

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 comments 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 for promoting non-custodial parent employment programs, unbundling State IV-D program services, and updating processes, particularly related to medical support provisions. We ask specifically that the final Rule **eliminate Section 302.56(h) regarding parenting time provisions in child support orders** (separate comments on Section 302.56(h) were submitted). While agreements on custody arrangements should be encouraged when appropriate, in many States, child support processes will not provide sufficient protection to domestic violence survivors in negotiations.

Section 302.33: Services to individuals not receiving Title IV-A assistance.

Notice Requirement

We support this rule change but recommend one necessary clarification.

Section 302.33(a)(4) provides that the IV-D agency has five working days to notify a family no longer eligible for services under the IV-A and Medicaid programs that the family may choose to close their case. In this way, child support services will continue, without application, unless the family notifies the agency to the contrary. This is a prudent and appropriate approach to cases for custodial parents who no longer have assigned rights to child support to a State. **We support this timely notice requirement and its shift towards empowering families to decide for themselves what child support services they need and want.** There may be situations in which a custodial parent wishes to end support payments from a non-custodial parent, but the termination should not happen automatically. By requiring affirmative notice from a State within five working days, custodial parents should have appropriate notice of options in order to make the best decisions for a family. **We urge OCSE to clarify that, when a State has opted to implement the limited services option authorized in Section 302.33(a)(6), the notice to former recipients of State assistance shall include information about the family’s option of**

seeking limited services rather than the binary option of continuing full services or closing the case.

Limited Services Option

We support this rule change.

Section 302.33(a)(6) adds a new paragraph to allow States the option of offering applicants a menu of limited services. We applaud OSCE's recognition of families' varying needs and believe that this amendment will allow States to better accommodate more families. Families are in the best position to know what services they may need, and an a la carte menu of services will allow them to decide what is best for their families at any given time. In particular, we are optimistic that offering paternity establishment services separate from support will benefit fathers, mothers, and children alike by providing parents the option of more affordable genetic testing and resulting in children with two identified and known parents. The availability of enforcement-only services would benefit custodial parents who did not want the IV-D agency involved in initiating a case or establishing an order but who run into problems collecting the funds they are owed. Conversely, custodial parents may instead have difficulties locating the non-custodial parent to initiate a case. While they may not want the full range of services the IV-D agency can provide, these custodial parents would undoubtedly benefit from being able to seek the assistance of the IV-D agency's Locate Unit. We hope that the shift towards more tailored services will free up IV-D agency resources currently being utilized to provide full services to families who do not necessarily want them.

We do not see any issues with the limited services option as it relates to domestic violence. In fact, as noted above, **we believe unbundling services and expanding choice will be beneficial to all families.** However, if the District of Columbia's antiquated case management system is at all representative, we do have concerns about how States would implement the limited services option using existing hard- and software, but we fully support giving States the authority and encouragement to make this change. Specifically, the notice requirement in 302.33(a)(6) is critical towards ensuring applicants are aware of the full range of their options and the consequences of their choice.

Section 302.38: Payments to the family.

We support this rule change with the adoption of a necessary revision.

Section 302.38 would require that support payments owed to a family be distributed directly to the family and not to any other party. **With one caveat (detailed below), we support OCSE's interpretation of Sections 454 and 457 as requiring direct distribution of payments owed to the family and not to any other third party, including private collection agencies.** This

proposed rule is in line with OCSE’s “family-first” approach and serves as a prudent safeguard against unscrupulous or inappropriate collection practices that could otherwise threaten a family’s solvency.

Despite our overall support of this proposed change, **we urge OCSE to clarify that payments must be made to the resident parent, legal guardian, or caretaker relative *who is the petitioner or named custodial parent obligee in the petition for support and the support order.***

The revision to Section 302.38 must not be read as authority for State IV-D agencies to unilaterally amend the obligee in a child support case when custody changes. Just as the IV-D agency or SDU must not distribute funds to a third party agency, they also must not distribute them to any other family member or caretaker other than the custodial parent named in the petition for support and support order. We recognize that family composition can be fluid, and the custodial parent at the time a petition is filed and order is entered may not remain the custodial parent throughout the child’s minority. However, when custody changes and child support payments need to be redirected, any change must be made by following the jurisdiction’s proper judicial or administrative processes; in the District of Columbia, a change would require filing a motion to terminate or suspend the initial order and a petition to establish a new one for the new custodial parent or caregiver. To avoid circumventing state-required procedural due process, Section 302.38 should include an additional clause to clarify that the family to whom payments must be made must also be the obligee named in the petition for support and support order.

Section 302.76: Job services.

We support this rule change.

Section 302.76 provides for the addition of an optional State plan requirement provision permitting States to provide employment services to eligible non-custodial parents pursuant to Section 303.6(c)(5). **We support this provision for the reasons detailed in Section 303.6.**

Section 303.6: Enforcement of support obligations.

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

The proposed change to Section 303.6 would allow States to request Federal financial participation (FFP) to provide job services, such as job search assistance, job readiness training, job development and placement, skills assessments, certification and GED programs, and work supports to eligible non-custodial parents.¹ **We support the inclusion of guidelines for States**

¹ Section 304.20(b)(3)(ix) details the provisions for FFP.

that elect to provide these job services. As child support practitioners in the District of Columbia, we work with low-income custodial and non-custodial parents. Many non-custodial parents have difficulty paying their child support orders due to unemployment or underemployment, and IV-D agency-provided employment services would be beneficial to parents who struggle to make consistent payments. Literacy, GED, and certification programs would be helpful to parents who suffer from a lack of basic skills. Job development and skills assessments would bolster parents who need assistance finding a new job after a period of unemployment or incarceration. Finally, work support, such as transportation assistance, could be vital to parents who are only able to work intermittently due to a lack of affordable and consistent transportation. We believe that employment services are integral to helping non-custodial parents pay their orders consistently, which provides stability and security to custodial parents and children.

However, the proposed rule, Section 303.6(c)(5), requires that a non-custodial parent have a current child support order to receive job services. Non-custodial parents may lack employment skills at the initiation of a child support case, and a prudent court may give non-custodial parents a period to look for a job before imposing a child support order. These parents would be ideal candidates for employment services. **OCSE should clarify that unemployed parents unable to pay child support are eligible for services *prior* to the entry of a support order.** In the alternative, a \$0 child support order should be sufficient to trigger the receipt of job services for non-custodial parents in need.

Similarly, job services should also be available to obligors whose children are emancipated or who otherwise have arrears-only cases. The custodial parent who bore the burden of meeting all of the children's needs when the other parent failed to pay should have just as much of a chance of receiving the owed money as the custodial parents of currently-minor children. **OCSE should clarify that a current order to pay *towards arrears* also qualifies a non-custodial parent for job services.**

We are also concerned about limiting the funded services to “rapid labor force attachment” rather than long-term career development. While allowing non-custodial parents to postpone immediate employment to better their long-term job prospects can hurt custodial parents in the short run, building a family's overall income-earning capacity is more likely to help lift children out of the cycle of poverty in the long term. For this reason, **we encourage OCSE to include subsidized employment as an allowable job service under the FFP. We also recommend that OCSE fund pilot projects that provide subsidized employment training so that custodial parents and children can continue to receive child support while non-custodial parents improve their job prospects.**

Section 303.8: Review and adjustment of child support orders.

Health Care Needs

We support this rule change.

Section 303.8(d) requires States to recognize health care needs as an adequate basis under State law to initiate a modification of a child support order. This is a critical change to State laws. The Affordable Care Act (ACA) created a new regime in the way that health care eligibility for Medicaid and Advanced Premium Tax Credits (APTC) for cost sharing is calculated. As parental income, tax filing status, and ability to claim a child as a tax dependent shift, so may a child's eligibility for various health care programs. **It is critical for State laws to provide for health care needs as a basis for adjusting a child support order even if the amount of child support itself does not require a change.**

Incarcerated Non-custodial Parents

We support this rule change but urge the adoption of further requirements.

Proposed Section 303.8 would allow OCSE to elect in its State plan the option to initiate the review of a child support order after being notified that a non-custodial parent will be incarcerated for more than 90 days. **We believe that it is critically important for States to initiate reviews of child support orders for incarcerated non-custodial parents.** We often encounter non-custodial parents who have been released from incarceration facing significant arrearages because their child support orders were never modified and they did not know that they themselves should have filed a motion to modify. As OCSE has recognized, this interferes with work opportunities for non-custodial parents and reconnections with their children, and often leads to uncollectible debt.

We are concerned, however, about how State IV-D agency would determine the date from which adjustments would be made, particularly in cases where a IV-D agency did not act in a timely manner. Pursuant to the Bradley Amendment, modification of child support orders is permitted only "with respect to any period during which there is pending a petition for modification, but only from the date that notice of such petition has been given, either directly or through the appropriate agent, to the obligee or (where the obligee is the petitioner) to the obligor." 42 U.S.C. Section 666(a)(9)(C). The proposed rule states that the review initiated by the IV-D agency would not need to be requested specifically by either party. Accordingly, **we recommend that OCSE instruct IV-D agencies to use the date they are notified of the non-custodial parent's incarceration status as the date of notice to which any modification would date back.**

In the alternative, if OCSE does not believe it can instruct States to do so under the Bradley Amendment, **we suggest that OCSE require State IV-D agencies to resolve reviews and adjustments initiated by a request of either parent or by notification of incarceration of a non-custodial parent within a certain period of time, such as within 30 days, to ensure that**

arrears do not unnecessarily accrue. If the IV-D agency fails to act within the specified time period, then arrears owed to the State that accrued during the non-custodial parent's period of incarceration should be waived back to the date of notification to the IV-D agency. In order to further ensure that State IV-D agencies conduct the review and adjustment process in a timely manner so arrears do not unnecessarily accrue, **we also recommend that such actions be tracked as part of OCSE's performance measures for State IV-D agencies.** We believe that IV-D agencies will be more likely to devote resources to this area if there is an economic incentive for them to do so.

For IV-D agencies that elect the option to initiate review of child support orders of incarcerated non-custodial parents, we also encourage OCSE to help the IV-D agencies set up a mechanism for the exchange of information between the IV-D agencies and state and federal prison systems. We have heard from the District of Columbia's child support agency that it often encounters barriers in obtaining necessary information from the federal prisons where obligors are serving their sentences for D.C. crimes. (As it has no state penitentiary system of its own, the District of Columbia houses all of its prisoners in the federal system.) We believe that OCSE, as another federal agency, may be better positioned to interface with the federal Bureau of Prisons, and **we recommend that OCSE implement a process for facilitating IV-D agency access to necessary information from the federal Bureau of Prisons to allow for quick processing of reviews and adjustments.**

We would also like to take this opportunity to encourage OCSE to advocate for modification of the Bradley Amendment, specifically 42 U.S.C. §666(a)(9)(C), for many of the same reasons that have motivated OCSE to propose revision of these regulations. The "no retroactive modification" provision of the Amendment was enacted, among other reasons, to prevent "purposeful noncompliance by the non-custodial parent, because of his hope that his child support obligation would be retroactively forgiven." S. REP. NO. 99-348, at 155 (1986). But, as legal services providers who work with low-income individuals, we have seen how this provision of the Bradley Amendment has created an unyielding regime that has negatively impacted the well-being of low-income non-custodial parents and, in turn, their families. In the District of Columbia, both advocates and judicial officers have expressed much frustration with this strict requirement. This provision of the Amendment not only prevents incarcerated non-custodial parents from being relieved from arrears that accrued during their period of incarceration, but also negatively impacts non-custodial parents who suffer from a physical and/or mental disability that prevents them from filing a motion to modify in a timely manner. We have seen many low-income non-custodial parents with disabilities who struggle for many years to deal with their disabilities and who either do not know of their affirmative duty to request a modification of their child support obligation or do not know how to do so. For the ones lucky enough to obtain Supplemental Security Income (SSI) or Social Security Disability Insurance (SSDI), which can also take many years in dealing with the Social Security Administration (SSA) and its backlog of cases, it is usually at the point of getting their SSA benefit garnished that they may learn that

they should have filed a request to modify, but only after many years have passed and a substantial amount of arrears have accrued. **We urge OSCE to consider supporting legislative steps to modify 42 U.S.C. §666(a)(9)(C) so that it does not apply to situations involving low-income non-custodial parents who can show that they were unable to work because either they were incarcerated or they were experiencing physical and/or mental disabilities during the period that arrears accrued.**

Section 303.11: Case closure criteria.

We support this rule change with the adoption of necessary revisions.

We support the proposed Section 303.11(b)(9), which would allow a State to close a child support case when a non-custodial parent’s sole source of income comes from Supplemental Security Income (SSI), from both SSI and Social Security Disability Insurance (SSDI) (“concurrent cases”), or from other needs-tested benefits. Non-custodial parents who qualify for such needs-tested programs rarely have the means to pay child support out of their extremely limited incomes. As your agency recognizes, such child support cases are unproductive for the State IV-D agencies to pursue and can result in accrual of arrears that are uncollectible and will never be paid.

However, it is important to note that these may often be cases where the income of the custodial parent, as well as the non-custodial parent, is below the subsistence level. These are challenging situations where both households are struggling to meet basic needs. It is sometimes the case that non-custodial parents receiving needs-tested benefits receive financial support from family members, and therefore could afford to pay some child support. Closure of such a case would not be appropriate. Accordingly, we believe **it is important in these cases for the IV-D agency to evaluate the specific circumstances of both parents before determining whether case closure is appropriate.** In addition to supporting the requirement that the recipient of child support services is entitled to notice 60 calendar days prior to case closure, we suggest that if the recipient of services objects to a case being closed automatically because the IV-D agency has learned the non-custodial parent receives needs-tested benefits, the IV-D agency should be required to conduct a review of the specific circumstances of the non-custodial parent and custodial parent receiving IV-D services to determine whether case closure is appropriate. In such cases where it is determined that closure is not appropriate and an order for support is still in effect, a modification of the child support order may be the appropriate action. We therefore suggest that **the IV-D agency should not just stop when it decides that case closure is not appropriate, but should instead proceed in such circumstances with a review and adjustment process** even though a specific request for such review may have not been submitted.

We also suggest that, when the IV-D agency closes a case where a current support order is in place, the agency be required to take the steps necessary to suspend the order before closing the case, either by filing a motion to modify in a judicial jurisdiction or through the review and adjustment process in an administrative jurisdiction. Suspending the order before a case is closed will ensure that no unnecessary arrears will have accrued during the time the case was closed.

With respect to the IV-D agency's notices of case closure, it is important that the notices clearly explain that even though the case is closed with the IV-D agency, case closure does not necessarily mean that any arrears that have accrued under the order are no longer valid or enforceable. Furthermore, such notices of case closure should also inform recipients of child support services that, if they disagree with the State IV-D agency's case closure action, they might be able to pursue filing a child support order or enforcement of child support arrears on their own through the court system and offer contact information of local organizations that might be able to offer free legal help.

Additionally, we recommend that in cases where the non-custodial parent receives concurrent benefits, regardless of whether the IV-D agency closes the case, the IV-D agency should be required to send notice to both the non-custodial parent and recipient of IV-D services that the child could be eligible for monthly SSDI derivative benefits and that the amount of the non-custodial parent's benefit will not be reduced if the child receives derivative benefits. The notice should explain that the custodial parent must visit his or her local Social Security Administration office to apply for derivative benefits for the child.

Lastly, with respect to derivative benefits, **we suggest that a mechanism be established that allows a IV-D agency to credit the amount of derivative benefits received toward arrears that accrued during the period of time in which derivative benefits were received.** For example, in an case where a child support order is in place, OCSE may want to suggest that, after the appropriate action has been taken regarding the order (i.e., the order has been suspended), the case remain open until it has been determined that a child can and is actually receiving derivative benefits. Our experience in the District of Columbia is that non-custodial parents have difficulty getting this information regarding eligibility and receipt of derivative benefits from the Social Security Administration. **We recommend that OCSE work with SSA to help facilitate access to information for IV-D agencies and non-custodial parents.**

Section 303.31: Securing and enforcing medical support obligations.

We support this rule change.

Section 303.31 includes critically important changes in the way that medical support obligations are defined. This provision would reorient the notion of medical support obligations from a

singular focus on private health coverage. Medical support would be defined to include coverage provided under Medicaid, CHIP, or other State health programs.

We wholly support the proposal to delete the provision excluding Medicaid from the definition of medical coverage and the inclusion of other forms of publicly supported health insurance. The Affordable Care Act expanded the eligibility of children and families for Medicaid and cost-sharing health insurance through State or Federal health insurance exchanges. It is incongruous for the Federal government to promote public health through the expansion of insurance for families through these programs while Medicaid is excluded from the definition of medical coverage in child support orders. **This proposal makes much needed changes to medical support provisions so that States have the flexibility to permit parents to meet their obligations consistent with the nation-wide expansion of health insurance programs.**

Section 304.20: Federal Financial Participation.

We support this rule change.

The proposed change in Section 304.20(b)(3)(ix) permits Federal financial participation for job services activities. **As described in Section 303.6, we support the use of Federal assistance for these critical services to promote enforcement of support obligations.**

Section 304.23: Expenditures for which federal financial participation is not available.

We neither support nor oppose this rule change.

We note that OCSE has proposed to continue allowing State IV-D agencies to use Federal financial participation (FFP) for training of hospital workers and others who administer voluntary acknowledgments of paternity (AOP). We are extremely concerned that many parents sign acknowledgments of paternity without truly understanding the long-term consequences of signing and with the good intentions of giving the newborn child a father to be listed on his or her birth certificate. We are also concerned that, even with better training of hospital workers and other personnel, the impact of voluntarily acknowledging paternity will not be fully appreciated. For example, even if an individual was told he had the right to genetic testing, he may not want to jeopardize his relationship with the mother of the newborn child by insisting on genetic testing when the mother has told him he is the father of the child.

Accordingly, we would like to take this opportunity to encourage OCSE to consider advocating at the federal legislative level for a change to 42 U.S.C. § 666(a)(5)(D)(iii), which prohibits a signatory to an acknowledgment of paternity from challenging the validity of the acknowledgement in court after 60 days, except on the limited bases of fraud, duress, or

material mistake of fact, with the burden of proof upon the challenger. As legal services providers, we encounter many individuals who have signed acknowledgments of paternity and, only years later, have reason to believe that they are not the biological father of the child in the case. In addition, they may not be able to prove that they signed the acknowledgment of paternity under fraud or duress, or that there was a material mistake of fact; they are therefore unable to challenge paternity successfully. For example, in the District of Columbia, the government attorneys representing the IV-D agency have opposed requests for genetic testing or disestablishment of paternity when an AOP has been signed and the 60 days deadline for rescission has passed, even when the custodial parents now assert the individual who signed the AOP is not the biological father or court-ordered genetic testing in a separate custody or neglect case demonstrates that the person who signed the AOP is not the father. In such cases, the position of the government attorneys representing the IV-D agency is that the individual who signed the AOP is still obligated to pay child support even though a judge in the custody or neglect case has either dismissed the person's request for visitation or determined he was no longer a party to the neglect case because he had no biological relationship with the child.

While we recognize the need for finality in the process of establishing paternity, we believe that it should be easier to raise a challenge to an acknowledgment of paternity, particularly given the widespread availability of genetic testing to ensure that a parent who is legally obligated to provide support for a child is, in fact, the child's biological father. We appreciate that the ability to obtain genetic testing to set aside paternity established by an AOP should be consistent with a State's law regarding estoppel and laches in the context of paternity disestablishment.

Section 307.11: Functional requirements for computerized support enforcement systems in operation by October 1, 2000.

We support this rule change but recommend further requirements.

We applaud your agency's recognition of the severe consequences that can result when SSI and other needs-based public benefits are erroneously garnished by a State IV-D agency. Non-custodial recipients of these benefits live on extremely limited incomes, and the garnishment of any amount out of their benefits can lead to drastic results, including homelessness. **We strongly support the proposed requirement that State IV-D agencies develop automated procedures to ensure that a non-custodial parent's needs-based benefit does not lose its protected character when the non-custodial parent deposits the benefit into a financial account.** We also support the proposal to require a State IV-D agency to have automated procedures in place to return incorrectly garnished funds within two days after the IV-D agency determines that such incorrect garnishment has occurred.

We support treating "concurrent cases" like SSI-only cases and, thus, preventing automatic garnishment of SSDI received by concurrent recipients. We are concerned,

however, about the impact of automatic enforcement on recipients of Title II Social Security Disability Insurance (SSDI), particularly those non-custodial parents who receive only slightly more in SSDI than the monthly SSI benefit amount. Under the federal Consumer Credit Protection Act, OCSE can garnish up to 65% of the non-custodial parent's SSDI monthly benefit for the payment of child support arrears. Garnishment of such a significant portion of non-custodial parents' already-low SSDI benefit often leaves non-custodial parents with an amount in SSDI that is less than they would receive if they were receiving SSI. In this way, these non-custodial parents – who are now disabled and unable to work – are penalized for having worked and paid into the Social Security system, and they are left in dire financial straits.

For example, if a non-custodial parent had a child support order of \$200 a month and then began receiving an SSDI benefit of \$800 a month – just slightly more than the \$753 benefit he would receive if he were a concurrent recipient of SSI and SSDI – that SSDI benefit could then be garnished for child support. If garnished at the rate of the last order entered, as would be the case in the District of Columbia, such garnishment would leave the non-custodial parent with just \$600 a month. If he were a recipient of SSI or, under the proposed rules, a concurrent recipient of SSI and SSDI, none of his benefit would have been subject to garnishment.

We therefore strongly recommend that State IV-D agencies be required to implement automated procedures to ensure that a non-custodial parent's SSDI benefit cannot be garnished in an amount that would leave the non-custodial parent with less in SSDI than the monthly SSI benefit amount. A non-custodial parent should still be permitted to request that his or her SSDI benefit be garnished at an even lower amount, but in no circumstances should the amount automatically garnished from an SSDI benefit leave the non-custodial parent with less than the monthly SSI benefit amount. Only after administrative or judicial review should OCSE be permitted to garnish an amount that would leave an SSDI recipient with less than the monthly SSI benefit amount, pursuant to relevant federal and state child support and debt collection laws. This review would include an inquiry into whether the non-custodial parent possessed assets that would place them above the subsistence level, in which case a higher garnishment amount might be appropriate.

Sincerely,

Bread for the City
Washington, D.C.

The Legal Aid Society of the District of Columbia

Neighborhood Legal Services Program
Washington, D.C.

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