



January 16, 2015

---

From: Center for Family Policy and Practice

To: Department of Health and Human Services, Centers for Medicare & Medicaid Services, Administration for Children and Families

Re: **Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs; Proposed Rule**

Please accept the following comments in response to your Notice of Proposed Rulemaking published November 17, 2014 (at 79 Federal Register 221) to revise and improve Child Support Enforcement program operations and procedures.

The Center for Family Policy and Practice (CFFPP) is a policy center founded in 1995. Our work examines the impact of national and state welfare, fatherhood, and child support policy on low-income parents and their children. We research and analyze state and national social welfare policies that may impede the ability of low-income noncustodial parents to achieve economic stability and save for their and their children's futures. Our goal is to help both service providers and policy makers to identify and address the disincentives to asset building, and the barriers to economic stability, that result from these policies. Finally, we provide concrete recommendations for policy change.

CFFPP recommends that HHS consider the following broad principles as it prepares the new federal regulations proposed in the subject NPRM:

- *With regard to the state plan options*, some states have consistently declined to take up more progressive options in the past. For example, 41 states have not taken up the so-called "family first" pass-through option authorized by the 2005 Deficit Reduction Act. CFFPP recently reviewed states' pass-through policies and found that 46% of current assistance cases are in states or territories that either do not pass through any child support payments at all to families, or functionally there is no pass through because the child support payment is not disregarded when calculating TANF benefits.<sup>1</sup> If those same

---

<sup>1</sup> Unpublished CFFPP analysis of child support caseload data and state pass-through policies. Sources include: Office of Child Support Enforcement (OCSE), Administration for Children and Families (ACF), U.S. Department of Health and Human Services (HHS), "FY2013 Preliminary Report - Table P-55: Total Caseload by Current Assistance for Five Consecutive Fiscal Years," <https://www.acf.hhs.gov/programs/css/resource/fy2013-preliminary-report-table-p-55>; OCSE, Intergovernmental Reference Guide (IRG), "Profile Query: F13. Will your state pass through (and disregard for TANF eligibility purposes) the excepted portion to families in current assistance cases?" <https://ocsp.acf.hhs.gov/irg/profileQuery.html>; and U.S. Government Accountability Office (GAO), "Child Support Enforcement: Departures from Long-term Trends in Sources of Collections and Caseloads Reflect Recent Economic Conditions," 2011, <http://www.gao.gov/assets/320/314589.pdf>

states decline the limited service, review, and adjustment options, and the case closure and federal financial participation opportunities (or use them in inequitable and ineffective ways), children and families in those states will continue to suffer. The poorest, most unemployed families in the national IV-D caseload will continue to be underserved and negatively impacted by the child support enforcement system. HHS should consider regulations that make case closure more likely in cases where accumulated arrears contribute to the financial burden on children and families, and change the proposed state plan options to requirements.

- *With regard to the state guideline and enforcement requirements*, the current culture of many state agencies and courts is to disregard noncustodial parents' financial needs and actual earnings. States must clearly and effectively define the terms “subsistence needs” and “actual earning” or their equivalent for caseworkers and decision makers. HHS should consider adding a requirement to Section 302.56(i) that states analyze and consider data on the financial needs, resources, and employment opportunities of parents in the state—disaggregated by race, gender, educational attainment and geographical location.
- *With regard to job services*, HHS should consider and reconcile the possible conflict of the child support enforcement agency acting simultaneously as both job service provider for a noncustodial parent and statutorily mandated child support order enforcer against that same noncustodial parent. This conflict is a particular concern for parents with no or low actual income, unmet subsistence needs, and no ability to pay. For a significant percentage of parents in the IV-D caseload, the inability to pay into the formal child support system is only one of the results of chronic unemployment, underemployment and poverty. Poor parents and their children (especially those currently receiving TANF benefits) have other complex and pressing needs. Statute and regulation allow federal financial participation only for services that lead to payment into the child support system. For the poorest, more insecure families, payment of child support ordered may not respond to the most urgent financial needs of the children, especially when payments are retained to reimburse welfare benefits.

### Guidelines for Setting Child Support Awards – Section 302.56

The majority of children and adults in the child support system are poor—both custodial and noncustodial parents—and they are more likely to be people of color. The income level of many of the families and individuals is below the official poverty line. The household income of many more IV-D families is well below the national median. Some of the poorest families in the IV-D system are receiving—or have previously received—cash welfare benefits. In 2013, current and



former TANF recipient families made up 55% of the agency caseload.<sup>2</sup> And, according to most recent estimates, about 25% of noncustodial parents in the caseload have a limited ability to pay child support, and 70% of unpaid child support debt is owed by parents with no or low income.<sup>3</sup> The inability of such parents to pay court-ordered child support is more likely to affect children and families of color. The Census reports that the majority of custodial mothers—52%—are women of color, including 28% who are Black, and 21% who are Hispanic.<sup>4</sup>

Still, the number of existing child support orders that are based on imputed income are evidence of child support agencies' and courts' difficulty with acknowledging the reality of chronic unemployment and adults with no or very low actual income.<sup>5</sup> We are concerned that it will be difficult for some state agencies to make the cultural shift necessary to operate on the concept of actual income and earnings—particularly in cases where noncustodial parents have low or no income and cannot meet their own subsistence needs.

We are also concerned that there is no regulatory direction for applying guidelines to child support orders in default cases. The proposed regulations require that the guidelines take into consideration the noncustodial parent's subsistence needs and be based on actual income. How will agencies set child support orders in default cases where there is neither evidence nor testimony from any source with regard to parents' subsistence needs or actual income? A significant number of child support orders for very low-income families are set by default,<sup>6</sup> and federal regulations should provide guidance to states for those situations.

We believe that the proposed guideline requirement to help states comply with the U.S. Supreme Court decision in *Turner v. Rogers*<sup>7</sup> can be a transformative policy change for low-income parents and children. Fulfillment of the Section 302.56(i) requirement that states analyze case data on the application of and deviations from the guidelines will be essential to entering and maintaining right-sized orders, and ensuring positive outcomes for children and families.

---

<sup>2</sup> OCSE, ACF, HHS, "FY2013 Preliminary Report – Table P-2: Statistical Overview for Five Consecutive Fiscal Years," <https://www.acf.hhs.gov/programs/css/resource/fy2013-preliminary-report-table-p-2>

<sup>3</sup> OCSE, ACF, HHS, Child Support Fact Sheet Series, *Improving Child Support Outcomes through Employment Programs*, Number 11, 2011, [https://www.acf.hhs.gov/sites/default/files/ocse/improving\\_outcomes\\_through\\_employment\\_programs.pdf](https://www.acf.hhs.gov/sites/default/files/ocse/improving_outcomes_through_employment_programs.pdf)

<sup>4</sup> Grall, Timothy, *Custodial Mothers and Fathers and Their Child Support: 2011*, U.S. Census Bureau, October 2013, p. 4, <http://www.census.gov/content/dam/Census/library/publications/2013/demo/p60-246.pdf>

<sup>5</sup> Office of Inspector General, HHS, *The Establishment of Child Support Orders for Low Income Non-custodial Parents*, OEI-05-99-00390, July 2000, <https://oig.hhs.gov/oei/reports/oei-05-99-00390.pdf>

<sup>6</sup> Sorensen, Elaine and Helen Oliver, *Policy Reforms are Needed to Increase Child Support from Poor Fathers*, Urban Institute, 2002.

<sup>7</sup> Supreme Court of the United States, *Turner v. Rogers, et al.*, Certiorari to the Supreme Court of South Carolina, No. 10-10 Argued March 23, 2011—Decided June 20, 2011.

---

Enforcement – Section 303.6(c)

*Job Services – Section 303.6(c)(5)*

This section would give state child support agencies the option to use federal funds for certain job services and activities. Job services and employment support is a great benefit to low-income and unemployed parents, and expanded HHS funding of job service activities is an excellent resource for children and families.

However, according to the preamble to the proposed regulation, it is intended to limit the use of these funds to services “which will help noncustodial parents find and maintain work so they can pay consistent and ongoing child support payments.” Because the central mandate of child support enforcement agencies is to establish and enforce child support orders, the focus is on payment—delivered to, and processed through the system.

The obligation to enforce orders, along with a number of other pertinent state and federal requirements and reactions (e.g. TANF child support assignment, interest on arrears, agency fees, enforcement tactics), will interact with and impact job services goals, objectives and outcomes. Ironically, the agency focus on payment can have an adverse impact on some of the poorest children and parents in the IV-D system. In practice, this focus prioritizes the parent’s act of payment—to or through the system—over his active response to his children’s immediate financial needs. The problem is most evident when a noncustodial parent lands a job and begins to make ongoing payments that are retained for welfare reimbursement, or for arrears and interest debt based on wrong-size orders. The goal of consistent and ongoing payment is reasonable and coherent, and it is consistent with the broader policy of financial support for children from their parents. But, consistent and ongoing payments made to government reimbursement and interest and fees mean less money available to the support and security of children and custodial parents.<sup>8</sup>

The precipitating factors (imputed orders, interest on arrears debt, assignment of child support rights, and agency fees) in the most distressing cases are still part of the framework of job services programming for very low-income noncustodial parents. Without broader policy change, this will continue to be the case with the job service opportunities in the proposed rules.

HHS should consider ways to help states analyze the impact and outcomes of job service activities on the children of the most child support-indebted parents. HHS should also consider a

---

<sup>8</sup> Boggess, Jacquelyn, Anne Price, and Nino Rodriguez, “What We Want to Give Our Kids: How Child Support Debt Can Diminish Wealth-Building Opportunities for Struggling Black Fathers and Their Families,” CFFPP and the Insight Center for Community Economic Development, April 2014, <http://cffpp.org/publications/whatwewanttogiveourkids.pdf>

reassessment of the goals and objectives of the job service component of the federal financial participation option in the regulations.

*Contempt Proceedings – Section 303.6(c)(4)*

Under this section of the proposed regulations the purge amount to avoid incarceration must be based on:

- Consideration of “actual earnings and income and the subsistence needs of the noncustodial parent,” and
- “Based upon a written evidentiary finding that the noncustodial parent has the actual means to pay the amount from his or her current income or assets.”

HHS should consider a regulation that requires states to provide numeric criteria based on state and local employment rates, income levels, and other demographic data to help agency caseworkers and other decision makers to define “actual means to pay” and “subsistence needs.”

In its analysis and recommendations in AT-12-01, the Federal Office of Child Support Enforcement cites the United States Supreme Court case of *Turner v. Rogers* as the foundation for its guidance to states on contempt proceedings.<sup>9</sup> In that same document OCSE recognized that “in the wake of the *Turner* decision there are unresolved issues with regard to due process for unrepresented obligors in child support contempt actions.” The current proposed regulations do not resolve those issues. HHS should consider regulations that give state agencies clear directives with regard to the following concerns:

- How should an agency proceed in the case of a defendant for whom there is no evidence of ability to pay (either the amount of the underlying child support order or any purge amount)? What is the process by which a noncustodial parent would be ordered to participate in an “alternative to incarceration” program if his lack of actual income precludes the possibility of his incarceration for contempt?
- What procedural safeguards should be instituted to ensure due process for defendants in civil contempt proceedings that can lead to incarceration where ability to comply with an order to participate in programming is at issue?
- If there are no procedural safeguards in court proceedings where the “ability to comply” is at issue, under what circumstances and who can make the case that the defendant has no actual ability to comply?

<sup>9</sup> AT-12-01, *Turner vs. Rogers* Guidance. Available at [www.acf.hhs.gov/programs/cse/pol/At/2012/at-12-01.htm](http://www.acf.hhs.gov/programs/cse/pol/At/2012/at-12-01.htm)



Case Closure – Section 303.11

One important impact of case closure is to stop the accumulation of arrears. The additional criteria for closure in the proposed regulation provide new opportunities for relief for poor and fragile families. However, the rules continue to provide for individual case closure rather than a broader change in agency policy and practice. In some of the poorest families in the IV-D caseload, arrears will continue to accumulate with no chance of payment or satisfaction—a situation that will only contribute to families’ financial hardship and economic instability. HHS should consider issuing a regulation that broadens the positive impact of this administrative action as follows:

- State agencies should be required to examine the number, frequency and demographic characteristics of cases with children and families who meet the criteria for closure in the current proposed regulations.
- States should have an option to include a process in their state plan by which all cases that meet certain of the criteria listed in this section will be considered for closure.

If you have comments or questions, please contact Jacquelyn Boggess, Co-Director, CFFPP, at [boggess@cffpp.org](mailto:boggess@cffpp.org)

**Mission Statement:** The mission of the **CENTER FOR FAMILY POLICY AND PRACTICE (CFFPP)** is to strengthen society through the expansion of opportunities for low-income parents – mothers and fathers – to protect and support their children. CFFPP operates as a policy think tank to remove the unique barriers and negative public perceptions that affect low-income men of color. Through technical assistance, policy research and analysis, and public education and outreach, CFFPP works to support low-income families and develop public awareness of their needs.