

**Testimony before the District of Columbia Council
Committee on the Judiciary and Public Safety
Child Support Services Division of the Office of Attorney General
Agency Performance Oversight Hearing
Fiscal Year 2016-2017**

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The Legal Aid Society of the District of Columbia¹ and Bread for the City² provide this testimony regarding the performance of Child Support Services Division (CSSD) of the Office of the Attorney General (OAG) as organizations that regularly interact with it and its attorneys. We discuss several issues: recent rules promulgated by the federal Office of Child Support Enforcement, concerns regarding CSSD's record-keeping, the continuing need for legislative reform of the District's paternity laws, lack of timely enforcement of child support orders, and a recent drop in filings of new petitions for child support.

Legal Aid and Bread for the City have significant experience litigating with and against attorneys from OAG/CSSD. Both organizations have long represented custodial and non-custodial parents in child support cases in the District of Columbia. Starting in 2011, Legal Aid and Bread for the City began receiving Access to Justice funding from the D.C. Bar Foundation to support a joint Child Support Community Legal Services Project. Through this Project, we operate the Child Support Resource Center, which provides court-based legal services at the Paternity and Child Support (P&S) Branch of the D.C. Superior Court.

Five days per week, attorneys from Legal Aid and Bread for the City provide legal information, advice, same-day temporary representation, and full representation to custodial and non-custodial parents in their paternity and child support cases. In addition, we also represent custodial and non-custodial parents in the Domestic Relations Branch and Domestic Violence Unit of Superior Court, in which OAG/CSSD is often involved in the child support part of the case.

¹ The Legal Aid Society of the District of Columbia was formed in 1932 to "provide legal aid and counsel to indigent persons in civil law matters and to encourage measures by which the law may better protect and serve their needs." Over the last 80 plus years, tens of thousands of the District's neediest residents have been served by Legal Aid staff and volunteers. Legal Aid currently works in the following four priority areas: consumer, family law, housing, and public benefits. Legal Aid also handles appellate cases in the D.C. Court of Appeals. More information about Legal Aid and its work can be found on our website, www.LegalAidDC.org, and our blog, www.MakingJusticeReal.org.

² Bread for the City, founded in the mid-1970s, provides low-income residents of Washington, D.C. with comprehensive services, including food, clothing, medical care, and legal and social services, in an atmosphere of dignity and respect. Bread for the City's Legal Clinic provides legal help in the following areas: family law, housing, and public benefits.

Now in the sixth year of running the Child Support Resource Center, and as a result of our longstanding commitment to representing litigants with a wide variety of legal issues and our ongoing presence at the District's Superior Court, we have a unique perspective on the role of the District's child support agency in the fight against poverty. Although we frequently oppose OAG/CSSD in the courtroom, we unreservedly share OAG/CSSD's goal of reducing poverty among District children. In the past, we have discussed our ongoing concerns at length in order to provide this Committee with an outside perspective on many of the ongoing, systemic challenges facing both OAG/CSSD and the many District residents that the agency is tasked with serving. Every year since 2012³, we have provided testimony to the Council not just to express our concerns about the agency's performance, but to highlight areas for improvement, collaboration, and growth. As always, we look forward to continuing our ongoing dialogue with OAG/CSSD leadership, because improving the administration of the District's child support program benefits both families and the District government. We are in the process of scheduling a meeting with OAG/CSSD leadership regarding these matters, yet we believe that the Council should also be informed about these important issues.

OAG/CSSD Should Work with the Council and Community Stakeholders to Implement the Rules Recently Published by the Federal Child Support Agency.

In November 2014, the Office of Child Support Enforcement (OCSE), the federal child support agency that oversees state child support agencies, including OAG/CSSD, published proposed revisions to federal regulations governing child support programs. In our 2015 testimony, we urged OAG/CSSD to work collaboratively with community stakeholders to implement the optional rules, as they could have a significant impact on the lives of low-income families in the District.

The final rules, published by the OCSE in December 2016 and effective January 19, 2017, are meant to improve agency operations and increase parental compliance by setting clearer standards for accurate child support orders. Research shows that non-custodial parents are more likely to comply with support orders that are based on evidence of the parents' ability to pay. In recognition, rule 303.4 provides guidance in setting child support orders based on a family's specific economic circumstance.⁴ This is particularly crucial for low-income families in the District, who often face barriers to employment that can impact a child support order. This rule requires OAG/CSSD, or any person initiating a case, to more thoroughly investigate non-custodial parents' individual circumstances to ensure that a court has all relevant information to set an order—leading to more accurate and fair orders, and greater compliance by non-custodial parents.

Additionally, there are several rules that, when implemented, should have an immediate positive impact on low-income parents in the District. For example, parents will have greater

³ We respectfully refer the Committee to our 2012, 2013, 2014, 2015, and 2016 Joint Testimony before the Committee on the Judiciary and Public Safety and the Committee on the Judiciary. We are happy to provide copies upon request.

⁴ See 45 C.F.R. § 303.4 (2016)

flexibility in meeting their medical support obligation for their children. Prior to the new rules, parents were ordered to obtain private health insurance for a child if private health insurance became available at a reasonable cost. “Reasonable” was a term of art, but it did not mean that the parent could necessarily afford it. Now, parents will be able meet their medical support obligations through enrolling an eligible child in Medicaid, Children’s Health Insurance Program (here, called the D.C. Healthy Families program), or other state public health insurance plans, so that parents are not required to pay for expensive private coverage for a child eligible for a public plan.⁵

Critically, the new rules also address the rights of parents at risk of incarceration or other deprivation of liberty due to unpaid child support. In the U.S. Supreme Court case *Turner v. Rogers*, 564 U.S. 431 (2011), the Court described the minimal safeguards (short of a right to counsel) that must be afforded to parents in civil contempt proceedings. The new rules move in an appropriate direction toward strengthening the due process protections for parents facing contempt cases. The rules require OAG/CSSD to screen cases for a non-custodial parent’s ability to pay or comply with the order *before* filing a motion for contempt.⁶ This will ensure that agency resources are not wasted prosecuting non-custodial parents who have no ability to pay due to disability or significant barriers to employment. Additionally, when OAG/CSSD does choose to pursue contempt cases, it must (1) provide the court with information regarding the non-custodial parent’s ability to pay and (2) clearly inform the non-custodial parent that his or her ability to pay is the critical question at issue in a contempt case. In the District, where most parents facing contempt cases are not represented by a lawyer, these notices from OAG/CSSD will provide much-needed guidance to parents navigating the court system alone.

While many of the rules are mandatory and have already gone into effect, other rules will require legislative changes over the coming years. We hope that OAG/CSSD will work with community stakeholders to ensure the expeditious and efficient incorporation of these rules into the agency’s every day work at their headquarters and the Superior Court. We also look forward to collaborating with OAG/CSSD and the Council to craft legislation that meets the rules’ requirements.

Recommendation:

- OAG/CSSD should engage in a transparent and collaborative process, involving the Council and community stakeholders, to implement rules regarding state child support programs recently published by the federal Office of Child Support Enforcement.

OAG/CSSD Should Improve Its Record-Keeping to Ensure That Non-custodial Parents Are Given Credit for Payments Made and Children Receive the Support to Which They Are Entitled.

OAG/CSSD, as the District’s collector of child support payments through the Child Support Clearinghouse and the state’s Support Disbursement Unit, is responsible for the accurate

⁵ See 45 C.F.R. § 303.31 (2016)

⁶ See 45 C.F.R. § 303.6 (2016)

and timely collection and disbursement of child support payments. We have previously testified about our clients' experiences with OAG/CSSD's imperfect record-keeping, most recently in 2016. As we discussed last year, an October 2015 report published by the District's Office of the Inspector General (OIG Report) briefly touched on OAG/CSSD staff concerns about the agency's performance of this critical duty. The Report found that 31% of OAG/CSSD staff rated the agency's record-keeping as either "fair" (22%) or "poor" (9%). Although this number may at first blush seem small, it is remarkable that nearly a third of OAG/CSSD's own staff rated the agency's record-keeping in this matter; moreover it belies what we believe to be a more extensive and consistent problem facing the agency.

In 2016, Legal Aid assisted a client whose wages and income tax refund were garnished for a child that was not his—in fact, this client has no children and does not owe child support to anyone. He simply shares a name with a man who owes child support pursuant to a court order in the District. This client's funds have been mistakenly garnished twice, requiring him to make multiple trips to OAG/CSSD's offices and to the Superior Court in the hopes of stopping the wrongful garnishment. This client makes a modest income, so suddenly losing hundreds of dollars from his paycheck and waiting weeks for his expected tax refund caused him great financial difficulty and stress. Although we were able to work with OAG/CSSD to help this client recover his hard-earned money, the agency recently mistakenly garnished his wages again. It is unclear if OAG/CSSD has the record-keeping capability to ensure that wages and funds are only garnished from those who actually owe child support, and we find this deeply troubling. And unfortunately, this client is not the only person that we have helped fight a wrongful garnishment.

OAG/CSSD's record-keeping problems, which can have a significant effect on families living in poverty, must be addressed. This issue can lead to parents both under- and over-paying child support, and it also reduces public confidence and trust in the agency, which is tasked with such an important role in the community. Child support is a powerful anti-poverty tool, and its importance to the health of children and families in the District cannot be overstated. Parents and children deserve an agency that they can trust to efficiently collect and disburse child support while maintaining accurate records of payments and arrears. We urge OAG/CSSD to listen and respond to the concerns raised by families, community stakeholders, and even their own staffers, and work to address the agency's deficiencies in this area.

Recommendation:

- OAG/CSSD should take concrete steps to improve the accuracy and efficiency of its record-keeping systems.

Legislative Reform Is Needed to Simplify and Streamline the District's Paternity Establishment Law, Thereby Making It More Accessible to District Residents.

We have reported in prior testimony our concerns about CSSD/OAG's opposition to District residents attempting to challenge paternity in cases in which there is a signed Acknowledgment of Paternity. We have been most concerned about OAG/CSSD's opposition to requests for court-ordered genetic testing in cases where (1) parents were not provided with

required statutory notices and protections mandated by District and federal law before signing, (2) putative fathers were misinformed about the probability of their paternity, (3) both the mother and putative father want genetic testing, and/or (4) DNA testing conclusively proves that the putative father is not actually the biological father. Although we have recently observed positive changes in OAG's position in some of these cases, more progress is necessary because these issues still exist and affect District families. Among other things, we are concerned about the execution of Acknowledgments of Paternity in a way that essentially permits an end-run around adoption (i.e., a mother could collude with her current boyfriend to sign an Acknowledgment of Paternity that would establish the boyfriend as the child's legal father, even where both the mother and the boyfriend know that the boyfriend cannot be the child's biological father; in that case, the child's actual biological father would have little recourse to challenge the Acknowledgment and to become the legal father). A major solution would be for the Council to simplify the District's paternity establishment law and clarify the right for an individual to obtain DNA testing and challenge paternity.

By way of background, generally, in order to establish a child support order, paternity must first be determined for a child's father. In the District, unmarried parents can establish the father's paternity of a child by going to court to request DNA testing or by signing a legal form called an Acknowledgment of Paternity at the hospital or the D.C. Department of Health, Vital Records. Federal and D.C. law created the Acknowledgment of Paternity to provide unmarried biological parents with an efficient means of legally recognizing the relationship between a father and child. To safeguard the Acknowledgment of Paternity process and ensure that the system is not abused, federal and D.C. law include procedural requirements that must be followed for parents to validly execute an Acknowledgment of Paternity.⁷ D.C. law also provides parents with an opportunity to rescind the Acknowledgment within in 60 days after signing it.⁸ After 60 days, it can only be challenged based on fraud, material mistake of fact, or extraordinary circumstances.⁹

Based on the experience of parties served by Bread for the City and Legal Aid over the past several years, it appears that too often, hospital or Vital Records staff fail to provide statutorily mandated notices. In addition, when they do not receive the proper notice, parties do not understand the 60-day rescission period and the otherwise binding nature of the Acknowledgment. Parties too often report that they were not told that they could obtain DNA testing prior to signing an Acknowledgement of Paternity at the hospital or at Vital Records. Problems arise when parties sign an Acknowledgement of Paternity without understanding the significance of the document or their right to not sign it. In many cases, fathers express understandable concerns about paternity, often because the mother has recently revealed that another man could be the child's father, or the parties have obtained a private genetic test that shows that putative father is not the child's biological father. Parties seek help from the court to clarify and resolve these extremely personal and complicated matters. Often, their main request is to have the court order a genetic test to determine paternity once and for all.

⁷ For instance, parents must be under oath. They must also be given written and oral notice of the alternatives to, legal consequences of, and rights and responsibilities that arise from the Acknowledgment. D.C. Code § 16-909.01 (a)(1) (2015).

⁸ D.C. Code §16-909.01(a-1) (Supp. 2010)

⁹ D.C. Code §16-909(c-1) (Supp. 2010)

It is the position of Bread for the City and Legal Aid that a signed Acknowledgment should not be used to deny a party's request to obtain genetic testing where the statutory requirements were not followed and/or if there is a good faith basis to believe the person who signed the Acknowledgment may not be the father. We also believe that the Acknowledgment should not be used to prevent disestablishment of legal paternity where private genetic testing conclusively shows the man is not the biological father. Indeed, Maryland law provides that a declaration of paternity in an order can be modified or set aside if a genetic test establishes that the individual named in the order is not the biological father.¹⁰ Additionally, under Maryland law, the court shall order paternity testing if requested by either party or the government.¹¹ Virginia, as well as California, Illinois, Alabama, Colorado, Georgia, Minnesota, Missouri, Florida, South Dakota, and Louisiana all specifically allow a "father" who signed an Acknowledgment to subsequently disestablish paternity based on genetic testing, and numerous other states at least provide some means for a "father" to challenge paternity after the rescission period.

We urge the Council to simplify the District's paternity establishment law and clarify the right for an individual to obtain DNA testing and challenge paternity. Bread for the City and Legal Aid have appreciated Attorney General Racine's willingness to work with advocates on ways to improve the agency's delivery of services to District families. Bread for the City and Legal Aid would welcome an opportunity to work with the Council and OAG/CSSD to craft legislation that clarifies the currently complex web of laws governing paternity establishment in D.C. We believe this clarification of the law will benefit District families.

Recommendation:

- The Council should prioritize legislative reform to simplify and streamline the District's paternity laws, thereby making them more accessible to District residents.

OAG/CSSD Should Enforce Current Child Support Orders in a Timely Manner so that Children in the District Receive the Support at the Time They Need It and Low-Income District Residents' Ability to Support Themselves Is not Drastically Affected.

OAG/CSSD should continue to improve on efforts to timely enforce child support orders. Under District law, a twelve-year statute of limitations applies to the collection of all civil judgments, which includes child support obligations. Once twelve years have run on an order, that order is no longer enforceable unless a motion to revive enforceable arrears has been filed and granted.

Bread for the City and Legal Aid have represented noncustodial parents in many cases in which OAG/CSSD is collecting unpaid child support arrears well past the expiration of the statute of limitations. In many cases, the children for whom support was owed are in their late 20s, 30s, or even 40s when OAG/CSSD begins garnishing 65% of the noncustodial father's

¹⁰ Md. FAMILY LAW Code Ann. § 5-1038

¹¹ Md. FAMILY LAW Code Ann. § 5-1029

Social Security Disability Insurance (SSDI) or Social Security retirement benefit to pay back child support arrears. In a particularly egregious example, Legal Aid recently helped a homeless, disabled non-custodial parent when OAG/CSSD began garnishing nearly half of his \$941 per month SSDI benefits to pay down child support arrears for his almost thirty-year old child. Bread for the City also recently assisted a father whose only income was a combination of SSDI and Supplemental Security Income (SSI) totaling \$753 per month. CSSD was garnishing \$100 per month of his SSDI to pay back arrears he owed for his child, who was 47 years old at the time.

Enforcement of this type makes it impossible for our clients, who rely on these benefits (earned through their work history and often their sole source of income) to meet their daily living expenses. In many cases, we have successfully argued—over OAG/CSSD’s strong objections—that the District is barred from enforcing these expired arrears and must cease withholding for arrears that are unenforceable.

It is important that OAG/CSSD take action to enforce child support orders at the time the support is owed and is needed by the child. We have observed OAG/CSSD filing some motions to revive arrears before the statute of limitations runs, but in too many cases we encounter there is no action on the part of OAG/CSSD for many years, while the child is still a minor. Often the trigger for agency action is the obligor starting to receive SSDI disability or retirement benefits, many years after the child has grown and moved out of the custodial parent’s home. Research has shown that timely enforcement of child support arrears is associated with an increase in formal child support payments, as well as an increase in noncustodial fathers’ involvement with their children.¹² We are hopeful that OAG/CSSD will improve on the timeliness with which it enforces child support obligations, in order to ensure that children are receiving support at the time they need it.

Recommendations:

- OAG/CSSD should stop directing its resources toward arguing that the statute of limitations does not bar arrears that are clearly expired under District law.
- OAG/CSSD should continue to enforce child support orders while the children need the support, not years or decades later when the children are adults.

The D.C. Council Should Request Information from OAG/CSSD Regarding the Problem of a Drop in New Case Filings in Court.

OAG/CSSD files the vast majority of paternity and child support cases that are filed in the Paternity and Child Support Branch of D.C. Superior. For the past couple of years, the number of new cases filed in this part of the court was steady at approximately 2,400 new case filings each year. However, according to the District of Columbia Courts Statistical Summary Report, in calendar year 2015 there was a 28.2 percentage drop in the number of new case filings

¹² Robert I. Lerman, Capabilities and Contributions of Unwed Fathers, *The Future of Children: Fragile Families* 20, no. 2, Fall 2010, at 76-78.

in the Paternity and Child Support Branch.¹³ In 2013, 2,407 new cases were filed. In 2014, 2,458 new cases were filed. But, in 2015, the number dropped to 1,765.

In a meeting with child support advocates in September 2016, OAG/CSSD acknowledged the drop in new case filings and attributed a part of the drop in numbers to the D.C. Department of Human Services, Economic Security Administration (ESA). Specifically, OAG/CSSD noted problems with receiving referrals of paternity and child support cases from ESA to OAG/CSSD; these referrals involve parents who receive Temporary Assistance for Needy Families (TANF) and assign their rights to child support to the District. OAG/CSSD also noted that the agency is working to ensure it has gathered better information before filing to ensure a higher percentage of orders entered for new cases filed.

Unfortunately, the economic growth in the District has not benefited its low-income families,¹⁴ and the need for a functioning child support system in D.C. is imperative, serving as a significant income support program for low-income families.¹⁵ Due to a scheduling conflict, Bread for the City and Legal Aid were unable to meet with OAG/CSSD before this oversight hearing to obtain an update on the status of the agency's new case filings. However, this is a good role for D.C. Council oversight: the Council should consider requesting data about the current state of new case filings and about the steps OAG/CSSD has taken to ensure that problems with TANF referrals from ESA are being resolved and that the agency is addressing any other problems accounting for the drop in new case filing numbers.

Recommendation:

- The D.C. Council should request data from OAG/CSSD about the current state of new case filings and what action OAG/CSSD has taken to ensure it is addressing the drop in new case filings.

¹³ District of Columbia Courts Statistical Summary, CY 2015, at 5. Available at: <http://www.dccourts.gov/internet/documents/2014-Statistical-Summary-FINAL-02-12-15.pdf>

¹⁴ See D.C. Fiscal Policy Institute, "DC's Racial Inequality Continues to Widen, Even as the City Sees Substantial Economic Growth" (Sept. 2016) (noting that, in 2015, the number of D.C. residents living below the federal poverty line grew to 110,500 – 18,550 more than in 2007). Available at: <http://www.dcfpi.org/dcs-racial-inequality-continues-to-widen-even-as-the-city-sees-substantial-economic-growth>

¹⁵ See Office of Child Support Enforcement, "The Child Support Program Is a Good Investment: Story Behind the Numbers" (Dec. 2016) (noting that the child support system nationwide serves more than one in five children, providing 41 percent of household income to low-income families who receive child support). Available at: https://www.acf.hhs.gov/sites/default/files/programs/css/sbtn_csp_is_a_good_investment.pdf