than its current form. Some local intervention has proven this approach's plausibility.<sup>332</sup> Certain socio-legal factors such as a strong grassroots organization, supportive state labor laws, and a state administration sympathetic to home-based care, are crucial to its success; none of these can be easily replicated everywhere. Even the local intervention that successfully upgrades home-based care prioritizes commercially-minded family care providers to more casual grandparent providers, suggesting that the upgrading model, in its most functional possible form in the status quo system, cannot necessarily reach all home-based care providers.<sup>333</sup>

Some compromising policy responses in between the two poles are both more viable and more probable to balance all actors' interests. Overall, only more flexible policies can increase public investments in select forms of informal care so that the home-based sectors can continue to play a significant role in the subsidized childcare economy. Institutionally, this is highly plausible. Not only has CCDF engaged home-based care more intensely in the past, public senior and disability care programs are also expanding consumer-directed home-based care.<sup>334</sup> I elaborate specific measures in the next Subpart.

331. Low-income parents also need lengthy paid family leaves to cover infant or toddler care and shorter and more stable working hours to reduce the need for non-traditional-hour care. For a similar proposal, *see generally* EICHNER, *supra* note 3.

332. *See supra* Part III.A.2.

333. NELSON et al, *supra* note 227, at 3.

334. Hila Shamir, *The State of Care: Rethinking the Distributive Effects of Familial Care Policies in Liberal Welfare States*, 58 AM. J. COMP. L. 953 (2010); Andrea Kozak-Oxnard, *Care and Community Empowerment: Coalition-Building Between Home Care Workers and Disability Rights Activists*, 35 COLUM. J. GENDER & L. 70 (2017); Clare L. Stacey & Lindsey L. Ayers, *Caught between Love and Money: The Experiences of Paid Family Caregivers*, in *CARING ON THE CLOCK: THE COMPLEXITIES AND CONTRADICTIONS OF PAID CARE WORK* 201 (Mignon Duffy, Amy Armenia & Claire Stacey eds., 2019).

## B. Suggested Policy Responses

Here I discuss four specific measures, ranking from less to more redistribution from center- to home-based care: adopting cost-based subsidy rate calculation, subsidizing home-based filler care, supporting cross-sector partnership, and incorporating relational quality measurements into childcare evaluation. As advocacy groups and state administrations play the most important roles in childcare subsidy politics, this Part will mainly consider their stances in evaluating political viability.<sup>335</sup>

First, switching from a market-rate- to a cost-based subsidy rate calculation will benefit all providers but disproportionately benefit home-based and small-center care. The CCDBGGA requires the state agencies to stipulate subsidy rates based on market rate surveys or an alternative cost-based methodology.<sup>336</sup> Only the District of Columbia uses an alternative methodology.<sup>337</sup> Since the entire childcare economy is resource-thin, the prices usually reflect what families can pay for childcare rather than the proper costs of childcare to providers, especially for providers serving low-income families and younger, costlier-to-care-for children.<sup>338</sup> Nor does the market survey properly include the costs of informal care.<sup>339</sup> In addition, providers serving sizable numbers of subsidized children reasonably consider subsidy rates in setting their “market rates,” making the price-setting process circular. The alternative cost-based calculation estimates expected costs of providing childcare, such as labor, rents, and other inputs, and thus reimburses all providers closer to a sustainable rate.<sup>340</sup> Home-based care providers will benefit more than their center counterparts given that their rates are under-calculated more given their customer pool. As all groups in the field agree on the link between higher rates and higher quality, this measure will draw an alliance within the field. But it predictably will face the fiscal constraints that any expansion of public spending does.

Second, as both poverty and feminist advocates have advocated for, public spending programs should at least expand subsidizing home-based care as complementary fillers of centers’ gaps, such as infant and toddler care, non-traditional-hour and last-minute care, and localities without nearby centers.<sup>341</sup> The intuition is very straightforward: even poor-quality babysitting with zero developmental benefits is better than no care at all. When an eligible family cannot find a logistically reasonable licensed provider to meet their needs, the

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335. *See supra* Parts III and IV.A.

336. Child Care and Development Block Grant Act of 2014, Pub. L. No. 113-186, 128 Stat. 1971, 42 U.S.C. § 9858c(c)4(B).

337. NAT’L CTR. ON SUBSIDY INNOVATION AND ACCOUNTABILITY, U.S. DEP’T OF HEALTH & HUM. SERVS., LINKS TO STATE MARKET RATE SURVEY REPORTS 2 (2020)

338. BIPARTISAN POL’Y CTR., THE LIMITATIONS OF USING MARKET RATES FOR SETTING CHILD CARE SUBSIDY RATES 5-8 (2020).

339. *Id.* at 7-8.

340. *Id.* at 8.

341. NAT’L WOMEN’S L. CTR., *supra* note 224; ADAMS ET AL., *supra* note 242.

subsidy programs should allow them to choose an informal provider. Furthermore, as the most flexible providers are often struggling the most to comply with regulations, subsidy policies should move from sticks to carrots in these circumstances to promote compliance.<sup>342</sup> Even if relaxing regulation might allow some low-quality or even unsafe providers into the subsidy system, it is still better than the alternative where the child moves around multiple unsafe, unsubsidized informal caregivers or is left uncared-for altogether. Subsidizing informal care to fill these gaps might reduce some demand for formal care, hindering the markets of infant care centers in certain regions from forming. Yet the immediate benefits of placing more children under some care of reasonable quality outweigh the benefits of a hypothetical formal market.

Third, childcare programs should subsidize, and thus promote, cross-sector partnerships where home-based care serves as the primary non-parent provider. Local experiments have suggested that this model of care is plausible and works better for some families. For example, Illinois's Community Connections Preschool for All program has connected state-funded half-day preschools with FFNs to sustain quality care across settings.<sup>343</sup> Three-year-olds attend a formal educational program for four half-days every week and stay with FFNs for the rest of the time that their parents are at work. In addition, the professional educators occasionally visit FFNs' homes to demonstrate developmentally beneficial interactions. However, this Illinois program does not directly pay FFNs and thus benefits only the families that can find regular unsubsidized FFN care. In order to reach low-income children, childcare subsidies need to pay home-based providers to participate in such cross-sector arrangements.

Cross-sector arrangements like this enable the low-income families to have the benefits of both formal and informal care—they expose children to sufficient developmental interaction while securing flexible-hour, stable support for parents and sustaining in-community bonds among home-based providers, parents, and children. Infants and toddlers can start with weekly half-days in centers or professional caregivers' home visits and advance to three hours of educational care every two days as they age. Consequently, young children do not have to stay in centers longer than they can mentally stand.<sup>344</sup> Home-based providers can retain their livelihoods around their own homes and reduce isolation at work. If coordinated well, the centers can actually increase the number of children they serve by offering half-day care to two different groups of children every day. This model also has strong potential for collaboration with the emerging city-level universal pre-K programs that often offer a half day or six hours of educational care to three- and four-year-olds during the school

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342. Local intervention has shown that monetary rewards effectively incentivize informal providers to regulatory compliance. *See, e.g., NELSON ET AL., supra note 2277.*

343. NAT'L WOMEN'S L. CTR., *supra note 224.* For a similar city-wide intervention that engages FFNs in school readiness programs, see Douglass et al., *supra note 2266.*

344. Loeb et al., *supra note 44.*

year.<sup>345</sup> Subsidized home-based care can fill in the time gaps between these programs and working schedules for low-income parents.

This model incurs some foreseeable administrative challenges. Transportation is a major one. To avoid long car rides, the partnership center still has to be adjacent to the target community. Promoting this model, subsidy agencies will have to deal with more providers of various types, which necessitates different protocols and more coordination work. This model of care is also more demanding for center-based workers who have to provide stimulating care to more children. Thus, subsidy policies need to offer higher hourly rates to recruit them into the partnership. Yet, in aggregate, it will be less costly and more achievable than paying centers to provide flexible-hour care. As a result, it might face fewer fiscal pushbacks but more administrative ones.

Finally, the childcare policy system needs to re-evaluate the definition of “quality.” The current evaluation systems prioritize quantifiable measurements of children’s performance, such as nutrition, health, and school grades, and follow a ritualistic checklist in observational evaluation. They pay little attention to the parties’ perceptions of quality or the quality of relationships among children, parents, and providers.<sup>346</sup> Nor do they consider childcare’s benefits to the child’s family or community.<sup>347</sup> The critical ECE approach is increasingly reflective on these shortcomings. Researchers find that the lack of these factors leads to a narrow definition of “quality” that disadvantages home-based care and has weak and inconsistent associations with children’s developmental results.<sup>348</sup>

A patching approach is to institute an additional evaluation protocol specifically adapted for home-based care and, thus, have a dual-track evaluative process. HHS is currently researching the feasibility of this policy.<sup>349</sup> However,

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345. For example, New York City’s 3-K for all program operates 6 hours and 20 minutes a day, 176 days a year. NYC DEP’T OF EDUC., 3-K FOR ALL & PRE-K FOR ALL HANDBOOK FOR DISTRICT SCHOOLS AND PRE-K CENTERS 52-53 (2018).

346. Hooper et al., *supra* note 2188; Nicole Forry et al., *Predictors of Quality and Child Outcomes in Family Child Care Settings*, 28 EARLY CHILDHOOD RSCH. Q. 893 (2013); KWANG KIM ET AL., U.S. DEP’T OF HEALTH & HUM. SERVS., OPRE REPORT 2014-65, FAMILY AND PROVIDER/TEACHER RELATIONSHIP QUALITY MEASURES: UPDATED USER’S MANUAL (2014); AMY BLASBERG ET AL., U.S. DEP’T OF HEALTH & HUM. SERVS., OPRE REPORT 2019-37, A CONCEPTUAL MODEL FOR QUALITY IN HOME-BASED CHILD CARE (2019).

347. Tonyan, *supra* note 2522; Forry et al., *supra* note 3467; BLASBERG ET AL., *supra* note 346; Daphna Bassok, Maria Fitzpatrick, Erica Greenberg & Susanna Loeb, *Within- and Between-Sector Quality Differences in Early Childhood Education and Care*, 87 CHILD DEV. 1627 (2016).

348. SUSMAN-STILLMAN & BANGHART, *supra* note 78; Tonyan, *supra* note 2522; BLASBERG ET AL., *supra* note 3467; Michal Perlman et al., *A Systematic Review and Meta-Analysis of A Measure of Staff/Child Interaction Quality (the Classroom Assessment Scoring System) in Early Childhood Education and Care Settings and Child Outcomes*, 11 PLOS ONE (2016); Ashley Brunsek et al., *The Relationship Between the Early Childhood Environment Rating Scale and its Revised Form and Child Outcomes: A Systematic Review and Meta-Analysis*, 12 PLOS ONE (2017).

349. BLASBERG ET AL., *supra* note 3467.

the dual-track evaluation reinforces the idea that certain particular features of home-based care are not universally valued. A more transformative approach would incorporate the outstanding values in home-based care, such as relational qualities, parties' satisfaction, and community cultural practices, into how the state evaluates all childcare arrangements and childcare policymaking. Some of these values even have quantifiable tokens. For example, given that a stable caregiver-child bond is fundamental for developmental quality, the state can include a metric measuring the average month that a child stays under the care of the same worker, not just the provider entity. Others can be incorporated in a qualitative way. For example, the observational evaluation can focus more on the caregiver-child relationship (such as "does the caregiver attend to the child's needs?") rather than the material conditionality of the provider (such as "how many children's books are on site?") or a behavioral checklist. The evaluation can also survey parents' satisfaction as a dimension of childcare quality.

This approach would predictably burden centers and professional childcare workers. With high child and worker turnover, centers might not do as well on stability and relational quality metrics. Introducing subjective and relational values also gives more discretion and more burden to the evaluators. This not only can add more training costs but also may introduce a different set of social biases into the quality evaluation. As discussed above, this is a controversial idea among ECE experts. On an ideological level, it might also challenge the universal childcare ideal that children from all families should receive identical public services. Instead, public subsidies helping low-income families can go to the modes of childcare that middle-income families do not desire for themselves. In addition, subsidizing home-based care, which is closer to familial care than centers are, might reopen the policy decision to subsidize market care in the first place. If the state is fundamentally subsidizing poor women to take care of other poor mothers' children in homes, why does it not just pay poor mothers to take care of their own kids?<sup>350</sup> Aware of all stakeholders' just causes and vulnerabilities and sympathetic to community-embedded care, this Article proposes these policy suggestions to mitigate—yet not reverse—the ongoing formalization reform's harsh consequences on home-based care and low-income parents. Like other reform measures, these measures will need adequate funding and may compete with different reform agendas for budgets. The benefits to children might not emerge quickly in standardized measurements. Yet it is essential to support home-based childcare and to make childcare work for low-income families.

## CONCLUSION

Analyzing the political economy of childcare subsidies illuminates the divergent visions of childcare and the roles of the state, the market, and the

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350. Zatz, *supra* note 6, at 46.

family. Moreover, the subsidies' institutional and sociological implications crystalize the almost inevitable trade-offs among many important causes: children's development, women's workplace equality, low-income parents' workforce participation, childcare workers' decent work, and minority neighborhoods' prosperity. It also exposes the fundamental tension in current and potential political projects to build a more care-responsive state: how a universal state program supports different groups' divergent, sometimes contradictory, care needs.

In order to realize childcare's plural profound benefits for society, the subsidized childcare economy needs to sustain, nurture, and improve diverse modes of care, especially the flexible and community-based ones that respond to low-income parents' family and employment needs.