



Santa Clara Law Review

Volume 25 | Number 2

Article 5

1-1-1985

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Recommended Citation

Diane Redleaf, *Illinois Child-Care Disregard Litigation: Modest Consolation for the Working Poor*, 25 SANTA CLARA L. REV. 375 (1985).
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ILLINOIS CHILD-CARE DISREGARD LITIGATION: MODEST CONSOLATION FOR THE WORKING POOR*

Diane Redleaf**

I. INTRODUCTION

One of the largest sources of governmental funding for child care is the Aid to Families with Dependent Children (AFDC) program. The Social Security Act, which governs the AFDC program, requires that every state allow working AFDC applicants and recipients a deduction for child-care expenses in determining the amount of the family's cash AFDC grant.¹ By means of this deduction, state welfare agencies in effect subsidize the child-care costs of working AFDC recipients.

The statutory requirement for the AFDC program's child-care deduction is straightforward. Nonetheless, some states have circumvented the statutory mandate by paying illegally low child-care subsidies or simply by ignoring the law.² Litigation in several states has been necessary to compel compliance with the Social Security Act.³ This article reviews two major federal suits in Illinois concerning the AFDC child-care deduction.⁴ The article also discusses some of the policy questions raised by the use of the deduction and points out the limitations of the deduction as a child-care funding mechanism.

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* The litigation discussed in this article was conducted by the Women's Law Project of the Legal Assistance Foundation of Chicago. Aviva Futorian, the Director of the Women's Law Project, was lead counsel in the *Simpson* suit. See *infra* note 4. The author, Diane Redleaf, then a staff attorney in the Women's Law Project, was lead counsel in the *Berberena* suit. See *infra* note 4.

Portions of this article originally appeared in the plaintiffs' briefs which are on file at the Santa Clara Law Review Office.

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1. The Social Security Act, 42 U.S.C. §§ 602(a)(7), 602(a)(8)(A) (1982).
2. Suits have been brought throughout the nation to challenge illegal AFDC-related child-care deduction practices. See *infra* notes 3 and 21.
3. See *Riemer v. Hooker*, 392 F. Supp. 145 (D.N.H. 1975); *Banas v. Dempsey*, 742 F.2d 277 (6th Cir. 1984); *Lowry v. Obledo*, 111 Cal. App. 3d 14, 169 Cal. Rptr. 732 (1980).
4. *Simpson v. Miller*, 535 F. Supp. 1041 (N.D. Ill. 1982); *Berberena v. Miller*, No. 81-5776, slip op. (N.D. Ill. Oct. 15, 1981).

II. THE AFDC PROGRAM'S CHILD CARE MANDATE

A. *AFDC Eligibility and Grant Amounts—General Requirements*

AFDC is the largest public assistance program in the country. Nationwide in 1982, approximately five and a half million families, including 6,899,000 children received AFDC. The federal government allocated nearly \$8.16 billion in federal dollars for AFDC benefits in 1985 to support eligible dependent children and their caretaker relatives.⁵

The Social Security Act provides that AFDC eligibility is based on two separate types of considerations: "categorical eligibility" and "financial eligibility." Categorical eligibility focuses on whether the household includes a child "deprived of parental support" (and thus dependent) who is "living with a specified relative."⁶ Financial eligibility focuses on whether the household's income, after all allowable deductions, falls below the state standard of need and payment level.⁷

If both types of eligibility considerations are satisfied, the child, relative or family will receive cash assistance, usually in the form of a monthly check issued by the state welfare department.⁸ In addition, AFDC recipients are automatically entitled to Medicaid coverage.⁹ For many people, this Medicaid coverage is more valuable than the small cash grant provided under the AFDC program.

The categorical and financial eligibility factors affect the availability of the child-care deduction or "disregard." In this context, "disregard" and "deduction" are synonymous; disregarded income is income which is subtracted from gross income, and thus it is not counted—instead, it is "disregarded." The child-care disregard is available only for specified relatives and children or persons living with them. It is unavailable to the working poor whose income, even with all allowable deductions, remains higher than the state's AFDC payment level.

5. CHILDREN'S DEFENSE FUND, CHILDREN'S DEFENSE BUDGET 1985. The Children's Defense Fund has documented dramatic cuts in social programs, including AFDC, since 1981. Statistics concerning the number of AFDC families are from child support caseload statistics. U.S. DEP'T OF HEALTH AND HUMAN SERVS., CHILD SUPPORT ENFORCEMENT, 7TH ANNUAL REPORT TO CONGRESS FOR THE PERIOD ENDING SEPT. 30, 1982 62 (1982).

6. 42 U.S.C. § 606 (1982); 45 C.F.R. § 233.10(b)(ii) (1984).

7. 42 U.S.C. §§ 602(a)(7), (a)(8)(1982); 45 C.F.R. § 233.20 (1984).

8. In some cases, the state will issue "protective payments" or vendor payments to persons other than the AFDC recipient. 42 U.S.C. § 606(b)(2) (1982). The Dep't of Health and Human Services recently proposed a requirement that vendor payments for the rent of AFDC recipients be issued to landlords instead of being included as a portion of the AFDC grant. 45 C.F.R. § 234.60 (1984).

9. 42 U.S.C. § 1396(a)(10)(A) (1982).

The AFDC program allows recipients to work; indeed, in 1972, participation in work programs became mandatory for all nonexempt adults.¹⁰ In addition, the AFDC program requires applicants and recipients to report all income, including income from employment, to the state public assistance agency.¹¹ This income is then counted in the amount of the family's "available income," which in turn is counted against the AFDC payment level to determine the amount of a particular family's grant.

To calculate available income, certain deductions or disregards must first be applied to gross income. Prior to October 1, 1981, recipients were entitled to deduct one-third of their gross income, plus \$30. This \$30 plus one-third deduction is known as the "work-incentive disregard." At that time, applicants could also deduct all reasonable work expenses, including child care.¹² Effective October 1, 1981, however, the Omnibus Budget Reconciliation Act (OBRA) made the work-incentive disregard available for only four months, changed the order in which deductions were taken, capped work expenses at \$75, and created a separate work-related child-care deduction of \$160 per child per month.¹³ The OBRA also allowed states to set lower child-care deduction caps for part-time workers.¹⁴ In October 1984, the Deficit Reduction Act (DRA) extended the \$30 portion of the work incentive disregard for an additional eight months. It also eliminated the states' option to set lower caps for the work expenses of part-time workers, but did not change the option to set lower child-care caps.¹⁵

The effect of the OBRA and DRA changes is to discourage AFDC recipients from working because they no longer recover their full costs of employment. Thus, a recipient with gross income of \$600, child-care costs for one child of \$200 and \$80 for another child, plus \$100 in additional work expenses would have received the \$220 work-incentive disregard and \$380 in work-expense deductions prior to the OBRA. This recipient would have had *zero* available income and thus would have been eligible for a full AFDC grant. After OBRA, however, the same recipient would have only \$340 in

10. 42 U.S.C. § 602(b) (1982).

11. 42 U.S.C. § 602(a)(14)(A) (1982); 45 C.F.R. § 233.28 (1984).

12. 42 U.S.C. § 602(a)(7) (1982).

13. Omnibus Budget Reconciliation Act, Pub. L. No. 97-35, 95 Stat. 357-933 (1981) (codified at 42 U.S.C. § 602(a)(8)(iii) (West Supp. 1981)).

14. Omnibus Budget Reconciliation Act, 42 U.S.C. § 602(a)(8)(A)(iii) (1982); 45 C.F.R. § 233.20(II)(i)(C) (1984).

15. Deficit Reduction Act of 1984, Pub. L. No. 98-369, §§ 2622-23, 98 Stat. 1134 (1984) (codified as amended at 42 U.S.C. §602 (Supp. 1985)).

work expense and child-care deductions, and only a \$103 work incentive disregard for only four months. This recipient's AFDC grant for the first four months after the OBRA would be \$157 less than the full grant; and after four months, it would be \$260 less. If a state's particular child-care deduction cap would pay this recipient \$400 if she stopped working, but only \$140 if she continued to work, she might well wonder if it pays to keep her job.

B. *Work Expense Deductions Prior to October, 1981: General Principles and Application to Child Care*

Prior to October 1, 1981, the Social Security Act required that "in determining need [for AFDC, the state welfare agency shall] take into consideration . . . any expenses reasonably attributable to the earning of such income."¹⁶ This law was consistently interpreted to both prohibit states from establishing absolute maximums or other limitations (apart from reasonableness) on work-expense disregards under the AFDC program, and to apply to child-care expenses connected with employment.

The United States Supreme Court, in *Shea v. Vialpando*,¹⁷ interpreted the Social Security Act to prohibit a state from establishing a maximum on the amount of work-related expenses which could be disregarded in determining eligibility and computing benefit levels. In concluding that a Colorado policy setting maximums for work-related expenses violated the Act, the Court stated:

By its terms, [the Act] requires the consideration of "any" reasonable work expenses in determining eligibility for AFDC assistance. . . . [W]e read this language as a congressional directive that no limitation, apart from that of reasonableness, may be placed upon the recognition of expenses attributable to the earning of income.¹⁸ . . . [T]he Colorado regulation results in a disincentive to seek or retain employment for all recipients whose reasonable work-related expenses exceed or would exceed that amount. Accordingly, the Colorado regulation conflicts with federal law and is therefore invalid.¹⁹

The holding in *Shea* was consistently applied by other courts to prohibit states from setting maximum disregards or maximum rates of

16. 42 U.S.C. § 602(a)(7) (1980).

17. 416 U.S. 251 (1974).

18. *Id.* at 260.

19. *Id.* at 265.

reimbursement for AFDC recipients' work expenses.²⁰ In addition, courts have applied the holding of *Shea* to child-care expenses, thus declaring that states must treat work-related child-care expenses like other work-related expenses.²¹

Further support for the notion that child care is a work expense can be found in interpretations by the Department of Health and Human Services, then the Department of Health, Education and Welfare. Under these interpretations, states were required to count recipients' actual child-care expenses, "whether [those expenses were] met as a disregarded amount of expenses of employment, or as a special need item . . . or as a service met through vendor payment²² or paid to the recipient. . . ." ²³

States were allowed to circumvent the deduction requirement, however, by paying the recipient's child care expenses directly. In *Riemer v. Hooker*,²⁴ a federal court found such treatment permissible as long as the state paid the full amount of the expenses and thereby eliminated the need for the deduction.²⁵

C. *Work Expenses and Child Care Expenses Under OBRA and DEFRA*

Effective October 1, 1981, the OBRA amended the Social Security Act to eliminate the need to deduct all reasonable work expenses in order to calculate the amount of AFDC grants. Instead, the OBRA set a \$75 maximum on work expenses,²⁶ and created a

20. *See, e.g.*, *Chambly v. Freeman*, 478 F. Supp. 1221 (1979), *aff'd*, 624 F.2d 1108 (8th Cir. 1980), *cert. denied*, 101 S. Ct. 1401 (1981) (policies involving work-related food, clothing, and transportation expenses); *Fones v. Percy*, No. 78-191, slip op. (W.D. Wis. Dec. 7, 1978), *aff'd*, 601 F.2d 600 (7th Cir. 1979) (transportation expenses); *Perez v. Chang*, 438 F. Supp. 238 (D. Hawaii 1966) (burdensome verification requirements for work-related expenses involving meals, clothing, transportation, union dues).

21. *See* *Schachter v. Percy*, No. 80-223, slip op. (W.D. Wis. 1980) (maximum rates for child-care reimbursements struck down, even though state allowed higher payments if special circumstances shown); *Godfrey v. Stanton*, No. 75-50, slip op. (N.D. Ind. 1975) (child-care maximum rates held invalid, even though state provisions allowed higher rates in "special circumstances").

22. Special needs items are supplements to AFDC grants. Some states vary the total AFDC grant according to the number of special needs. Vendor payments are payments to the service provider directly, such as a direct payment for a recipients' rent to a landlord.

23. HEW Memorandum, PIQ 74-159 (October 29, 1974); HEW Memorandum, SFP 79-21 (August 15, 1979).

24. 392 F. Supp. 145 (D. N.H. 1975).

25. *Id.* at 147.

26. *See* *Heckler v. Turner*, 105 S. Ct. 2 (1984), which held that the \$75 cap applies to gross income, not net income, and includes mandatory tax withholdings. In short, no deductions for withholdings in excess of \$75 are allowed, even though the withheld money is not

separate deduction for child-care expenses. The OBRA provided that state public assistance agencies "shall disregard from earned income of any . . . individual . . . an amount equal to expenditures for care in such month for a dependent child . . . requiring such care for such month, to the extent that such amount does not exceed \$160."²⁷ The OBRA allowed states to set lower caps for child-care deductions for part-time workers. Following the enactment of the OBRA, the Department of Health and Human Services promulgated regulations which required states to use the child-care disregard instead of making special need payments or otherwise eliminating the expenses.²⁸

The OBRA also changed the order of the application of disregards to reduce the effect of the work-incentive bonus. Instead of first applying the "\$30 plus one-third" disregard to gross income, the disregard is applied *after* both the \$75 work-expense deduction and the \$160 per child per month child-care deduction. This means the disregard is applied to net income. The result is a smaller work-incentive than previously was available.²⁹ Many recipients found they were penalized for working when they lost the \$30 plus one-third deduction after four months, combined with the new caps on work expenses. When their work expenses actually exceeded the caps and each dollar they earned was counted against their potential grant, many people found they would have more net income from AFDC if they quit their jobs.³⁰

Effective October 1, 1984, DRA again amended the Social Security Act to ameliorate some, but not all, of the penalizing effects of

available to the recipient. The Supreme Court in *Turner* reviewed the legislative history of the Social Security Act and found that "earned income" referred to gross income. The Court noted that Congress, in enacting the \$75 cap, clearly intended to eliminate deductions for "all reasonable work expenses, which include mandatory tax withholding. The Court explicitly refused to comment on the "wisdom of the course Congress has set" in enacting the \$75 cap. 53 U.S.L.W. at 4219.

27. 42 U.S.C. § 602(a)(8)(A)(iii) (1982).

28. 45 C.F.R. § 233.20(a)(II)(i)(B), (ii)(C) (1984).

29. See discussion *infra* at text accompanying notes 10-20 for an example of why the work-incentive disregard is now smaller.

30. The General Accounting Office reported that between 39% and 60% of working AFDC recipients lost AFDC when the OBRA was implemented. CHILDREN'S DEFENSE FUND REPORTS, THE DEFICIT REDUCTION ACT OF 1984, at 2. There is a disincentive to work because gross income rather than net income is now considered available, and the full cost of working is not deductible. After the work-incentive disregard is lost, each dollar earned is counted against a dollar in public assistance benefits. When work expenses and child-care expenses exceed the statutory maximums, the full cost of working is not compensated by any increase in the AFDC grant. Thus, those who work end up with less disposable income than those who quit work and get a full AFDC grant. CHILDREN'S DEFENSE FUND BUDGET 1985, *supra* note 5.

the OBRA. While the sequence of applying the disregards remains the same as under the OBRA, the \$30 portion of work-incentive disregard now is available for twelve months and the full \$75 work expense deduction is available to part-time workers. However, states can continue to set child-care disregards at less than \$160 per child per month for part-time workers.³¹

III. NONCOMPLIANCE: THE PROBLEM IN ILLINOIS PRIOR TO *Simpson v. Miller*³² AND *Berberena v. Miller*³³

Despite the Social Security Act's clear mandate to require child-care disregards for working AFDC applicants and recipients, several states did not deduct these expenses.³⁴ In Illinois, the Department of Public Aid (IDPA) treated child care as a "social-service" stipend for which a special request was needed.³⁵ The IDPA did not publicize the availability of such social service stipends, however, and often delayed its decisions on stipend requests. For those whose stipend requests were approved, reimbursement for child-care expenses was paid on a fixed schedule, depending on the type of care. This reimbursement schedule provided for payments in Chicago of \$0.88 per hour or \$4.30 per day for babysitters in the recipient's home; \$6.01 per day or \$132.22 per month for day-care homes; and \$10.18 per day for licensed center care.³⁶ These maximum rates applied no matter how much the client actually spent on child care.³⁷ No reimbursement was available for care provided by relatives living in the child's home, even if these relatives had no legal responsibility to care for the child.³⁸ Finally, no reimbursement was provided for services in day-care homes which were required to be licensed under state law but which did not in fact have a license.³⁹

Most AFDC applicants and cancelled recipients, who would

31. Deficit Reduction Act of 1984, Pub. L. No. 98-369, §§ 2622-23, 98 Stat. 1134 (1984) (codified as amended at 42 U.S.C. §602 (Supp. 1985)).

32. *Simpson v. Miller*, 535 F. Supp. 1041 (N.D. Ill. 1982).

33. *Berberena v. Miller*, No. 81-5776 slip op. (N.D. Ill. Oct. 15, 1981).

34. See cases cited *supra* notes 3 and 21.

35. Social service grants had to be requested by means of a social service request form. Social service grants were available to cover some or all of the costs of homemaker services, emergency caretaker services and other special needs of the AFDC family. See 45 C.F.R. § 1396.41(g)(3) (1980). In Illinois, a special unit separate from the AFDC caseworkers handled social service requests and special forms were needed to make the request.

36. Ill. Admin. Reg. § 5657, Rule 5.23 (1981).

37. *Id.*

38. *Id.*

39. *Id.*

have been eligible for AFDC had their child-care expenses been deducted from their income, did not receive any state assistance with their child-care needs.⁴⁰ Some of these people were referred to a separate state agency, the Department of Children and Family Services (DCFS), for enrollment in the "transitional day care" (TDC) program.⁴¹ If they followed up on this referral and became enrolled in the TDC program, most of their child-care expenses were paid, except that they were required to make a small co-payment.⁴² The TDC program, however, only paid for care for 252 days per year and would not reimburse unlicensed care. The program also delayed enrollment and made no retroactive payments.⁴³ Thus, many parents who would have been eligible for AFDC with the child-care deduction had to absorb their own child-care costs for several months between the time they were denied or cancelled from AFDC and the time they began receiving TDC payments.⁴⁴

Neither the IDPA social service stipends nor the TDC program were treated as an entitlement of the AFDC applicant or recipient, but rather were treated as a special favor bestowed upon a special request. Thus, very few people were aware of or made use of either program.⁴⁵ Only a very small percentage of the AFDC-eligible population received any reimbursement for their child-care expenses. Lacking reimbursement, many AFDC recipients ended up making "underground" babysitting arrangements with other AFDC recipients. The AFDC-recipient babysitters charged low rates and did not report their child-care income to the welfare department or to the Internal Revenue Service.⁴⁶ The state's failure to account for and disregard child-care expenses thus fed a system of welfare fraud by

40. See *infra* text accompanying note 43.

41. The Transitional Day Care Program was a special child care payment program developed in January, 1979 in response to *Williams v. Quern*, No. 77-4218 (N.D. Ill. Nov. 14, 1977). Under an agreed order in that suit, IDPA established that a referral to DCFS could take the place of a deduction for the plaintiff's child-care expenses and other work expenses. No class was ever certified in *Williams*, even though the case was brought as a class action, and no policy changes were incorporated into the IDPA manual for caseworkers.

42. *Berberena v. Miller*, No. 81-5776, slip op. (N.D. Ill. Oct. 15, 1981).

43. *Berberena v. Miller*, No. 81-5776, slip op., at paras. 27-29 (N.D. Ill. Oct. 15, 1981).

44. *Berberena v. Miller*, No. 81-5776, slip op. (N.D. Ill. Oct. 15, 1981).

45. In 1981, for example, only 1,497 of the 21,198 persons denied or cancelled from AFDC were referred for enrollment in the TDC program. The entire TDC caseload in 1981 consisted of 1650 persons. *Berberena v. Miller*, No. 81-5776, slip op. (N.D. Ill. Oct. 15, 1981) (plaintiffs' memorandum in support of summary judgment at 11).

46. These arrangements were reported to plaintiffs' counsel at client meetings held in September and October of 1982. Because the arrangements are "underground," no reported statistics are available on the number of AFDC recipients who made similar accommodations.

child care users and AFDC-recipient babysitters.

The biggest losers from the failure to deduct child-care expenses were probably the AFDC applicants and cancelled recipients whose child-care expenses were simply ignored when they were found ineligible for AFDC. These parents generally received no assistance with their child-care expenses.⁴⁷ By losing their entitlement to AFDC benefits, these parents automatically lost Medicaid coverage as well.⁴⁸ Had IDPA deducted child care expenses in determining AFDC eligibility, many women and children would have remained AFDC-eligible and would have reaped the financial and medical benefits that AFDC eligibility confers.

IV. *Simpson v. Miller*⁴⁹ AND *Berberena v. Miller*:⁵⁰ ILLINOIS LITIGATION REMEDIES THE DENIAL OF CHILD CARE DEDUCTIONS

A. *The Two Complaints*

On May 28, 1981, Karen Simpson and Diane Brooks filed suit in the federal court for the Northern District of Illinois challenging the welfare department's failure to deduct their child-care expenses when the department determined the amount of their AFDC grants.⁵¹ Karen Simpson worked part-time, received AFDC, and spent \$140 per month on child care. She did not get a social-service stipend for her expenses or any deduction. Simpson's child-care provider was not required to be licensed.⁵² Diane Brooks worked, received AFDC, and spent \$86 per month on child care. Brook's child-care arrangement was with a day-care home which cared for more than three unrelated children, and thus was subject to Illinois' day-care licensing law. Because the home Brooks used did not have a license, Brooks could not obtain a social service stipend to meet her child-care needs.⁵³

Simpson and Brooks filed suit on behalf of themselves, on behalf of their children, and, pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, on behalf of a class of AFDC recipients.

47. *Berberena v. Miller*, No. 81-5776, slip op. (N.D. Ill. Oct. 15, 1981).

48. The General Accounting Office noted that in some parts of the country, 50% or 60% of the families losing AFDC due to OBRA changes had no health insurance. CHILDREN'S DEFENSE FUND REPORTS, *supra* note 30.

49. 535 F. Supp. 1041 (N.D. Ill. 1982).

50. No. 81-5776, slip op. (N.D. Ill. Oct. 15, 1981).

51. 535 F. Supp. 1041 (N.D. Ill. Oct. 15, 1981) (plaintiff's complaint).

52. *Id.* at 5-6.

53. *Id.* at 6.

The *Simpson* plaintiff class was defined as:

All AFDC recipients in Illinois . . . who, since April 1, 1980, have been, are being, or will be employed and who have incurred, are incurring, or will incur reasonable employment-related child-care expenses . . . [which defendants have failed or refused to reimburse, in their actual amount] prior to October 1, 1981), [and in their actual amount up to \$160 per child per month as of October 1, 1981].⁵⁴

The *Simpson* suit focused on the AFDC recipients' rights to higher AFDC grants once child-care expenses were deducted.

Five months later, Dinorah Berberena and Rebecca Weaver filed suit in federal court challenging the welfare department's failure to deduct their work-related expenses in a different determination—whether they were initially *eligible* for AFDC.⁵⁵ Dinorah Berberena was cancelled from AFDC in September, 1981. At that time, her child-care expenses were \$309.96 per month and included \$86 for one child who used a babysitter and \$223.96 for another child who used licensed center care. Had her September, 1981 child-care expenses been deducted from her income, as legally required, she would have remained AFDC-eligible.⁵⁶ Instead of receiving a deduction, however, two weeks after she received her AFDC cancellation notice, Berberena was referred to the Transitional Day Care (TDC) program administered by Illinois Department of Children and Family Services (DCFS). The TDC program required that she make co-payments for her child care and would not pay for any care during October. In addition, the program would not pay Berberena's \$86 per month babysitting bill because the babysitter was not licensed.⁵⁷ Rebecca Weaver, who spent \$129 per month for child care in an unlicensed day-care home, was cancelled from AFDC in October of 1981 without receiving any referral to the TDC program. Had Weaver's child-care expenses been deducted from her \$500 per month income, she would have remained eligible for AFDC and Medicaid.⁵⁸

Like *Simpson* and *Brooks*, Berberena and Weaver also sought to bring their suit as a class action. The *Berberena* class was defined to include denied AFDC applicants and cancelled recipients—while

54. *Simpson v. Miller*, 535 F. Supp. 1041 (N.D. Ill. 1982) (plaintiffs' amended complaint Sept. 23, 1981).

55. *Berberena v. Miller*, No. 81-5776, slip op. (N.D. Ill. Oct. 15, 1981).

56. *Id.* at 6-8, 10-11.

57. *Id.* at 8.

58. *Id.* at 8-9, 10-11.

Simpson included only current AFDC recipients. The *Berberena* case challenged the failure to count child-care expenses in determining AFDC eligibility (which automatically conferred Medicaid eligibility), while the *Simpson* suit focused on the failure to count these expenses in determining the amount of the AFDC grant. The *Berberena* class, as finally certified on May 14, 1982, was defined as:

All applicants for and recipients of Aid to Families with Dependent Children (AFDC), on or after February, 1979, (1) who would be or would have been eligible for AFDC benefits if their work-related child-care expenses (in a reasonable amount prior to October 1, 1981, and in an amount not exceeding \$160.00 per child per month as of October 1, 1981) were deducted from their income but (2) whom the Illinois Department of Public Aid has found, or will find, ineligible (by denying their applications or terminating their benefits) without first promptly paying or assuring prompt payment of plaintiffs' child-care expenses in a reasonable amount prior to October 1, 1981 and in an amount not exceeding \$160 per child per month as of October 1, 1981.⁵⁹

Because the *Berberena* case involved the adequacy of the TDC program as a substitute for the child-care disregard, the Director of DCFS was joined as a defendant along with the Director of the IDPA.⁶⁰ Upon filing suit, *Berberena* and Weaver sought preliminary injunctive relief, which they obtained by an agreement with IDPA on October 23, 1981.⁶¹ The agreement provided that IDPA would pay the full amount of their child-care expenses pending further litigation.⁶²

59. *Berberena v. Miller*, No. 81-5776 (N.D. Ill. May 14, 1982) (class certification).

60. Two suits instead of one were filed for several reasons. The principal reason was that the plaintiffs feared that *Williams v. Quern*, No. 77-4218, slip op. (N.D. Ill. Nov. 14, 1977), might bar the claims of applicants and cancelled recipients. For that reason, they limited the *Simpson* case to persons who were not class members in *Williams*—i.e. current recipients. Other reasons were that an additional defendant, DCFS, was included in *Berberena*; the adequacy of the TDC remedy was in issue only in the *Berberena* case; and the measure of damages in the two cases was different. The plaintiffs might have moved to relate *Berberena* and *Simpson* had the judge in *Simpson* not been recuperating from surgery at the time *Berberena* was filed. The defendants eventually moved to relate the two cases, but by that time, the *Simpson* court was ready to rule, while discovery was still pending in *Berberena*.

61. *Berberena v. Miller*, No. 81-5776 (N.D. Ill. Oct. 15, 1981) (order granting preliminary injunction).

62. *Id.*

B. *Proceedings Prior to Judgment*—Simpson

The first briefing in the *Simpson* suit concerned class certification. Because as many as 32,000 people were members of the *Simpson* class, there was no doubt that the plaintiffs met the "numerosity" requirement for class certification.⁶³ Following the passage of the OBRA, the plaintiffs filed an amended complaint to reflect the OBRA changes. Thereafter, the defendants sought to challenge class certification by excluding from the class persons whose claim for child-care deductions ended prior to October 1, 1981. The defendants argued that the OBRA made moot such claims for injunctive relief, and thus the class should not include persons with moot claims.⁶⁴

On this issue of first impression, the court certified the entire *Simpson* class on February 16, 1982.⁶⁵ The court reasoned that persons whose claims arose prior to October 1, 1981, retained an adversarial and concrete interest in obtaining notice of their administrative remedies to pursue retroactive benefit claims. Thus, even though these persons had no interest in injunctive relief, their claim for some relief was not moot.

With the passage of the OBRA, AFDC eligibility for many *Simpson* class members would be lost in January, 1982. Four months from the effective date of the new law, the AFDC grants of thousands of *Simpson* class members would be cancelled when their work-incentive disregard was no longer allowed. While the *Simpson* plaintiffs did not and could not claim that the loss of the work-incentive disregard was illegal, the loss of the disregard, coupled with the illegal failure to count their child-care expenses, threatened them with irreparable harm. To avert the impending loss of AFDC benefits for thousands of class members, in mid-January the *Simpson* plaintiffs moved for preliminary injunctive relief.⁶⁶

This relief was denied on February 11, 1982.⁶⁷ The court rea-

63. This estimate is based on projected statistics concerning the number of working AFDC recipients in Illinois in 1980 (38,607), less the number who received full reimbursement for licensed center care (5,809). See *Simpson v. Miller*, 93 F.R.D. 540, 542 (N.D. Ill. 1982) (class certified). The estimates were found adequate for class certification.

64. A similar issue arose in *Banas v. Dempsey*, 742 F.2d 277 (6th Cir. 1984). In *Banas*, however, the state began complying with OBRA, thus mooting the class' claim for any injunctive relief. The court did not find that the class was moot, but found that no relief could be granted because notice relief could only be issued if it were ancillary to injunctive relief.

65. *Simpson v. Miller*, 93 F.R.D. 540 (N.D. Ill. 1982).

66. *Simpson v. Miller*, 93 F.R.D. 540 (N.D. Ill. 1982) motion for preliminary injunction).

67. *Simpson v. Miller*, 93 F.R.D. 540 (N.D. Ill. 1982) (order denying preliminary

soned that because the principal cause of injury was the loss of the work-incentive disregard, which was not challenged, preliminary injunctive relief was inappropriate. As a compromise in plaintiffs' favor, and possibly in recognition of the strength of their challenge to the denial of child-care deductions, the court asked the parties to file cross motions for summary judgment and it set an expedited briefing schedule on these motions.⁶⁸

On March 17, 1982, the court granted summary judgment to the *Simpson* plaintiffs on every claim.⁶⁹ On March 19, 1982, an injunction order required the IDPA to immediately begin deducting child-care expenses in order to compute AFDC grants.⁷⁰ The *Simpson* summary judgment decision represents the first federal decision on the child-care deduction requirement of the OBRA and one of a handful of federal decisions that interpreted pre-OBRA work-expense law as applied to child-care expenses.⁷¹

The most highly controverted issue in the case and probably the most significant portion of the court's ruling concerned whether the child-care deduction was available to recipients who used unlicensed child care. The defendant argued against allowing such deductions in order to promote the legitimate state interests to protect the health and safety of children.⁷² The plaintiffs, on the other hand, argued that the Social Security Act did not restrict the deduction solely to licensed care or care which was exempt from licensing requirements. The court ruled in the plaintiffs' favor, and held that the licensing restriction acted as a disincentive to work, thus violating the purpose of the Social Security Act deduction provision.⁷³ The court also found that the licensing requirement penalized needy children by denying them assistance for reasons outside their control.⁷⁴

A final judgment order was entered in *Simpson* on May 12, 1982.⁷⁵ This order provided for notice to all class members of their rights to pursue state administrative remedies to obtain retroactive

injunction).

68. *Id.*

69. *Simpson v. Miller*, 535 F. Supp. 1041 (N.D. Ill. 1982).

70. *Simpson v. Miller*, 93 F.R.D. 540 (N.D. Ill. 1982) (preliminary injunction).

71. For other federal decisions interpreting pre-OBRA work-expense law, see cases cited *supra* notes 3 and 21.

72. *Simpson v. Miller*, 535 F. Supp. 1041 (N.D. Ill. 1982) (defendant's memorandum in opposition to preliminary injunctive relief) (defendant's memorandum in opposition to summary judgment).

73. 535 F. Supp. 1041 at 1048, 1050.

74. *Id.* at 1050.

75. *Simpson v. Miller*, 535 F. Supp. 1041 (N.D. Ill. 1982) (final judgment order).

child-care benefits.⁷⁶ Furthermore, the judgment declared illegal the defendant's failure to deduct work-related child-care expenses in computing AFDC grants and it enjoined future denials of such deductions.

C. *Proceedings Prior to Judgment: Berberena*

While the *Simpson* class sought preliminary injunctive relief, the *Berberena* class made a similar motion.⁷⁷ The court in *Berberena* followed the lead of the court in *Simpson*. First, the court denied the motion, and then it set an expedited briefing schedule on cross motions for summary judgment.⁷⁸ The *Berberena* plaintiffs had not completed their discovery concerning the adequacy of the TDC program as a substitute for the disregard, however, and for that reason, the summary judgment briefing schedule was later extended.⁷⁹ Meanwhile, the court in *Simpson* issued its summary judgement decision.

Despite the complete victory for the plaintiffs in the *Simpson* suit, the defendants made no effort following the *Simpson* ruling to settle the *Berberena* case. Although the IDPA stopped TDC program referrals on April 2, 1982, the IDPA did not take steps to amend its child-care deduction policies for AFDC applicants and cancelled recipients. After the defendants stipulated that the *Berberena* case could proceed as a class action,⁸⁰ both sides went forward with summary judgment briefing. Only after all the briefs were filed did the parties reach an agreement. The consent decree was entered on August 27, 1982—more than six months after the *Simpson* rul-

76. In *Edelman v. Jordan*, 415 U.S. 651 (1974) the U.S. Supreme Court ruled that the Eleventh Amendment to the U.S. Constitution precludes federal courts from ordering states to pay retroactive damages. *Edelman*, like *Simpson* was a Legal Assistance Foundation of Chicago suit against the IDPA Director. After this ruling in *Edelman*, the plaintiffs there sought an order requiring the state agency director to notify class members that they could use state administrative procedures to obtain retroactive benefits. The issue of whether this notice relief was permissible was raised before the U.S. Supreme Court in *Jordan II*. The Supreme Court held that such notice relief was "prospective" and "ancillary" to injunctive relief and hence permissible under the Eleventh Amendment. *Quern v. Jordan*, 440 U.S. 332 (1979).

77. *Berberena v. Miller*, No. 81-5776, slip op. (N.D. Ill. Oct. 15, 1981) (minute order Jan. 21, 1982).

78. *Berberena v. Miller*, No. 81-5776, slip op. (N.D. Ill. Oct. 15, 1981) (minute order Feb. 11, 1982).

79. *Berberena V. Miller*, No. 81-5776, slip op. (N.D. Ill. Oct. 15, 1981) (minute order May 4, 1982).

80. *Berberena v. Miller*, No. 81-5776, slip op. (N.D. Ill. Oct. 15, 1981) (class certification). See *supra* note 45 for class statistics.

ing.⁸¹ The decree came after strong urging by the court. The court supplied a key paragraph which compelled the defendants to either settle or face another summary judgment ruling: "The parties agree that the ruling on the merits in *Simpson v. Miller* governs all defendants' duties and plaintiffs' rights in this case."⁸² While the meaning of this paragraph was somewhat cryptic to the plaintiffs, it did indicate that the state's denial of child-care deductions was illegal. The *Berberena* decree, like the *Simpson* judgment order, provided for notice to class members of their administrative remedies and enjoined future violations of the child-care deduction provisions of the Social Security Act.⁸³

D. Post-Judgment Issues

In litigation, judgment orders and consent decrees often mark only the beginning of further litigation, not the end. Similarly, in both *Simpson* and *Berberena*, two years of additional litigation followed the entry of the final order and consent decree.

Compliance with the *Berberena* decree became an issue shortly after it was entered. First, the IDPA failed to promulgate new court-ordered rules to implement the child-care deduction. On November 23, 1982, the plaintiffs moved for a contempt ruling.⁸⁴ On December 14, 1982, the court ordered the defendants to promulgate particular policies to comply with the consent decree.⁸⁵ In addition, the court awarded the plaintiffs' attorneys' fees for successfully prosecuting their enforcement claim.

The second compliance issue in *Berberena* raised more serious problems. Day-care lobbyists in Illinois had fought successfully for a seven million dollar appropriation to the TDC program in Illinois. With the TDC program abolished by virtue of the *Berberena* consent decree, these day-care lobbyists, as well as IDPA and DCFS, were eager to reinstate some version of the TDC program so that the appropriate funds would still be used for child care.

On December 8, 1982, IDPA announced its intention to reinstate a new version of the TDC program.⁸⁶ Under this new pro-

81. *Berberena v. Miller*, No. 81-5776, slip op. (N.D. Ill. Oct. 15, 1981) (consent decree).

82. *Id.*

83. *Id.*

84. *Berberena v. Miller*, No. 81-5776, slip op. (N.D. Ill. Oct. 15, 1981) (plaintiff's motion for a rule to show cause Nov. 23, 1982).

85. *Berberena v. Miller*, No. 81-5776, slip op. (N.D. Ill. Oct. 15, 1981) (order).

86. *Berberena v. Miller*, No. 81-5776, slip op. (N.D. Ill. Oct. 15, 1981) (plaintiffs'

gram, AFDC applicants and recipients whose child-care expenses were higher than their AFDC grant would be offered the choice of enrollment in TDC instead of continuing to receive AFDC.⁸⁷ Thus, a recipient whose child-care expenses were \$150 per month, while her AFDC grant (after deducting her child-care expenses) was only \$20 per month, might well prefer to have her child-care expenses paid even though she would lose AFDC and Medicaid benefits.

The *Berberena* plaintiffs objected to the manner in which IDPA sought to reinstate the program, however. The notices that the IDPA intended to use to explain the program did not fully explain the benefits which TDC participants would lose—including Medicaid coverage. Additionally, after IDPA agreed to modify its notices to meet the plaintiffs' objections, it proceeded to adopt other notices to which the plaintiffs had never agreed. For that reason, the *Berberena* plaintiffs again moved for a contempt ruling.⁸⁸ After negotiations, a more balanced notice was developed which fully explained the choice between TDC and AFDC. Interestingly, the IDPA discontinued the new TDC program after only a few months because very few AFDC recipients chose to participate.

In both *Simpson* and *Berberena*, the most time-consuming issues after judgment have involved the retroactive benefit claims of thousands of class members. After sending notice and claim forms to class members of their right to pursue their state administrative remedies, the IDPA received about 4,200 claims from *Simpson* class members and 3,900 claims from *Berberena* class members.⁸⁹ The IDPA then took no further action regarding these claims; it failed to process the claims or to set any administrative hearings in order for class members to prove their entitlement to retroactive relief.

On January 6, 1983, the *Simpson* plaintiffs returned to federal court to ask that the defendant be ordered to process class members' claims.⁹⁰ As briefing on this motion was pending, the defendant then

motion for a rule to show cause, June 21, 1983).

87. *Id.*

88. *Id.* at Exh. 2.

89. *Simpson v. Miller*, 535 F. Supp. 1041 (N.D. Ill. 1982) (defendant's report to the court Oct. 29, 1982); *Berberena v. Miller*, No. 81-5776, slip op. (N.D. Ill. Oct. 15, 1981) (defendant's report to the court Feb. 1, 1983).

90. *Simpson v. Miller*, 535 F. Supp. 1041 (N.D. Ill. 1982) (plaintiff's motion for enforcement of final judgment order Jan. 20, 1983). It remains an open question whether a federal court can order a state agency to dispose of retroactive benefit claims in a particular manner, consistent with the Eleventh Amendment. Federal regulations at 45 C.F.R. § 205.10(a)(16) (1980) require states to hold administrative hearings concerning AFDC benefits within 90 days of the request. The defendants in *Simpson* argued, however, that this regulation did not apply to administrative hearings following class-wide notice relief.

began to process the claims and the motion in federal court was therefore withdrawn. Pursuant to these procedures, the IDPA found 540 persons eligible for a total of \$590,000 in retroactive benefits.⁹¹

Nonetheless, the IDPA refused to pay these retroactive benefits. It insisted instead that the plaintiffs file yet another suit in the Illinois Court of Claims.⁹² IDPA sought to force the plaintiffs into the Court of Claims in order to avoid paying the benefits out of current IDPA appropriations.⁹³ While the plaintiffs had no objection to using the Court of Claims judgment fund as a source of payment, they did fear that their claim might be denied by the Court of Claims, and that they would then have no judicial recourse.⁹⁴ Therefore, plaintiffs filed two actions to recover their retroactive benefits: one action was filed in the trial court which normally reviews administrative agency decisions, and one action was filed in the Illinois Court of Claims.⁹⁵ After the trial court action was dismissed and a notice of appeal filed, the Court of Claims awarded judgment to the plaintiffs.⁹⁶ Approximately \$400,000 in retroactive child-care benefits were finally paid to *Simpson* class members on December 24, 1983.⁹⁷

The procedures used to compute *Berberena* retroactive benefits are far more complex than the procedures used to compute *Simpson* benefits. In *Simpson*, the measure of damages was the amount of child-care expenses not deducted, with a monthly ceiling of \$160 per child for each claim month after October 1, 1981. In *Berberena*, the measure of damages was the amount of AFDC benefits (and arguably Medicaid benefits) the family would have received if the state had deducted child-care expenses.⁹⁸ To properly compute *Berberena* damages, a full AFDC grant computation must be performed for

91. *Harris v. IDPA*, No. 83-51369, slip op. (filed June 3, 1983).

92. *Id.*

93. *Id.*

94. The Court of Claims is not really a court, but an arm of the legislature. No appeals are allowed from Court of Claims decisions in Illinois. *Seifert v. Standard Paving Co.*, 64 Ill. 2d 109, 355 N.E. 2d 537 (1976).

95. *Harris v. IDPA*, 83 L 51369, slip op. (N.D. Ill. June 3, 1983); *Harris v. State of Illinois*, 83 Ill. Ct. Cl. 2856 (1983).

96. *Harris v. State of Illinois*, 83 Ill. Ct. Cl. 2586 (1983) (awarding *Harris* claimants \$590,634.52).

97. This sum is less than the sum allocated because some claimants could not be located and checks had to be reprocessed because of address changes.

98. Additional suits were filed in state court to recover retroactive benefits for persons initially found ineligible. *Applewhite v. IDPA*, 83 L 53110 (86 class members); *Bingham v. IDPA*, 84 CC 1836 (17 class members).

each month the class member would have been AFDC-eligible.⁹⁹ Due to the administrative difficulties in performing such calculations, the IDPA has been slower to act on *Berberena* claims than *Simpson* claims. In fact, the IDPA took no action on *Berberena* claims until November 7, 1983, when it sent each *Berberena* claimant an additional screening form so that an average entitlement could be constructed. To date, however, IDPA has not issued a final administrative decision granting retroactive benefits to any *Berberena* class member.

V. THE LIMITS OF LITIGATION IN AFDC CHILD-CARE REFORM

By all measures, the federal *Simpson* and *Berberena* suits were remarkably successful.¹⁰⁰ As a result of the litigation, thousands of working AFDC recipients continued to be eligible for AFDC; state policies restricting child-care reimbursements were enjoined; and retroactive benefits of close to half a million dollars were paid to working poor families.¹⁰¹ Similarly, suits in other states have stopped the illegal practice of failing to deduct child-care expenses to determine AFDC eligibility and grant amounts.¹⁰²

Despite the victory for the plaintiffs in *Simpson* and *Berberena*, however, the defendants profited more by violating the law than they lost by losing the suits. For each year that it failed to recognize child-care expenses, the state saved many millions of dollars in AFDC benefits and Medicaid.¹⁰³ And while the state compensated hundreds of class members by making retroactive benefit awards, the state also profited by the disappearance of many class members.¹⁰⁴

99. 42 U.S.C. § 1396(a)(10)(A) (1982) confers Medicaid eligibility to AFDC-eligible persons. Because the calculations change on October 1, 1981 with OBRA, and again four months after each claimant loses the "30 plus one third" disregard, they can be very time consuming.

100. The Seventh Circuit found the results "significant" in affirming the plaintiffs' full request for attorney's fees. *Berberena v. Coler*, 84-1458 (filed January 1, 1985).

101. The benefit to the *Berberena* class alone was estimated at about \$4.8 million annually. *Id.*

102. See *supra* notes 3 and 21.

103. The state paid only about a half million in damages, while the costs of compliance at the higher 1980-81 caseloads would have been more than the \$4.8 million annual cost of compliance with *Berberena*, *supra* note 100.

104. Many class members did not pursue their claims because they had difficulty in obtaining all the information they needed in order to make a claim. Some encountered difficulties in locating former babysitters or persuading babysitters to write out a statement to verify their child-care expenses. Others had difficulty verifying earnings and remembering their AFDC eligibility determination dates. Plaintiffs' counsel attempted to streamline the claims process by holding a series of training sessions for class members interested in filing claims. Nonetheless, even those who attended these sessions frequently experienced difficulties in com-

The loss of AFDC benefits caused by the state's illegal denial of child-care deductions, therefore, has not been and will not be sufficiently recompensed.

Class action litigation like *Simpson* and *Berberena*, though necessary to compel compliance by recalcitrant state welfare agencies, is inherently limited as a means to insure adequate recognition of the child-care needs of working poor people. First, these suits merely seek to enforce the law, not to change it. Thus, when the OBRA instituted a cap of \$160 per child per month on child-care expenses, the *Simpson* and *Berberena* plaintiffs had to restrict their entitlement claims to this statutory limit, no matter how inadequate that maximum might actually be. For recipients using licensed center care, these maximums may be inadequate *per se*, if the state had previously paid a greater amount (as was the case in Illinois). Legislation amending the child-care caps and restoring the deduction for all reasonable work-related child-care expenses is needed to recognize the full amount of AFDC applicants' and recipients' needs.

A second limitation of the child-care disregard as a child-care funding mechanism is that it requires recipients to first *incur* child-care expenses before any expenses are recognized. For poor recipients, this restriction sometimes prevents a parent from choosing adequate day-care and sometimes bars full reimbursement of child-care costs. For day-care providers, this method can introduce cash flow problems when the recipients do not have adequate cash on hand to pay for their services.

Finally, the work-expense deduction method does not adequately serve the full AFDC population. With the OBRA's restrictions on the work-incentive disregard, fewer AFDC recipients reap any financial benefit from working. A smaller percentage of AFDC recipients work now than did in 1980.¹⁰⁵ The deduction remains wholly unavailable for care needed while the parent is enrolled in school or training to obtain employment. These limitations, unfortunately, cannot be remedied by litigation over the work-related child-care disregard.

AFDC applicants and recipients will only be encouraged to work if they can profit from their labor. Legislation to restore the

pleting their claims.

105. The defendants in *Simpson* reported 5,632 AFDC earned income cases in September, 1982. *Simpson v. Miller*, 535 F. Supp. 1041 (N.D. Ill. 1982) (defendant's report to the Court Oct. 27, 1982). The number of earned income cases in November, 1980, by contrast was over 12,000. Letter from Karl Peipenburg, IDPA Office of Public Information, to Rhonda Cassidy, Clerk, Women's Law Project (December 23, 1980).

full work-incentive disregard and to allow deduction of all reasonable work-expenses, including child care, is the only long-term solution to this work-disincentive problem the OBRA has created. The expenses of child care must be recognized and fully reimbursed in order to enable poor parents to leave the welfare roles. Litigation such as *Simpson* and *Berberena* can only enforce the legal rights Congress confers on the working poor. These rights can be expanded only by increased congressional awareness of the importance of child care for the working AFDC recipient.