Proposed Child Care and Development Fund (CCDF) Regulations Governing Child Care Worker Background Checks (Docket No. ACF-2015-0011)

Joint Comments Submitted by

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Joint Comments to the Proposed CCDF Regulations
Governing Child Care Worker Background Checks
(Docket No. ACF-2015-0011)

I. Summary

We write to recommend improvements to the proposed CCDF regulations implementing the Child Care and Development Block Grant (CCDBG) Act of 2014, specifically those regulations addressing child care worker criminal background checks to be codified at 45 C.F.R. Section 98.43. (80 Fed. Reg. 80466, 80503, dated December 24, 2015).

Our organizations seek to promote and protect the basic rights of all workers, including their civil, labor, and privacy rights, and the rights of those who are unfairly denied employment due to an arrest or conviction record. We also share a strong commitment to preserving the safety and security of children who receive care from CCDF-regulated providers and ensuring robust access to quality and affordable child care, especially in low-income communities.

As described below, we believe the proposed CCDF regulations should provide increased protections against unfair and arbitrary hiring decisions on the basis of arrest or conviction records. While we strongly support the preamble and regulatory language that references the key federal civil rights standards regulating criminal background checks for employment, we recommend a series of improvements to the regulatory language to more effectively prevent discrimination against people of color disproportionately impacted by the criminal justice system and improve the accuracy and reliability of the background check process.

II. The Collateral Consequences of Child Care Background Checks on Women and Communities of Color

Our position on the proposed CCDF regulations governing criminal background checks of child care workers is informed by the growing consensus that decades of over-criminalization—fueled by the “War on Drugs”—has taken a heavy toll on the job prospects of millions of U.S. workers, especially in communities of color. Indeed, nearly one in three Americans (over 70 million adults) now has an arrest or conviction record that can show up on a routine
criminal background check for employment. In addition, one in four women (44 percent of African American women) has an incarcerated family member, thus undermining the health and well-being of entire families and their communities.

President Obama has led this national conversation about mass incarceration, and has been joined by elected officials from across the political spectrum who have called for serious reforms to eliminate these racial disparities and reduce the collateral consequences of a criminal record. In 2011, the president prioritized executive agency reform by convening the Federal Interagency Reentry Council (Reentry Council), which is charged with “remov[ing] federal barriers to successful reentry so that motivated individuals—who have served their time and paid their debts—are able to compete for jobs, attain stable housing, support their children and families, and contribute to their communities.”

Since the Reentry Council was established, the Obama Administration has acted aggressively on multiple fronts to break down federal barriers to employment of people with records. Most importantly, in 2012, the Equal Employment Opportunity Commission (EEOC) updated its guidance that strictly regulates criminal background checks for employment. The guidance directs private and public employers to refrain from applying blanket restrictions against hiring people with records. Instead, complying with Title VII of the Civil Rights Act of 1964 (Title VII) requires employers to take into account the age and nature of the offense and the relationship of the offense to specific job at issue, and to provide for an “individualized assessment” that evaluates evidence of rehabilitation among other factors.

The significant “disparate impact” of criminal background checks on communities of color triggers special scrutiny under Title VII. According to the EEOC, background checks result in a racially disparate impact because “African Americans and Hispanics are arrested in numbers disproportionate to their representation in the general population. In 2010, 28% of all arrests were of African Americans, even though African Americans only comprised approximately 14% of the general population.” Background checks that screen for drug offenses have an

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1 National Employment Law Project, “Advancing a Federal Fair Chance Hiring Agenda” (February 2015), at page 1.
even more pronounced disparate impact on workers of color, even though research shows that whites and persons of color use drugs at the same rate.\(^6\)

The diverse profile of the child care workforce justifies close scrutiny of the proposed Administration for Children and Families (ACF) regulations. Sixteen percent of child care workers are African American (compared to 11 percent of the total U.S. workforce) and another 22 percent are Latino (compared to 16 percent of the total U.S. workforce).\(^7\) These workers typically endure long hours while earning especially low wages (averaging just $21,490 annually), and qualifying for few, if any, benefits.\(^8\) Given these challenges, child care workers are especially likely to reside and work in low-income communities that are most affected by over-criminalization and mass incarceration.

The child care workforce is also overwhelmingly represented by women (96 percent), and women now constitute the fastest growing segment of the correctional population.\(^9\) Arrest data from 2003 to 2012 indicates that arrests of women in the United States increased by 3 percent, while the rate declined by 13 percent for men.\(^10\) The rise in arrest rates has corresponded with a major increase in incarceration rates for women as well (exceeding the rate of men by 1.5 times, from 1980 to 2010),\(^11\) and the criminalization of African American girls in schools.\(^12\) However, women with an arrest or conviction record pose a low risk to public safety because they tend to enter the criminal justice system for non-violent crimes that are often drug-related or driven by poverty.\(^13\) In fact, women have markedly

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\(^6\) According to the EEOC guidance (at page 18): “In 2008, Hispanics were arrested for federal drug charges at a rate of approximately three times their proportion of the general population. Moreover, African Americans and Hispanics were more likely than Whites to be arrested, convicted, or sentenced for drug offenses even though their rate of drug use is similar to the rate of drug use for Whites.”


\(^10\) Federal Bureau of Investigation, Crime in the United States 2012, Table 33.


\(^13\) Supra note 9, “Ten Truths that Matter When Working With Justice-Involved Women,” at page 1; American Civil Liberties Union, “Caught in the Net: The Impact of Drug Policies on Women and
lower rates of recidivism than men.\textsuperscript{14}

Despite the fact that most women with records present low risks to public safety, they also have the hardest time making their way back into the labor force after a period of incarceration, which significantly undermines their ability to raise thriving families in healthy homes. An Urban Institute study of several states found that 61 percent of men were working after serving a prison sentence, compared to 37 percent of women.\textsuperscript{15} As an analysis by Community Legal Services of Philadelphia concluded, a major reason for the discrepancy is that women are disproportionately employed in retail and the service fields, such as care-giving, which tend to more extensively screen for criminal history information.\textsuperscript{16}

Also of special relevance to the proposed CCDF regulations, the U.S. Attorney General sent a letter to all state attorneys general urging them to “carefully tailor laws and policies to genuine risks while reducing or eliminating those that impede successful reentry without community benefit.”\textsuperscript{17} The Attorney General similarly called on all federal agencies participating in the Reentry Council to “review their regulations with an eye toward how and where each agency could eradicate or mitigate certain federally-imposed collateral consequences without compromising public safety.”\textsuperscript{18}

As an active member of the Reentry Council, the U.S. Department of Health and Human Services (HHS) has taken its responsibilities seriously to ensure that people with records are able to lead stable and productive lives benefiting their families and building healthier communities. For example, HHS clarified the limits of the “drug felony ban” on TANF assistance, funded a fatherhood initiative specifically targeting the formerly incarcerated, and has actively promoted access to health care for the formerly incarcerated under the Affordable Care Act (ACA). Focusing on employment specifically, HHS recently funded a national initiative to help remove barriers to health care jobs for people with records.

Here too, we urge ACF to exercise its special responsibility to reduce the collateral consequences of a criminal record by ensuring that the proposed CCDF regulations are narrowly tailored to address the safety and security concerns of children receiving CCDF-regulated child care.

\textsuperscript{14} Id.
\textsuperscript{16} Supra note 9, “Young Women of Color with Criminal Records.”
\textsuperscript{18} Federal Interagency Reentry Council, “Collateral Consequences” (August 2015).
III. Comments

As described in more detail below, we urge ACF to take the following steps limiting the collateral consequences of the proposed CCDF regulations:

- Consistent with the narrow language of the CCDBG Act of 2014, ACF should not extend background checks to individuals age 18 or older who reside in a non-relative, license-exempt CCDF provider’s home. (Section 98.43, page 80504, second column).
- In order to limit consideration of inaccurate conviction history information that disproportionately penalizes people of color, ACF should eliminate the preamble language urging states to require applicants to “self disclose” their conviction records. (Section 98.43, page 80506, column 3).
- Consistent with the preamble language (Section 98.43, page 80506, column 3), we urge ACF to adopt regulatory language incorporating the EEOC guidelines into the provision allowing the states to impose additional disqualifying offenses. (Section 98.43(h)(1), page 80573, column 3).
- Given the discriminatory impact of drug offenses on women of color, ACF should specifically reference the EEOC guidelines in the regulations authorizing the state to waive disqualifying drug offenses. (Section 98.43(e)(4), page 80573, column 3).
- Given the reliance on FBI background checks, which routinely contain faulty information, ACF should adopt more protections governing appeals by workers challenging inaccurate background checks. (Section 98.43(e), page 80573, columns 2 and 3).

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1. Consistent with the narrow language of the CCDBG Act of 2014, ACF should not extend background checks to individuals age 18 or older who reside in a non-relative, license-exempt CCDF provider’s home. (Section 98.43, page 80504, second column).

ACF has proposed to vastly expand the CCDF background check regime by requiring comprehensive background checks of everyone age 18 or older who resides with license-exempt providers caring for non-relatives — also known as “friend and neighbor” child care providers. These providers constitute a sizable portion (over 13 percent) of all participants in the CCDF program. They are also a special source of care for low-income families because they offer relatively low-cost services with added flexibility to accommodate shift, evening, and other non-standard work arrangements.
We urge ACF to abandon the proposed expansion of coverage for several reasons. First, the CCDBG Act of 2014 does not mention, much less require, background checks for individuals age 18 or older residing in a non-relative, license-exempt CCDF provider’s home. The Senate report language on criminal background checks similarly clarifies that the legislation covers child care providers and their employees—not the broad, additional category of individuals covered by the proposed regulations.

Second, expanding background checks to adult household members would have a disparate impact on low-income communities and communities of color, which have higher than average arrest and conviction rates. Based on the experience of our organizations serving these communities, it is clear that they constitute a significant proportion of license-exempt child care providers and are more likely to have multiple generations living in the same house.

Third, by proposing to extend costly background checks to all adults residing in the homes of these providers, the regulations will seriously jeopardize the livelihood of large numbers of child care workers and undermine access to an invaluable source of care for low-income families. Indeed, if they are forced out of the program because of this requirement, the regulations may have the perverse effect of driving license-exempt providers underground, resulting in totally unregulated care, which is not in the best interest of children.

Finally, the proposed regulations far exceed current state background check restrictions, thus they would impose an added and costly burden on states already struggling to implement the new CCDF background check regime. Only 12 states require license-exempt providers to undergo comprehensive background checks, as defined by Section 98.43(b) of the CCDBG Act of 2014. In all likelihood, even fewer states extend this requirement to those individuals age 18 or older residing in a non-relative, license-exempt provider’s home.

Accordingly, in order to address our concern, we urge HHS to remove the reference to “[a]ny individual residing in a family child care home who is age 18 or older.” (Section 98.43(a)(2)(ii)(C), page 80572, third column).

2. In order to limit consideration of inaccurate conviction history information that disproportionately penalizes people of color, ACF should eliminate the preamble language urging states to require applicants to “self disclose” their conviction records. (Section 98.43, page 80506, column 3).
For the reasons described below, we recommend that ACF redact the preamble language that encourages self-disclosure of an individual’s record.

First, our organizations have found that self-disclosure of one’s criminal history routinely generates inaccurate and irrelevant information on the part of the applicant, which unnecessarily undermines the integrity of the background check process. Because they have had more contact with the criminal justice system, people of color will surely be most disadvantaged by the unnecessary information produced by a self-disclosure policy.

Second, rather than “avoid unnecessary checks on individuals who disclose information that would preclude them from passing a background check” (page 80506, column 3), as stated in the preamble, the information will divert limited state resources in order to validate a multitude of minor records that would not automatically disqualify workers from employment.

In addition, self-disclosure often has a chilling effect on individuals with a conviction history that is completely unrelated to their ability to responsibly care for children. Thus, the policy will discourage qualified, prospective staff members from seeking child care employment.

Finally, the policy runs counter to the rationale of “banning the box” on employment applications, which was recently endorsed by President Obama as applied to the federal hiring process (and has been adopted by 20 states and about 150 cities and counties across the country). Rather than erecting unnecessary barriers at the start of the application process, ban the box aims to encourage qualified applicants with records to seek employment while still allowing for a criminal background check to take place later in the hiring process.

3. **Consistent with the preamble language** (Section 98.43, page 80506, column 3), we urge ACF to adopt regulatory language incorporating the EEOC guidelines into the provision allowing the states to impose additional disqualifying offenses. (Section 98.43(h), page 80573, column 3).

We strongly support the position of ACF stated in the preamble to the regulations—that the states adopting additional disqualifying offenses should “ensure that a robust waiver and appeals process is in place” and that the waiver and appeal process conforms with the EEOC criminal records guidelines. (Page 80506, column 2). In order to guarantee that these critical protections are, in fact, adopted by the states, we urge ACF to codify the EEOC standards into the regulations set forth in Section 98.43(h).
Strong waiver and appeal protections have proven invaluable in reducing discrimination against people of color required to navigate occupational licensing restrictions. For example, the Transportation Security Administration (TSA) has adopted a robust waiver and appeal system as applied to the federal background checks required of the nation’s port workers. The National Employment Law Project (NELP) conducted a detailed analysis of the TSA port worker program, concluding that African Americans were three times more likely to benefit from the TSA appeal and waiver protections when compared with workers of other races.

As distinguished from an “appeal,” which allows an individual to challenge an inaccurate record, a robust “waiver” process allows the applicant a meaningful opportunity to present evidence of rehabilitation and other mitigating factors. For example, TSA’s waiver regulations require the agency to consider the circumstances of the offense, restitution made by the individual, mitigating remedies, and “other factors that indicate the applicant does not pose a security threat.”

Similarly, Section 6201(a)(4)(B)(iv) of the ACA, which regulates background checks of long-term care workers, provides helpful language mandating an “independent” review process. Specifically, the statute provides that states receiving federal funding to implement the background checks “shall include consideration of the passage of time, extenuating circumstances, demonstration of rehabilitation, and relevancy of the particular disqualifying information with respect to the current employment of the individual.”

This “individualized assessment” of mitigating factors is a critical component of a fair background check process, as detailed in the EEOC guidance. It simply provides an opportunity for a prospective hire to explain why she is qualified for the position and does not pose a risk to child safety and well-being, even if she may have an otherwise disqualifying offense on her record. Individualized assessments are also particularly important for victims of domestic violence, who are often charged and convicted of a broad range of offenses, many of which are directly related to the abuse they experience.

Accordingly, we urge ACF to incorporate the language of the EEOC guidance into Section 98.43(h)(1) of the CCDF regulations, thus mandating that

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19 49 C.F.R. Section 1572.7; 49 C.F.R. Section 1515.5.
20 National Employment Law Project, “A Scorecard on the Post-9/11 Port Worker Background Checks: Model Worker Protections Provide a Lifeline to People of Color, While Major TSA Delays Leave Thousands Jobless During the Recession” (July 2009), at page 4.
21 49 C.F.R. Section 1572.7.
22 Specifically, the relevant section of the EEOC guidance (at page 18) states that:
the states take into account the individual’s work history, evidence of rehabilitation, and other compelling factors that mitigate against disqualifying the individual from child care employment based on a conviction record.

4. **Given the discriminatory impact of drug offenses on women of color, ACF should specifically reference the EEOC guidelines in the regulations authorizing the state to waive disqualifying drug offenses. (Section 98.43(e)(4), page 80573, column 3).**

The failed “War on Drugs” is responsible for massive numbers of people in the United States who struggle to find work and support their families despite the debilitating stigma of a criminal record. Thus, President Obama and elected

| Individualized assessment generally means that an employer informs the individual that he may be excluded because of past criminal conduct; provides an opportunity to the individual to demonstrate that the exclusion does not properly apply to him; and considers whether the individual’s additional information shows that the policy as applied is not job related and consistent with business necessity. The individual’s showing may include information that he was not correctly identified in the criminal record, or that the record is otherwise inaccurate. Other relevant individualized evidence includes, for example:

- The facts or circumstances surrounding the offense or conduct;
- The number of offenses for which the individual was convicted;
- Older age at the time of conviction, or release from prison;
- Evidence that the individual performed the same type of work, post conviction, with the same or a different employer, with no known incidents of criminal conduct;
- The length and consistency of employment history before and after the offense or conduct;
- Rehabilitation efforts, e.g., education/training;
- Employment or character references and any other information regarding fitness for the particular position; and
- Whether the individual is bonded under a federal, state, or local bonding program.

If the individual does not respond to the employer’s attempt to gather additional information about his background, the employer may make its employment decision without the information.
officials from across the political spectrum have taken significant steps to reduce the number of people serving time for drug offenses.\textsuperscript{23}

As described in Section II of these comments, communities of color, and women of color in particular, have suffered immeasurably as a result of the collateral consequences of an arrest or conviction for a drug offense. Indeed, women now represent the fastest growing segment of the criminal justice system, due largely to drug offenses, not violent crime. In fact, 24 percent of all incarcerated women were convicted of drug offenses, compared to just 16 percent of men.\textsuperscript{24} As the ACLU concluded in their analysis of the issue, “[w]omen of all races use drugs at approximately the same rate, but women of color are arrested and imprisoned at much higher rates.”\textsuperscript{25}

Taking these concerns into account, the CCDBG Act of 2014 adopted special provisions that regulate the consideration of drug offenses as part of the background check process. Specifically, the statute limits the disqualification to felony drug offenses committed during the preceding five years. In contrast to the other mandatory felony disqualifications, the statute also allows the states to waive a drug-related disqualification under a process that “shall be consistent with title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.).”

The proposed CCDF regulations essentially restate the relevant language of the CCDBG Act of 2014, without providing any further guidance to the states on this issue of critical significance to communities of color hardest hit by excessive drug enforcement measures. To more effectively elevate these considerable statutory protections, we urge ACF to emphasize in the preamble that the states should adopt robust waivers procedure as applied to disqualifying drug offenses. In addition, as proposed above in Recommendation #3, ACF should specifically incorporate the EEOC guidelines in the regulations (Section 98.43(e)(4)), which would provide specific direction to the states beyond simply referencing Title VII.

\textsuperscript{23} The president, for instance, has commuted the sentences of numerous people incarcerated for drug convictions, exclaiming the need to “be smart on crime, more cost effective, more just, more proportionate.” Julie Hirschfeld Davis & Peter Baker, In ‘Fairness,’ Obama Commutes Sentences for 95, Mostly Drug Offenders, N.Y. TIMES, Dec. 18, 2015, http://www.nytimes.com/2015/12/19/us/politics/obama-commutes-sentences-of-95-prisoners-and-pardons-two.html?_r=0

\textsuperscript{24} U.S. Department of Justice, Bureau of Justice Statistics, “Prisoners in 2014” (September 2015), at Table 11.

\textsuperscript{25} Supra note 13, “Caught in the Net,” at page 17.
5. Given the reliance on FBI background checks, which routinely contain faulty information, ACF should adopt more protections governing appeals by workers challenging inaccurate background checks. (Section 98.43(e), page 80573, columns 2 and 3).

Both the CCDBG Act of 2014 and the proposed regulations contain helpful standards requiring that the prospective child care staff member receive proper notice of the background check determination and information related to each disqualifying offense in order to prepare an appeal.

However, the regulations fail to include adequate standards governing appeals that seek to demonstrate that the background check information relied upon was inaccurate or incomplete. Given the CCDF program’s reliance on the FBI background check system, which routinely generate faulty information, ACF should adopt more robust appeals rights to protect those workers – mostly workers of color – who, through no fault of their own, often have inaccurate records in the federal and state criminal history information systems.

The statute and the CCDF regulations require extensive background checks of multiple federal and state databases, which puts a premium on the need for strong appeal rights. The failings of FBI background check system in particular have been well documented. According to a U.S. Attorney General report\(^\text{26}\) and analyses by the National Employment Law Project (NELP),\(^\text{27}\) roughly half of the FBI records fail to indicate the final disposition associated with an arrest. These gaps in the FBI system create an unfair burden on all workers to produce the missing information. However, the FBI records especially penalize workers of color who routinely have an arrest on their record that did not lead to disposition for a disqualifying offenses. In fact, one-third of felony arrests do not result in a conviction, and many others are reduced to misdemeanors.\(^\text{28}\)

As detailed in NELP’s report evaluating TSA’s port worker background check program, clear appeal rights to challenge inaccurate FBI records proved indispensable to the port workers and to the integrity of the background check regime.\(^\text{29}\) NELP collected demographic data on roughly 500 workers who navigated the TSA appeal and waiver process, and found that over 40 percent of the TSA appeals were filed by African Americans, which represents three times


\(^{27}\) National Employment Law Project, “Wanted: Accurate FBI Background Checks for Employment” (July 2013), at pages 9-10; National Employment Law Project, “Faulty FBI Background Checks for Employment: Correcting FBI Records is Key to Criminal Justice Reform (December 2015).

\(^{28}\) Id.

\(^{29}\) \textit{Supra} note 20, “A Scorecard on the Post-9/11 Port Worker Background Checks.”
their share of the port worker population. And Latinos represented about 30 percent of the appeals challenging inaccurate records, which was roughly twice their share of the port worker population. According to the latest TSA figures, workers were successful in 97 percent of the nearly 60,000 TSA cases challenging inaccurate FBI records, which convincingly attests to the vast magnitude of the problem and to the critical need for strong appeal procedures.

The proposed CCDF regulations (Section 98.43(e)(3), page 80573, column 3) fail to include any specific guidelines regulating the appeal processes established by the states. Rather, they simply require that a state “process” be established to challenge incomplete and inaccurate background reports, that notice be provided to the individual indicating the opportunity exists to file an appeal, and that the process be completed in a “timely manner.” Absent more specific appeal standards regulating the states, large numbers of qualified child care workers without disqualifying records will fall through the cracks of the appeals process.

Thus, the following key features of a fair and effective appeal process should be incorporated into the ACF regulations:

1. In response to an appeal filed by a worker challenging the accuracy of the background check report, the state should immediately make the background check report available in order for the worker to validate the state’s information and properly prepare an appeal.
2. The burden should be on the state to make a genuine effort to track down missing disposition information related to disqualifying offenses, not on the worker. Often, the worker is not in a position to locate information on an arrest that may have occurred in another state or may no longer be readily accessible in court or law enforcement systems due to the age of the offense.
3. The worker should be provided at least 60 days to prepare the appeal, and a longer period of time (up to 120 days) if the state requires the individual to produce official documentation of a record. The state should also allow for a “good cause” extension of time to file the appeal or supporting material.
4. Once the state has received the appeal information from the worker, it should issue a written decision within a specific period of time (not to exceed 30 days).
5. In the case of a negative determination, the decision should indicate the state’s efforts to verify the accuracy of the information challenged by the worker. The decision should also indicate any additional appeal rights available to the worker, as well as information on how the individual can correct the federal or state records at issue in the case.
6. The state should collect and periodically report data on the number of appeals filed, the outcome of the appeals, and the state’s decision processing times.

Elements of these key protections have been adopted by various federal and state laws regulating occupational licensing and certification.30

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Thank you for your consideration of our comments responding to the needs of the growing numbers of child care workers who work hard to overcome their criminal records and the stigma that prevents them from realizing their full potential in the workplace and as contributing members of society.

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30 For example, California law requires all licensing boards and state agencies to furnish the individual a copy of the federal and state background check report if it was the basis for an adverse employment, licensing or certification decision. Cal. Penal Code, Section 11105(t). California law also requires the state’s central criminal records system to make a “genuine effort” to determine the disposition of an arrest if the record is distributed to a licensing board of state agency making an employment, licensing or certification decision. Cal. Penal Code, Section 11105(l)(2)(c). In addition, the TSA regulations implementing the port worker background checks include helpful timeframes regulating the appeal process. 45 C.F.R. Section 1515.5.