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MEMORANDUM

TO: Child Support Advocates

FROM: Paula Roberts

DATE: August 13, 2003

RE: Recent Federal Guidance on Important Program Issues

In the last few months, the federal Office of Child Support Enforcement (OCSE) has issued a number of important Action Transmittals (ATs) and Policy Information Questions (PIQs). The full text of these documents can be found on the OCSE website www.acf.dhhs.gov/programs/cse/poldoc. Their content is summarized below.

ACTION TRANSMITTALS

OCSE-AT-03-01 (June 16, 2003) provides clarification of the federal law and regulation governing review and adjustment of child support orders.

42 USC § 666(a)(10) requires states to periodically review and (if appropriate) adjust child support orders being enforced by the state's child support (IV-D) program. Such reviews must occur at least once every three years if either parent requests or—in TANF cases—if the state IV-D agency requests a review. In February 1999, OCSE issued an interim final regulation detailing what is required of states in implementing this law. In response to public comment, OCSE made several changes in the interim final regulation. These changes are codified in the final regulation issued on May 12, 2003 at 68 *Fed. Reg*. 25298[1] and are found at 45 CFR § 303.8. AT-03-01 reminds states of the basic content of the final regulation and of their obligation to implement it. The summary of the final regulation contained in this Action Transmittal may be helpful to advocates

[1] For a full analysis of the changes see Paula Roberts, *New Child Support Regulations (June 16, 2003)*, available at www.clasp.org under Publications, Child Support and Low-Income Fathers, 2003.

for both custodial and non-custodial parents seeking review/adjustment of their clients' child support orders.

PIQS

1*. PIQ-03-01 addresses some of the issues around paternity disestablishment.*

The husband's paternity is generally presumed when a child is born to a married couple. If the couple is not married, paternity may be established through voluntary acknowledgment or through a paternity adjudication. Whichever method is used, the husband/partner is then the legal father of the child. He has the right to have a relationship with the child and the obligation to support the child. In some cases, the legal father is not the child's biological father. Recently, there have been a number of cases in which the legal father, the mother, or the child's biological father have sought to disestablish the paternity of the legal father based on genetic test results.[2] State child support agencies have been concerned about their proper role in these cases as well as the financial implications for the state when paternity is disestablished. The PIQ notes that this is primarily a state, not a federal, issue. However, it notes that there are some federal laws and regulations that are germane, including 42 USC § 666(a)(5) and 45 CFR § 303.5 . Drawing on this federal guidance, the PIQ addresses five basic questions:

1. **Must state agencies provide services to noncustodial parents seeking to disestablish their paternity?** No, this is not required.

   However, if paternity has been established by voluntary acknowledgment, states can *elect* to provide services to 1) a person who signed the acknowledgment and now wishes to challenge it based on fraud, duress, or material mistake of fact;[3] or 2) a signatory who is resisting such a challenge. In such cases, 90 percent federal funding is available for genetic testing and 66 percent federal funding is available for other reasonable and necessary expenses.

2. **Is federal funding available for genetic testing in IV-D disestablishment cases?** Yes, but only if the issue of paternity can be raised under state law and one party denies paternity and requests testing.

[2] An extensive discussion of the issues surrounding these cases can be found in Paula Roberts, *Truth and Consequences: Parts I, II, and III,* 37 FAMILY LAW QUARTERLY 35-103 (Spring 2003) or at www.clasp.org under Publications, Child Support and Low-Income Fathers, 2003.

[3] When paternity is established by voluntary acknowledgment, states must give the signatories 60 days to change their minds. Thereafter, federal law specifies that states can allow challenges to the voluntary acknowledgment only on the basis of fraud, duress, or material mistake of fact. 42 USC § 666(a)(5)(D).

As noted above, paternity may be established by presumption, voluntary acknowledgment, or adjudication. If state law allows paternity to be disestablished after it has been established by one of these methods, and the action is allowed to proceed,[4] then it is likely that genetic tests will be requested by one of the parties. If it is a IV-D cases, federal law requires the state to pay the costs of such testing (subject to recoupment in appropriate cases). 42 USC § 666(a)(5)(B). Ninety percent federal funding is available to defray these costs.

3. **Is 90 percent federal funding available for genetic testing offered and provided as part of the voluntary acknowledgment process?** Yes, but only if it is a IV-D case.

   The majority of voluntary acknowledgments are signed in the hospital at the time of the child's birth or at the state's birth records agency. Some of the signatories may already be in the IV-D system, but most are not. Thus, federal funding for genetic testing in conjunction with acknowledgments is quite limited. Parents contemplating an acknowledgment but wanting genetic tests first should not sign the acknowledgment and either 1) apply for IV-D services before the birth; or 2) apply for IV-D services after the birth, and request the tests. Once the test results are obtained, the parents are free to sign the voluntary acknowledgement.

   Note that this policy restricts states' ability to offer genetic testing in all non-marital births unless they are willing to pay the genetic testing costs out of state funds in all but IV-D cases.

4. **May a court require genetic testing before accepting a voluntary acknowledgment in a IV-D case?** No.

   Federal law and regulations prohibit procedures that require judicial (or administrative) approval of voluntary acknowledgments. See 42 USC § 666(a)(5)(D)(ii) and (E) and 45 CFR § 302.70(a)(5)(vii).

5. **Does a state law that allows child support arrears to be vacated in a paternity disestablishment action violate the Bradley Amendment (42 USC § 666(a)(9))?** No.

[4] Even when state law allows paternity disestablishment in some cases, a court might first conduct an analysis of the best interests of the child in deciding whether the particular case should proceed. Only if the court determines that this is a case in which disestablishment is appropriate will genetic testing be ordered. See, Roberts, *Truth and Consequences*, *supra.* Federal funding would not be available if the court determines that the case should not proceed as such testing would not be consistent with state law.

The Bradley amendment prohibits retroactive *modification* of child support orders. Vacating an order is not the same as modifying it. A vacated judgment is one that, as a legal matter, has no effect and is treated as if it never existed.

2. PIQ-03-02 provides additional guidance on the recoupment of child support overpayments.

In the process of distributing child support payments, mistakes can be made. Sometimes the result is that a custodial parent receives an "overpayment." In PIQ-02-01 (August 5, 2002), OCSE issued some guidance to states on the limits of their ability to recoup such overpayments from future collections and the correct process for doing so.[5] Pursuant to that PIQ, when an overpayment occurs, a state can recoup the funds from future collections if it 1) obtains *written permission* from the custodial parent to do so; or 2) follows a *three-step process* for contacting the custodial parent to obtain such permission and the parent fails to respond. The other option open to the state is to seek written *prior authorization* from the parent—at the time of IV-D application—for such recoupment should an overpayment be made. To use either the three-step process or the prior authorization, however, the state must have followed certain procedures to minimize overpayments and adopted policies under which vendors involved in the distribution and disbursement process absorb the cost of losses due to their own errors.

PIQ-03-02 provides further guidance in this area. It clarifies that a state seeking to obtain *prior authorization* to recoup overpayments as part of the IV-D application process must inform the applicant that consent is *optional* and that the *provision of IV-D services is not conditioned on his/her consent to recoupment* of overpayments from future collections. Advocates may want to monitor states that have opted to use this procedure to make sure that clients are fully informed that they will receive services even if they decline to sign a blanket authorization for future recoupment.

PIQ-03-02 also discusses the role of private vendors in the recoupment process. The state can delegate to both privately operated State Disbursement Units (SDUs) and full-service privatized IV-D offices the authority to follow the recoupment procedures found in PIQ-02-01. If it chooses to delegate this authority, then the contract with the private vendor must describe the recoupment procedure being delegated, the circumstances under which the procedure may be used, and the documentation that must be maintained to substantiate that permission to recoup has been obtained. The contract must also address the procedures for handling vendor errors. Finally, the state must monitor compliance to ensure that the proper procedures are being followed and that custodial

[5] This earlier PIQ is described in Paula Roberts, *New Office of Child Support Enforcement Policy on Recoupment of Overpayments* available at www.clasp.org under Publications, Child Support and Low-Income Fathers, 2002.

parents are not being coerced into granting permission to recoup. Advocates in states with privatized offices might want to consult with the state IV-D agency to make sure that vendor contracts follow these guidelines and that the state has a plan for monitoring compliance.

3. *PIQ-03-04 clarifies that child support agencies must accept payments in a foreign currency.*

Child support payments are sometimes made in a foreign currency. Before the payments are distributed, they must be converted into U.S. dollars. PIQ-03-04 explains that, under federal law, SDUs must accept payments in foreign currency and that the costs of conversion are eligible for federal funding at the usual 66 percent rate. States may also elect to charge either the custodial parent or the noncustodial parent a fee for the costs associated with conversion. If a state chooses to do this, it must report the fees collected as program income.

However, the state may not deduct the cost of conversion from the support collected. The custodial parent should receive the value of the foreign payment as of the date of conversion. If the converted amount is less than the amount due, then arrears accrue. If the converted amount exceeds the amount due, the state should handle the excess amount as it would in a domestic case.

Finally, in determining the time in which the payment must be disbursed, the PIQ indicates that the time for conversion can be taken into account. The converted amount must be sent to the custodial parent within two days of receipt. However, the date of receipt is measured from the date the converted amount (not the foreign currency) is received by the SDU.

4. *PIQ-03-05 discusses two issues related to private collection agencies.*

New York requested clarification of two issues related to private collection agencies (PCAs). In this PIQ, OCSE shares its response to those questions with other states.

The first question concerns whether a PCA can act as an "agent of the child" for purposes of Federal Parent Locate System services. Federal law does not define "agent of the child," while New York requires that the PCA have a contract with the *child* in order to be an agent of the child. A parent may not appoint an agent for the child or enter a legally binding contract on his/her behalf. New York asked for guidance when a PCA has an agency relationship with the custodial parent but not the child. OCSE replied that the PCA is able to request FPLS information as an agent of the custodial parent even if it could not request such information as an agent of the child under state law.

The second question involves issues that arise when a custodial parent submits a change of address request in order to direct payments collected by the

state to a PCA. Even certified systems do not have the capacity to change an address for one purpose but not for another. Thus, a request to change the address to redirect payments will also redirect notices and correspondence to the PCA rather than the custodial parent. As a result the custodial parent may not receive important notices such as the right to periodic modification. In interstate cases, the parent may also fail to receive legal papers forwarded by the IV-D agency pursuant to Section 307 of the Uniform Interstate Family Support Act (UIFSA). New York asked whether federal law prohibits sending notices and correspondence to the PCA if the custodial parent is fully informed of the consequences and nonetheless submits a written change-of-address request. OCSE replied that nothing in federal law prohibits a state from sending all information to a designated third party. However, the custodial parent needs to be fully informed of the consequences of requesting a change of mailing address. Moreover, the state may wish to recommend to the parent that he/she take steps to ensure that the PCA is obligated to forward all notices and correspondence from the IV-D agency to the parent in a timely manner. Advocates might also wish to discuss these issues with clients who are using or thinking of using the services of a PCA that requires them to redirect all payments to the PCA for disbursement.

5. *PIQ-03-08 describes steps states that establish their orders through judicial process might take in refining their approach to the issue of the "reasonable cost" of private health care coverage.*

To meet federal requirements, states must seek private health care coverage in all IV-D cases in which such coverage is available to the noncustodial parent at "reasonable cost," 42 USC § 652(f). Under federal regulations, all employer-sponsored or other group coverage is deemed to be reasonable in cost. 45 CFR § 303.31(a)(1). This creates problems in cases where the noncustodial parent's employer or union offers dependant health care coverage at very high cost. Then, either cash support is adjusted downward (leaving little cash to meet the child's other needs) or the order includes both cash and medical support in amounts too high for the obligated parent to pay. The Congressionally mandated Medical Child Support Working Group (MCSWG) recommended changes in federal law and regulations to deal with this problem, but to date little has happened at the federal level.[6] In the interim, several states—including Texas—have tried to fashion an approach that meets federal requirements but obviates the potentially harsh results. Several states inquired whether they too could adopt the Texas approach and this PIQ addresses that issue.

Texas is a judicial state. The IV-D agency petitions for support but the court establishes the support order. The PIQ clearly states that the IV-D agency is required to act consistently with federal law. In any case in which the custodial

[6] See Paula Roberts, *Failure to Thrive: The Continuing Poor Health of Medical Child Support* available at www.clasp.org under Publications, Child Support and Low-Income Fathers, 2003.

parent and children do not already have satisfactory private health care coverage, the agency must make a *specific request* to the court that dependant health care coverage, which is available to the non-custodial parent through employment or other group coverage (regardless of actual cost), be ordered. The petition must also make clear that this request is consistent with federal requirements.

However, by their terms, this particular federal law and regulation do not apply to the courts; they only apply to IV-D agencies. Courts render their decisions under state law. Pursuant to Texas Family Code § 154.181(e), the court is to order private coverage if the associated premium does not exceed 10 percent of the responsible parent's net monthly income. Thus, the court is not required to order coverage if the premiums are too high. This is acceptable according to this PIQ. Other states that set orders judicially can enact statutes governing their courts that define "reasonable cost" in a way the state deems appropriate and still meet federal requirements.

Note, however, that this analysis is not helpful to states in which the IV-D agency sets order administratively. The OCSE analysis relies on the fact that it is the judiciary (who are not subject to the federal laws and regulations at issue here) which makes the final determination.

6. *PIQ-03-09 describes the process for closing child-only Medicaid cases when the custodial parent requests closure or refuses to cooperate in pursuing support.*

A custodial parent may seek Medicaid coverage for his/her child without seeking coverage for him/herself. These cases are called child-only cases. The Medicaid statute says that a parent who does this is not subject to the otherwise applicable child support assignment and cooperation provisions. 42 USC § 1396k(a)(1). However, the Medicaid statute does require that states have laws automatically assigning a Medicaid recipient's right to reimbursement for medical care by a third party (e.g., dependant's health care coverage) to the extent that Medicaid has covered the services provided. State practice varies on the issue of whether the Medicaid agency refers these cases to the IV-D agency. They clearly can do so pursuant to 45 CFR § 302.33(a)(1)(ii).

Once a referral is made and a IV-D case is opened, it counts in determining the state's performance and cost efficiency rates and affects its ability to obtain incentive payments. If the case is workable, that is not a problem. However, if the custodial parent refuses to cooperate, this creates a problem for the state. In addition, the custodial parent may request that the case be closed. Current federal regulations at 45 CFR § 303.11(b) are ambiguous on whether the state can honor this request. PIQ-03-09 provides guidance on these two issues.

Pursuant to this PIQ if a custodial parent in a child-only case requests that the case be closed, the state may do so under 45 CFR § 303.11(b)(8) if Medicaid

has made no payments on the child's behalf and there are no assigned arrears owed to the state. However, if Medicaid payments have been made and/or there are assigned arrears, then the case must remain open.

The PIQ also states that there is no authority to close a case opened pursuant to 45 CFR § 302.33(a)(1)(ii) when the custodial parent refuses to cooperate. Thus, the case must remain open.