CLASP

CENTER FOR LAW AND SOCIAL POLICY

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Shannon Christian
Associate Commissioner
Administration for Children and Families
Child Care Bureau
330 C Street SW
Room 2046
Washington, DC 20447

Dear Ms. Christian:

Thank you for the opportunity to respond to the Notice of Proposed Rulemaking (NPRM) published in the *Federal Register* on November 9, 2004 (Vol. 69, No. 216) regarding changes to the matching requirements in the Child Care and Development Block Grant (CCDBG).

The proposed rules would make two changes to matching requirements for CCDBG:

- Under current law, states may use private funds to count toward state match under certain circumstances, but if the funds are not transferred to the state, they must be received by a single entity designated by the state to receive the funds. Under the proposed rules, states would be allowed to designate multiple public and/or private entities to receive private donations that could be certified as child care expenditures for purposes of receiving federal matching funds.
- Under current law, states can use public pre-kindergarten dollars to count toward up to 20 percent of the state's matching requirement. Under the proposed rules, public pre-kindergarten dollars could count toward up to 30 percent of state matching funds.

While we understand and support the need for state flexibility and improved coordination among state early care and education programs, we have a number of concerns with the rules as proposed. Specifically, we fear that the rule changes proposed could lead to reduced accountability and the potential for fraud and misexpenditures, and would allow states to supplant current investments in their state child care subsidy program, resulting in an overall diminution of public resources committed to child care and early education. We have outlined the areas of concern below, and suggest alternative approaches.

I. Designating Multiple Agencies to Receive Donated Funds

The current rules allowing private funds to count as match under certain circumstances reflect an effort to balance multiple goals. On the one hand, allowing private funds to count as match can encourage private giving and can help states and communities draw down federal match in

instances in which state funds may be unavailable but private entities are prepared to commit resources to the child care program. At the same time, allowing private funds to count as match presents a range of potential risks: it could result in states cutting back their contributions; it could result in inequitable distribution of funds within a state as wealthier communities are more able to generate match than are poorer communities; it could result in distorted program priorities if particular private entities are only willing to give subject to special conditions; and, it could result in less accountability and even in fraud, as it may be more difficult to track funds and ensure that they are "real" expenditures.

The current rules seek to strike a balance by allowing private funds to count as match, while establishing a number of safeguards. Specifically, any private funds counting as match:

- Must be donated without any restriction that would require their use for a specific individual, organization, facility, or institution;
- May not revert to the donor's facility or use;
- May not be used to match other federal funds;
- Must be certified by the donor and the lead agency as available and representing expenditures eligible for federal match;
- Must be subject to audit requirements;
- If not transferred to the state, must be given to a single entity designated by the state to receive donated funds; this entity, and the purposes for which such funds will be expended, must be designated in the state's plan.

[See 45 C.F.R. §§98.53(e), (f); 45 C.F.R. §98.16(c) (2).]

In addition, language in the preamble to the donated funds regulations states that "Both the Lead Agency and the entity designated by the State to receive donated funds must, however, certify that the donated funds are available and eligible for federal match." 63 Fed. Reg. 39965 (July 24, 1998).

The proposed rule retains most of the above safeguards, but would increase the risk of noncompliance and make it far more difficult for the federal government or a state to determine whether the safeguards are being complied with. Under the proposed rule, a state would be allowed to designate multiple private or public entities to accept donated funds. It appears that there would be no limit on the number or character of designated entities. For example, a state could seemingly designate individual child care providers, private businesses, religious institutions, and a range of for-profit and non-profit entities as eligible to accept donated funds.

The preamble to the 1998 CCDBG regulations had explained the rationale for having a single entity receive donated funds:

> We want to clarify that the regulation provides for the designation of a single entity in each State to receive donated funds. We settled on this for a number of reasons. First, it would be burdensome for the Lead Agency to have to deal with hundreds of individual providers or programs all claiming to have received donated funds which are allowable. Since the Lead Agency is ultimately responsible for the allowability of the donated funds we did not want to create such a burden on them. More importantly, we did not want to create a mechanism wherein individual programs, providers or jurisdictions might be

> forced to compete with each other for donated funds. Nor did we want to create a situation wherein the Lead Agency might tie the availability of certificates, grants, or contracts to a jurisdiction, provider, or program's ability to attract donated funds. We believe that allowing for the designation of only a single entity to receive donated funds, at least initially, is a reasonable policy choice. [63 Fed. Reg. 39965 (July 24, 1998).]

Allowing for multiple entities to receive donated funds would upset the current balance in several ways:

- Having multiple recipients for donated funds creates the risk that such entities compete in the collection of private funds, and that as a result, services are reduced for poorer communities. If funding to a community turns, even in part, on the extent to which private funds are collected, it is very foreseeable that wealthier communities will be more successful because they have more community resources than poorer communities. As a result, there is a serious risk that the poorest communities will receive less in CCDBG resources.

- Having multiple entities increases the risk that the policy, program, or beneficiary preferences of the entities distorts overall program priorities. For example, suppose a state allows a broad range of entities to accept donated funds, and non-profit or for-profit organizations raise funds that qualify for matching monies that they wish to limit to benefiting their members. This seemingly would not violate the existing provision against a donor earmarking funds for particular beneficiaries, since the entity receiving donated funds, rather than the donor, would be imposing the restrictions. Or, suppose private child care providers were asked to compete in raising the funds that could count as state match. The resulting competition could seriously disrupt the operation of the child care system in local communities.

- The proposed regulation may increase the risk of fraud or misexpenditure. It may be extremely difficult for states to independently determine whether funds reported as collected by a range of private entities were actually collected, and were collected in a manner consistent with the restrictions specified in federal regulations. There will surely be some instances in which a donor contributes funds with an explicit or implicit understanding about how they will be used, and the more entities involved in the process of collecting funds, the more difficult it will be to ensure the integrity of the process.

- Finally, an expansion of the donated funds option might result in shrinkage of public commitment because legislatures might reduce or not increase appropriations in the expectation that agencies or communities should generate private match instead.

The text accompanying the proposed rule provides no explanation as to why the existing requirement for a single entity has been a problem and offers no examples of any instance in which it has impeded coordination or discouraged the use of private contributions.

Our principal recommendation here is that this proposed modification not be adopted; there is simply no need to depart from the current safeguard provided by having a single entity for the receipt of donated funds. If, however, HHS elects to allow for multiple entities to receive donated funds, we recommend that:

1) The regulations should specify that when an entity receives donated funds:
    a. The entity may not impose a requirement that the funds be used for a specific individual or group of individuals, organization, facility, or institution;
    b. The funds may not revert to the entity's facility or use; and
    c. The funds must be subject to audit requirements that would specifically focus on determining compliance with safeguards applicable to donated funds.
2) Regulations should specify that decisions about the appropriate expenditure of donated funds counting as state match must be made by the state agency rather than by the entity receiving the donated funds.
3) Regulations should specify that any state electing to use donated funds as state match must provide assurances that CCDBG federal and matching funds will be allocated in an equitable manner that does not result in disproportionate allocation of resources to communities or entities based on the collection of donated funds.
4) States should be required to describe in their state CCDBG plans how the allocation of funds for services and quality activities between areas of the state is reasonable and appropriate in light of the identified needs of the respective areas of the state.
5) The Child Care Bureau should collect and publish information on the amount of donated funds that are used to help states draw down the federal matching funds and should ensure that program reviews include components designed to monitor compliance with federal requirements applicable to donated funds.

II. Increase the Amount of Public Pre-kindergarten Expenditures that May Be Used for Match to 30 Percent of the Amount of Expenditures Needed

States are currently allowed to use state pre-k funds for up to 20 percent of the amount of expenditures needed to pull down the full federal match. The original intent of this regulation was to enhance coordination between state pre-k programs and the rest of the state's child care and early education system. In addition, the goal was to include pre-k programs as part of the overall system of care and education while ensuring that states continue to maintain their level of support for the system of child care and early education for all eligible children. At the same time, HHS was mindful of potential risks in allowing for extensive counting of pre-k funds as state match without safeguards:

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

States to more closely link their pre-k and child care systems. This could result in a coordinated system that would better meet the needs of working families for full-day/full-year services that prepare children to enter school ready to learn. We struggled with these issues and considered various alternative approaches to counting pre-k expenditures in the CCDBG. [63 Fed. Reg. 39965-66 (July 24, 1998).]

Balancing these concerns, the 1998 regulations provided that:

- No more than 20 percent of funds counting toward a state's match and no more than 20 percent of funds counting toward maintenance of effort could be pre-k funds.
- If a state intended to use pre-k funds for more than 10 percent of either match or maintenance of effort funding, the state must describe how it would coordinate pre-k and child care services to expand the availability of child care.
- If a state uses pre-k funds for maintenance of effort, the state cannot reduce its level of effort in full-day/full-year child care services.
- If state uses state pre-k funds for match, the state must describe the efforts it will undertake to ensure that pre-k programs meet the needs of working families.

[45 C.F.R §98.53(h); 63 Fed. Reg. 39966 (July 24, 1998).]

Throughout the last decade, states have been expanding their pre-kindergarten programs to provide three- and four-year-old children with early learning experiences before kindergarten. In 2002-2003, these expenditures reached $2.54 billion, according to the National Institute for Early Education Research (NIEER). NIEER also found that vast disparities exist in quality, access, and resources across the states and that the majority of states do not provide full-day, full-year services that low-income working families need.[1]

HHS states that the proposed change to increase the amount of public pre-kindergarten expenditures that may be used for match to 30 percent of the state's matching expenditures is designed to help states improve the coordination between their state pre-k programs and the child care subsidy program. However, it is unclear how increasing the amount of state pre-k dollars that can be used to meet the match requirement will in any way improve coordination, and the proposed rule may make it easier for states to supplant current investments.

Our concerns with the proposed change fall into the following categories:

- There is no protection in the proposed regulation against the use of pre-k funds to supplant current state expenditures counting toward state mach. Given the already-existing state funding for pre-k, if an increased amount of pre-k dollars can be counted toward match without protection against supplantation, states could simply count these pre-k dollars as match and make a corresponding reduction in state child care funding. While the risk of supplantation would be troubling under any circumstances, it is

[1] National Institute for Early Education Research. (2004). *The State of Preschool: 2004 State Preschool Yearbook*. Rutgers, New Jersey: Rutgers, The State University of New Jersey.

particularly of concern at a time when at least 22 states continue to face budget shortfalls,[2] which have led to cutbacks in state resources for child care subsidies. The GAO found that at least 23 states have limited child care assistance for some families since 2001,[3] and the National Women's Law Center found that states have limited eligibility, expanded wait lists, increased parent fees, and failed to pay adequate rates to providers.[4] The Child Care Bureau has not yet published child care caseload data for all states for 2002, but did post data for 11 states (in connection with a pilot study on payments). When we compared the 2002 caseload data for these 11 states with published data for 2001, we found that seven of the 11 had decreased the number of children served between 2001 and 2002.[5] It is clear that there are not enough resources available to meet the needs of eligible families, yet this proposed rule may make it easier for states to supplant current expenditures and eventually reduce the total state funds available for the child care subsidy program.

- The CCDBG helps families find full-day, full-year child care arrangements in order to help parents with children from birth to age 13 find and retain employment. Many pre-k programs are less than full-day or full-year and are not required to help parents find these services.

The proposed rule notes that "states find the current regulations too restrictive when States seek to encourage coordination among early childhood education programs or to implement the President's Good Start, Grow Smart initiative." It is unclear both why this is true, and how the proposed rule will allow states any greater policy flexibility than they currently have. This measure also would not address the major underlying issue that states need more federal funding to achieve the stated goals of Good Start, Grow Smart and expansion of pre-kindergarten in coordination with child care. Over the past year, CLASP has surveyed state child care agencies and pre-k administrators to seek a better understanding of issues arising in efforts to integrate child care into state pre-k programs, and specifically in putting together state pre-kindergarten funding with the federal CCDBG dollars. During this process, we found that the most common emerging model for pre-k includes child care providers as pre-k providers, and a wide variety of policy issues arise around fostering coordination between pre-kindergarten and child care programs.[6] For example, states find it difficult to navigate the CCDBG guidelines and requirements for verifying family income and limitations on eligibility based on family income, parent fee requirements, and payment rates when combining these funds with a state-funded, free

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[2] Johnson, N. (2004). *State Fiscal Crisis Lingers: Cuts Still Loom.* Washington, DC: Center on Budget and Policy Priorities.

[3] General Accounting Office. (May 2003). *Recent State Policy Changes Affecting the Availability of Assistance for Low-Income Families.* Washington, DC: U.S. General Accounting Office.

[4] Schulman, K., & Blank, H. (September 2004). *Child Care Assistance Policies 2001-2004: Families Struggling to Move Forward, States Going Backward.* Washington, DC: National Women's Law Center.

[5] Improper Payments in the Child Care Program Pilot Project. (September 2004). "Summary of the Diversity of States Partnering with the Child Care Bureau." Downloaded from http://www.acf.hhs.gov/programs/ccb/ta/ipi/state_diversity.htm.

[6] Schumacher, R., Ewen, D., Hart, K., & Lombardi, J. (forthcoming in 2005). *All Together Now: State Experiences in Using Community-Based Child Care to Provide Pre-Kindergarten*. Washington, DC: Center for Law and Social Policy.

early education program that is available to all children. Most states have insufficient funding available to enhance program quality and meet high standards in their states, and they see this as a major barrier to better coordination of child care with pre-kindergarten. These issues stand in the way of ensuring access to high-quality early education for low-income working families who may need full-day, full-year services.

There is clearly an important role for the Child Care Bureau in providing technical assistance to states to assist in coordination, and there are some areas for which review of existing regulations and policies could assist in promoting coordination. However, simply increasing the share of pre-k expenditures that counts as match without any safeguards to ensure that states maintain their current child care investments does not promote coordination; it just allows states to withdraw existing funding from child care.

For the reasons noted above, we do not recommend raising the share of pre-k funds that can count as state match unless the modification is accompanied by safeguards to ensure that it does not result in supplantation or diminution of child care services. Without these safeguards, the risk of supplantation and other negative outcomes would seem to outweigh any potential benefits of the new rule. We recommend the following additions to the proposed rule:

1) Include language specifying that any state using pre-k expenditures for more than 20 percent of its matching funds must provide assurances that the state will not supplant existing services and must demonstrate that the increase in funds has not resulted in a decline in state expenditures.
2) Include a requirement that states demonstrate in their state plan how they are using any increase to both improve coordination and to increase the availability of services for low-income working families.

In addition, if this rule is enacted, we recommend that the Bureau create a new project to identify state needs for technical assistance in order to better coordinate pre-kindergarten and child care programs.

We greatly appreciate the opportunity to comment on these proposed regulations.