

**Testimony of Ashley McDowell
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And

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**Before the Committee on the Judiciary and Public Safety
Council of the District of Columbia**

Performance Oversight Hearing Regarding the Office of the Attorney General

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The Legal Aid Society of the District of Columbia¹ and Bread for the City² respectfully submit this joint testimony regarding the performance of the Child Support Services Division (CSSD) of the Office of the Attorney General (OAG), the agency tasked with initiating child support cases, establishing and enforcing support orders, and collecting child support. Our testimony concerns several issues that we believe warrant oversight by the Council: a lack of transparency surrounding OAG/CSSD's policies and procedures for working with incarcerated parents, the ongoing need for reform of the District's paternity laws, and a recent drop in filings of new child support cases.

Legal Aid and Bread for the City have significant experience litigating against attorneys from OAG/CSSD. Both organizations have long represented custodial and noncustodial parents in child support cases in the District of Columbia. Starting in 2011, Legal Aid and Bread for the City received Access to Justice grant money from the D.C. Bar Foundation to fund 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, and same-day temporary representation to custodial and non-custodial parents in their paternity and child support cases. In addition, we represent custodial and non-custodial parents in the Domestic Relations Branch and Domestic

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.

Violence Unit of the Court, in which OAG/CSSD is often involved in the child support part of the case.

We are now in the seventh year of running the Child Support Resource Center, and as a result of our longstanding commitment to representing litigants with child support cases and our ongoing presence at the District's Superior Court, we are intimately familiar with many of the challenges currently facing OAG/CSSD. Our representation of thousands of clients in a variety of civil legal matters gives us insight into the barriers facing families living with low income in the District. Additionally, our litigation and advocacy in local court and government agencies has shown us how important it is to low-income District residents that agencies work together with community-based organizations, and the difficulties created for families when our government falls short.

Each year, we remind both the Council and the agency that although we frequently oppose OAG/CSSD in the courtroom, we unreservedly share OAG/CSSD's goal of reducing poverty among District children. This remains true today. In the past, we have submitted testimony in order to provide this Committee with outside perspective on many of the ongoing, systemic challenges facing both OAG/CSSD and the many District residents living in poverty that the agency is tasked with serving. Since 2012,³ we have testified before the Council regarding OAG/CSSD's performance, areas of concern, and ways in which we hope to collaborate with the agency in support of our goal of a better-functioning child support system in the District. This brings benefits to not only parents and children living with low income, but all District taxpayers.

OAG/CSSD SHOULD CREATE A TRANSPARENT PROCESS TO TELL INCARCERATED NONCUSTODIAL PARENTS IF THE AGENCY WILL FILE A MOTION TO MODIFY CHILD SUPPORT ON BEHALF OF THE PARENT AND TAKE GREATER STEPS TO ENSURE THAT PARENTS DO NOT RETURN TO THEIR COMMUNITIES WITH LARGE CHILD SUPPORT DEBTS

When noncustodial parents who owe child support are incarcerated, their support orders are not automatically suspended. In order for a child support order to be suspended, the custodial parent must affirmatively file a motion to modify with the court. In many, if not most, of these cases involving noncustodial parents, the child support order would be suspended if a motion were filed because incarceration is typically a change in circumstances warranting modification of the child support order.⁴ However, until a motion is filed and modification ordered by the court, child support arrears will continue to accrue, and the parent will be responsible for those arrears. Most noncustodial parents are unaware that they need to take these affirmative steps to suspend their child support orders. As a result, many parents unnecessarily accrue large child support arrears while in jail. These parents also face severe collateral consequences when returning home which can impede their successful reentry into the community, including access to employment and other opportunities. These consequences can include suspension of a

³ We respectfully refer the Committee to our 2012, 2013, 2014, 2015, 2016, and 2017 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 D.C. CODE § 16-916.01(g) and (g-1).

driver's license, child support obligations reported to credit bureaus, and the initiation of civil contempt proceedings.

The District's Child Support Guidelines require OAG/CSSD, when it learns that a noncustodial parent is incarcerated for more than 30 days, to review the circumstances of both parents and determine if modification of the support order is appropriate. OAG/CSSD must then decide whether to file a motion on behalf of the incarcerated parent. However, OAG/CSSD is not required to file a motion to modify, even if the agency determines that circumstances warrant modification. OAG/CSSD is not even required to inform the incarcerated parent whether it has decided to file a motion.

Timing is of the essence when filing a motion to modify based on incarceration, and OAG/CSSD should be obligated to file a motion to modify (if circumstances warrant such filing) and to provide notice to incarcerated parents about its decision on this issue. Federal law prohibits retroactive modification of child support orders, and therefore any modification of a support order will only date back to when the opposing party received notice of the motion. An obligor cannot ask that child support debt be forgiven after he or she is released from custody. In too many cases, motions to modify are not filed while the parent is incarcerated, and noncustodial parents come to Bread for the City and Legal Aid after they are released from prison or jail, unable to pay arrears that accrued while they were incarcerated. By the time these parents come to us, it is too late help with this problem.

Sometimes parents are able to obtain legal assistance to suspend their child support orders while they are still incarcerated. On a few occasions, we have worked collaboratively with OAG/CSSD to ensure that happens. In one case, an incarcerated father heard about Bread for the City's child support practice and his jail case manager contacted us on his behalf. Bread for the City was able to assist this father with filing a motion to suspend the child support order. OAG/CSSD agreed with the request, and the child support order was successfully suspended.

However, we are concerned that this is not the norm and many more incarcerated parents need help. Child support practitioners and other interested players have recognized this as a problem. The Paternity & Support Branch Subcommittee includes representation from Legal Aid, Bread for the City, OAG/CSSD, court personnel, the D.C. Bar Pro Bono Center, and the Public Defenders Service. Accordingly, the Subcommittee created an Incarcerated Obligor Working Group. The Working Group plans to create training opportunities for professionals who regularly interact with incarcerated parents with child support obligations and develop outreach projects to bring awareness to this important issue.

OAG/CSSD, on its own, is also engaged in outreach and other programs to reach incarcerated obligors. It is our understanding that OAG/CSSD's outreach workers go to the D.C. jail to conduct information sessions on the rights of incarcerated parents and on modifying orders, as well as to help incarcerated parents with requests to modify child support orders. However, we do not have much information about what occurs after a parent makes a request for a modification with OAG/CSSD. There does not appear to be transparency about what OAG/CSSD is doing for parents regarding suspension of their support orders and whether parents are being notified of OAG/CSSD's decisions. We want to make sure that OAG/CSSD

makes timely decisions about whether to file motions on behalf of incarcerated parents and that the agency notifies parents about their decision. If the agency notifies a parent that it has decided not to file a motion, or that it still has not made a decision within a specific timeframe, this would put parents on notice that they need to consult with legal service providers about their options and/or file their own motion if necessary.

In addition, with the goal of ensuring the successful reentry of incarcerated obligors, we suggest that the D.C. Child Support Guidelines be amended to require OAG/CSSD to file a motion to modify within a set period of time in cases where the agency determines the circumstances warrant a modification. It is unclear why the statute makes this a discretionary action.⁵ We also suggest that the Guidelines require OAG/CSSD to notify incarcerated parents within a designated period of time if the agency decides it will not file a motion to modify. We believe these requirements will lead to the timely filing of more motions to suspend child support orders in appropriate cases, leading to fewer unnecessarily accrued arrears that can frustrate a parent's successful reentry into the community.

OAG/CSSD has an important role in assisting incarcerated parents and preventing the unnecessary accrual of child support debt. We believe that the outreach work that OAG/CSSD is doing is a necessary step towards the goal of reducing or eliminating the child support debt of incarcerated obligors. However, since much is unknown about how OAG/CSSD is collecting information about the incarceration of parents that owe support and the effectiveness of the steps OAG/CSSD is currently taking, it is important for the Council to request information about OAG/CSSD's practices in assisting incarcerated parents. To that end, we suggest to the Committee several recommendations.

Recommendations

- 1) The Committee should inquire into the effectiveness of the agency's actions to comply with the requirements of the D.C. Child Support Guidelines and to ensure that incarcerated parents are not released with unnecessary child support debt. The Council should ask OAG/CSSD to provide data about the cases where the agency learned that a noncustodial parent was incarcerated. For each of those cases, specifically:
 - a) How OAG/CSSD learned the parent was incarcerated;
 - b) How quickly OAG/CSSD made contact with the parent after learning they were incarcerated;
 - c) How long it took for the agency to make a decision about whether or not to file a motion to modify;
 - d) Whether OAG/CSSD filed a motion to modify for the parent; and
 - e) If OAG/CSSD made a decision not to file a motion, the reasons why the agency did not file a motion in those cases.

⁵ "If the IV-D agency determines that a parent's incarceration has resulted in a change in financial circumstances warranting a modification of the support order, the IV-D agency may request the court to suspend or modify the support order pursuant to this subsection." D.C. CODE § 16-916.01(r)(5).

- 2) OAG/CSSD should work with legal services providers by referring cases where CSSD has decided not to file a motion to modify or where CSSD is unable to make a timely determination about whether to file a motion.
- 3) OAG/CSSD should implement a policy of notifying incarcerated parents, within a designated time period, of its decision to file or not to file a motion to modify and if CSSD is unable to make a timely determination about whether to file such a motion.
- 4) The D.C. Child Support Guidelines should be amended to require OAG/CSSD to request a modification if it determines that circumstances warrant it. OAG/CSSD should be required to make such a determination within a reasonable time, and, if such determination cannot happen within that period, then OAG/CSSD should be required to notify the incarcerated parent that it has not been able to conclude if modification is warranted. If OAG/CSSD has determined that it will not file a motion for modification, it should be required to inform the incarcerated parent of its decision not to do so.

OAG/CSSD SHOULD WORK WITH STAKEHOLDERS TO ADDRESS THE DROP IN NEW CASE FILINGS IN COURT

Last year, we raised concerns about a drop in child support and paternity case filings, and this year we renew our concerns. OAG/CSSD files the vast majority of paternity and child support cases that are filed in the Paternity and Child Support Branch of the D.C. Superior Court, and a significant drop in the number of new cases filed is worrying because it suggests that custodial parents who might benefit from establishing a child support order are instead being left to support children in their custody without all the resources available to them.

For the past few years, the number of new Paternity and Support cases filed held steady at approximately 2,400 new case filings each year. The District of Columbia Courts Statistical Summary Report for the 2016 calendar year shows that the drop that occurred in calendar year 2015 may have been the beginning of a new trend, and not simply an unusual year. According to the Court's Report, in calendar year 2012, there were 2,429 new filings. This was in-keeping with previous years' levels, when 2,407 new cases were filed in 2013, and 2,458 cases were filed in 2014.⁶ In 2015, that number dropped to 1,765, and the trend continued into calendar year 2016, when 1,835 cases were filed.

Previously, OAG/CSSD told child support advocates that part of the drop in filings was due to the agency receiving fewer referrals from the D.C. Department of Human Services, Economic Security Administration (ESA). These referrals involve parents who receive Temporary Assistance for Needy Families (TANF) and assign their rights to child support to the District. However, this raises more questions than it answers. While the total number of families receiving TANF did decrease from 2014 to 2015, it is not clear from available data how much of this decline is attributable to a decline in new applications (as opposed to a change in

⁶ District of Columbia Courts Statistical Summary, CY 2015, at 5, <https://www.dccourts.gov/sites/default/files/divisionspdfs/Statistical-Summary-CY2016-Final.pdf>.

the number of terminations).⁷ Indeed, the number of District children living in poverty and extreme poverty actually increased slightly from 2014 to 2015—and again in 2016—suggesting that many families in the District continue to live day-to-day with very limited resources. It is not clear to us how much new demand or community need for TANF has declined, and whether this is truly the driver of the decline in new child support filings. Instead, our clients’ experiences suggest another possible factor: that ESA and CSSD may not be effectively communicating with each other about custodial parents who need child support orders, leading to roadblocks to custodial parents having their day in court and receiving the support that they need.

Anecdotally, litigants have expressed frustration at a lack of communication between OAG/CSSD and ESA. Though our work in the Child Support Community Legal Services Project, we have met with several custodial parents who have terminated their TANF benefits at ESA only to be later told by OAG/CSSD at court that the agency’s records show that the parent still receives TANF. One litigant stated that she had terminated her TANF months earlier, but at court was assumed to still be in receipt of benefits. Additionally, instead of seeking updated information from ESA, OAG/CSSD has asked parents to go back to ESA to obtain proof of their termination of TANF benefits. This can mean hours-long waits at DHS service centers to obtain information that should be available to OAG/CSSD.⁸ TANF status impacts whether a parent has assigned his or her right to support to the District. Crucially, TANF recipients cannot come to a settlement agreement with the opposing party about the amount of child support. When OAG/CSSD puts forth outdated and incorrect information about a parent’s TANF status, they could inadvertently curtail a parent’s ability to advocate for him or herself in the court process.

A lack of effective communication between OAG/CSSD and ESA may be at the root of the reduction in new case filings, and if it is, we hope that OAG/CSSD will work with ESA to remedy this. We need the Committee to request data so that we can have a better understanding to why CSSD filings are declining. The Committee should work with the Committee on Human Services to get more details from DHS about trends in TANF caseloads, so that we can understand if the source of the decline is attributable to fewer new TANF applications, or the referral process itself. And, given the coordination/communication issues that we continue to see between the two agencies, the Committee should ask OAG/CSSD about the steps it 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.

Recommendations

- 1) The Committee should request data from OAG/CSSD (and work with the Committee on Human Services to obtain relevant data from DHS) about the current state of TANF caseloads and new child support case filings.

⁷ See Kids Count Data Center, *Families, Children and Adults Receiving TANF by Ward* (Jan. 2017), <http://datacenter.kidscount.org/data/tables/7316-families-children-and-adults-receiving-tanf-by-ward?loc=10&loc=3#detailed/3/any/false/573,869,36,868,867/3539,3538,3537/14382>.

⁸ See The Legal Aid Society of the District of Columbia and D.C. Fiscal Policy Institute, *Closing the Gap Between Policy and Reality: Preventing Wrongful Denials and Terminations of Public Benefits in the District of Columbia*, at 6 (May 2014), <https://www.legalaiddc.org/wp-content/uploads/2014/05/Closing-the-Gap-Final.pdf>.

- 2) The Committee should ask what action OAG/CSSD has taken to ensure it is addressing the drop in new case filings.

THE DISTRICT'S PATERNITY LAWS REMAIN COMPLEX AND CONFUSING AND OAG/CSSD SHOULD PRIORITIZE ENGAGEMENT WITH STAKEHOLDERS TO CRAFT LEGISLATION THAT PUTS FAMILIES FIRST

Over the years, we have testified about OAG/CSSD's previously hardline positions in cases involving paternity challenges. Attorneys in both of our organizations have worked on cases where OAG/CSSD opposed granting parents genetic testing or fought against the disestablishment of paternity where there was an existing Acknowledgement of Paternity. This included situations where (1) parents were not provided with required statutory notices and protections mandated by District and federal law before signing, (2) putative fathers were lied to 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. We are glad to say that recently, OAG/CSSD has taken a more reasonable and family-centric approach when litigating cases involving questions about a father's paternity. However, OAG/CSSD's flexibility remains uneven, and there are further steps that the agency could take to help families mired in the District's complex parentage laws. The courts are the only District institution that can fully resolve these issues, and OAG/CSSD can serve as a roadblock to a satisfying resolution for the mother and putative father.

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 Vital Records. The Acknowledgment of Paternity was created by federal and D.C. law 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. For instance, both parents must be placed 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.⁹ When these requirements are not followed, Bread for the City and Legal Aid take the legal position that the Acknowledgment should not be used to establish paternity or require a putative father to pay child support if a party wants genetic testing or has obtained private genetic testing conclusively showing the man is not the biological father.

In a recent case handled by Legal Aid, our client requested DNA testing because he was concerned that he was not the only possible biological father. Our client reported that, while he had signed something at the hospital, he certainly had not received an adequate explanation of what he was signing or what would be the legal effect of that document. During a hearing, the biological mother of the child confirmed that the parties did not receive the proper notices at the hospital. To make matters worse, our client struggled with alcoholism. He was under the

⁹ See D.C. CODE § 16-909.01 (a)(1) (2018).

influence at the hospital when the child was born and when he signed the Acknowledgement of Paternity. It was clear that neither party understood the legal implications of signing or even had the capacity to understand.

In light of these facts, the judge admonished OAG/CSSD to contact a supervisor and consent to DNA testing. OAG/CSSD, however, continued to oppose testing. This forced the court to use time and resources to hold a hearing and order testing over the government's objection. Further, OAG/CSSD had filed petitions for child support against this client twice in the past. Both times they attempted to rely on the same Acknowledgement of Paternity, and both times judges found that the client did not fully understand what he had signed.

Litigants served by Bread for the City and Legal Aid continue to report that too often, hospital or Vital Records staff fail to provide statutorily mandated notices. Parties often are 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. Additionally, when OAG/CSSD does not oppose the granting of genetic testing, the agency will sometimes request that putative fathers be denied the benefit of lower-cost or government-subsidized testing and ask that the putative father pay what is called the "private rate." This "private rate" is approximately \$400, whereas the "government rate" may be closer to \$150. Although we are not privy to the details of OAG/CSSD's pricing contract with the lab that conducts court-ordered testing, it is not clear that providing putative fathers with the benefit of the "government rate" does any harm to OAG/CSSD's budget or the District's bottom line. A \$400 bill for genetic testing is a daunting prospect for many parents living with low incomes, and that sum could be the difference between a parent going through with genetic testing to conclusively establish paternity or choosing to drop a valid request. A lack of income should not be the reason that a man who is not actually a child's biological father remains listed on that child's birth certificate.

Although OAG/CSSD has begun to take less hardline positions on paternity cases, District law remains complicated and out-of-date, and the Council should take this opportunity to update the District's paternity laws to better account for the availability of genetic testing. A number of other jurisdictions, including neighboring ones, do this, and these laws could be models for any modernization effort here in the District. For example, 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

¹⁰ MD. CODE ANN., FAM. LAW § 5-1038.

¹¹ MD. CODE ANN., FAM. LAW § 5-1029.

other states at least provide some means for a “father” to challenge paternity after the rescission period.

Recommendations

- 1) The District should offer free or low-cost genetic testing to low-income individuals at hospitals or at Vital Records prior to presenting them with an Acknowledgement of Paternity.
- 2) OAG/CSSD should not oppose giving putative fathers access to lower-cost genetic testing ordered by the court.
- 3) The Council should prioritize legislative reform to simplify and streamline the District’s paternity laws, thereby making them more accessible to District residents. Bread for the City and Legal Aid would welcome the opportunity to work with the Council and OAG/CSSD to craft legislation that clarifies the law.

CONCLUSION

We appreciate the opportunity to testify and look forward to working with the Committee and OAG/CSSD to address the concerns that we have raised today.