

January 16, 2015

Commissioner Vicki Turetsky
Office of Child Support Enforcement
Administration for Children and Families
Department of Health and Human Services
901 D Street, SW
Washington, DC 20447

Dear Commissioner Turetsky:

We respectfully submit the following comment to Section 302.56 “Guidelines for setting child support awards” in response to proposed 42 CFR Part 433 and 45 CFR Parts 301-308, and 309, published in the Federal Register on November 17, 2014, titled “Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs; Proposed Rule.” We support the Office of Child Support Enforcement’s (OCSE) goals of ensuring that child support orders are based on actual income and limiting consideration of other evidence to only those situations when actual income does not fairly reflect ability to pay.

Section 302.56 Guidelines for setting child support awards.

We support this rule change but urge the adoption of necessary revisions.

The proposed revisions to 45 CFR § 302.56(c) include important changes that will enhance the long-term stability of low-income, non-custodial parents and their families. As organizations that work with low-income families, we see the destabilizing effects of child support obligations that exceed the non-custodial parents’ ability to pay. We see first-hand the difference between parents who can meet their established child support obligations but do not -- and those, like many of our clients, whose child support orders or accumulated arrearages exceed their ability to pay. Saddled with unrealistic child support obligations, many of our clients find themselves threatened with jail or loss of driver’s licenses even as they struggle to find stable employment, unable to cover their basic needs, including housing, and facing increased familial tension as they fall further and further behind. The proposed regulation will help non-custodial parents gain and maintain employment while meeting their basic needs. The proposed regulation will also ameliorate the overuse and mechanized application of imputation of income.

While we support the proposed regulation’s goal of creating orders based on ability to pay, we are concerned that there is no specific mention that orders for arrearage payments be based on actual ability to pay as well. In addition, we believe that the revision may not sufficiently take into account situations in which the non-custodial parent is working underground or intentionally hiding income. Therefore, we have suggested additions to the proposed language as discussed below.

First, orders for prospective child support as well as for arrearage payments should accurately reflect non-custodial parents' ability to pay. Requiring guidelines that determine a low-income noncustodial parent's support obligation based upon a noncustodial parent's "actual" earnings and income rather than "all" earnings and income (§ 302.56(c)(1)), is an important step toward fostering consistent and long-term compliance with support obligations. **The IV-D agency should require states to base child support orders on specific income and earnings data rather than on routinized imputation of income** (e.g., based on minimum wage, or one-size-fits-all presumptions about ability to work), so that child support orders more accurately reflect the parent's ability to pay.

In order to establish reasonable child support orders, the amount that the non-custodial parent is required to pay toward arrearage must reflect the parent's actual ability to pay. Without such limitations, wage garnishments for even a reasonable child support obligation can result in the withholding of untenably burdensome wage amounts when they are compounded by additional garnishments for outstanding arrearage debt. Such garnishments may amount to far more than the state's guidelines would otherwise allow. Low-income, non-custodial parents often struggle with support payments that include both current support obligations and significant payments on arrearages. Those who are able to maintain their current obligation may not have the ability to reduce their arrearages quickly, thus exposing them to penalties which may threaten their ability to retain employment, such as the revocation of driver's licenses.

Second, imputed income generally does not reflect ability to pay and should only be used as a last resort when evidence suggests that the non-custodial parent is voluntarily unemployed/underemployed, or when the non-custodial parent's reported income or assets is inconsistent with standard of living. The proposed regulation offers language that will discourage the overuse of and standardized application of imputation of income. Imputing income to a low-income, non-custodial parent who is acting in good faith often leads to child support orders that are based on unrealistic expectations and exceed the non-custodial parent's ability to pay. However, we are concerned that the revision may not sufficiently take into account situations in which the non-custodial parent is working underground or intentionally hiding income and the custodial parent is unable to show proof other than circumstantial evidence of this income. The only evidence of "actual earnings or income" may be related to proof of the non-custodial parent's unexplained expenditures and lifestyle.

The preamble to the proposed regulation suggests that "data, not assumptions, are a more accurate method of determining the income and resources of non-custodial parents." (p. 68555.) We agree with this proposition insofar as it applies to cases in which there is reliable data from which to determine the non-custodial parent's income. However, state guidelines must give courts and administrative agencies the flexibility to use reliable, circumstantial evidence to establish or modify child support when traditional income data is not available and the non-custodial parent is acting in bad faith. This type of evidence does not lead to orders based on an assumption, but rather orders grounded on a reasonable inference given the evidence presented.

We do not support widespread or blanket imputation. There should be no automatic use of minimum wage or any other standardized metric to impute income. However, in those circumstances in which there is credible evidence that a non-custodial parent is employed in the underground economy or intentionally failing to seek employment, it is appropriate for guidelines to provide authority to impute income. **For these reasons, we recommend that the language of 302.56(c)(1) be revised to require that guidelines take into consideration:**

“actual earnings as well as other evidence of ability to pay or evidence of voluntary unemployment or underemployment.”¹

Sincerely,

Bread for the City
Washington, D.C.

The Legal Aid Society of the District of Columbia

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¹ Similar language appears in 302.56(c)(4) in reference to consideration of the subsistence needs of non-custodial parents, but it is not clear that this language applies to (c)(1). The commentary in the preamble regarding (c)(4) suggests that imputation will be allowed “where the non-custodial parent’s lifestyle is inconsistent with earnings or income AND [emphasis added] where there is evidence of income or assets beyond those identified.” (p.68555) However, requiring both inconsistency in lifestyle AND evidence of income is a confusing burden to place on parents seeking support from non-custodial parents who are intentionally trying to hide income and assets. Evidence about lifestyle may itself be evidence of hidden income, and the implication that these are two separate categories of proof suggests a higher burden than appropriate. The preamble further suggests that in cases where a non-custodial parent simply refuses to work, courts can deviate from the guideline (p.68555). However, the language of proposed regulation 302.56(c)(1) does not clarify that imputation is acceptable in this circumstance.