CLASP

CENTER FOR LAW AND SOCIAL POLICY

MEMORANDUM

TO: Interested People

FROM: Paula Roberts

DATE: June 16, 2003

RE: New Child Support Regulations

In February 1999, the federal Office of Child Support Enforcement (OCSE) issued Interim Final regulations implementing changes contained in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), the Balanced Budget Act of 1997, the Adoption and Safe Families Act of 1997 (AFSA) and the Child Support Performance and Incentive Act of 1998 (CSPIA). On May 12, 2003, OCSE responded to public comment on these changes and issued Final Regulations. 68 *Fed. Reg*. 25293-25305. Many of the regulatory changes simply clean up language to reflect the fact that Temporary Assistance for Needy Families (TANF) has replaced the Aid to Families with Dependant Children (AFDC) program. Others reflect a change from use of the term "absent parent" to the term "noncustodial parent." There are also some substantive changes, and these are discussed below.

45 CFR § 302.50 Assignment of Rights to Support

The title of this regulation was changed so that it adequately reflects the law. An individual assigns his/her right to support, not the support obligation itself. 68 *Fed. Reg*. 25295.

45 CFR § 302.51 Distribution of Support Collected

The Final Regulations contain only one minor change. However, the Response to Comments discusses a number of important issues.

OCSE reiterates that, under the statute, the date of collection—for purposes of the distribution regulations—is the date the money is received by the State Disbursement Unit (SDU). However, when a collection is made through income withholding, states have the option of deeming the date of withholding to be the date of collection. If a state opts to do this, it may obtain the date of withholding from the employer or it may reconstruct the date of withholding by comparing the amount collected with the pay schedule in the order. It is not necessary for the state to contact the employer to obtain the actual date. 68 *Fed. Reg.* 25296.

The former regulations contained a provision that, once all support had been properly distributed, if there was money left it was to go to the family. This provision was deleted from the Interim Final regulation. CLASP requested that the provision be maintained so that it was absolutely clear that a state could not retain more in child support than it had paid in benefits to a family. OCSE declined to do this since the statute is clear on this point. However, it did state that: "…the basic principle of ensuring that the State never retains more assigned support collections than the total amount of assistance paid to the custodial parent is still in effect. This provision is found in section 457(a)(1)(B) of the Act (see also two Action Transmittals on distribution OCSE-AT-97-17 and OCSE-AT-98-24)."

In addition, the Response to Comments reiterates that state income tax intercepts are to be distributed under the family-first distribution rules, not the rules applicable to federal tax intercepts. This is very important to post-assistance families. Under 42 USC § 657(a)(2), this money is supposed to go to these families until all of their arrears are paid.[1] However, some states have been retaining these funds to pay arrears owed to the state under the public assistance assignment. OCSE clearly states that this is wrong: "There is no discretion in federal law to allow State income tax refund offset collections to be distributed like federal income tax refund offsets." 68 *Fed. Reg.* 25295. Advocates may wish to check with their state to make sure these funds are being distributed properly.

Also of interest, the Response to Comments notes that support owed to a family must be sent to the family within 2 business days of receipt by the SDU. This time frame applies to *future* payments as well as current support and arrears. To the extent that this is inconsistent with Question and Answer 41 in OCSE Action Transmittal 97-17 (October 21, 1997), the Action Transmittal is incorrect and will be amended. 68 *Fed. Reg*. 25296.

[1] OCSE has held this position since 1997. See OCSE Action Transmittal 97-17 (October 21, 1997) as well as statements made in the issuance of the Interim Final regulations at 64 Fed. Reg. 6239 and the Interim Final rule, 45 CFR § 302.51(a)(3).

45 CFR § 303.8 Review and Adjustment of Support Orders

Child support orders are set pursuant to the state's child support guidelines. These guidelines are based on one parent's or both parents' income and assets.[2] Since income and assets change over time, orders need to be periodically reviewed and adjusted. Every state allows such modifications when there has been a "substantial change in circumstances" as defined in state law. Typically, this is a change in income (up or down) that would result in a significant change in the amount to be paid under the state's guideline. Under federal law, state agencies must process these types of requests for modification whenever appropriate. There is no time constraint.[3] This is reflected in 45 CFR § 303.8(b)(5).

In addition, federal law requires states to conduct periodic "review" and "adjustment" of orders at the request of a parent or the state agency (in the case of a family receiving public assistance). Such reviews must be made available at least once every three years. To obtain this type of review and adjustment, the requester does not need to show a "substantial change in circumstances."[4] To ensure that parents know they have this right, states must inform them at least once every three years that they can request such a periodic review.[5]

States can carry out their periodic review and adjustment obligations in one of three ways: 1) conduct a guidelines review; 2) adopt a cost-of-living adjustment; or 3) use automated methods to identify orders which clearly need adjustment.[6] If a state selects one of the latter two methods, then it must give parents the opportunity to contest the adjustment and, instead, have a guidelines review.[7]

The Final regulation largely mirrors this statutory scheme It begins with a definition of "parent" that makes it clear that either parent (and any other person or entity with standing) may request a review and adjustment of the order. 45 CFR § 303.8(a). To make sure parents know this, they must be notified no less than once every three years of their right to request a review and the place and manner in which such a request can be made. 45 CFR § 303.8(b)(6). Initial notification may be in the order itself, id. Thereafter, an actual triennial notice is required. 68 *Fed. Reg.* 25298. In interstate cases, the state that is working the case is responsible for sending the triennial notice. In cases with multiple orders, a UIFSA review to determine the controlling order should take place. Thereafter

[2] See, 42 USC § 667 and 45 CFR § 302.56.
[3] 42 USC § 666(a)(10)(B).
[4] Id. § 666(a)(10)(A).
[5] Id. § 666(a)(10)(C).
[6] Id. § 666(a)(10)(A)(i).
[7] Id. § 666(a)(10)(A)(ii).

the state with jurisdiction to modify the controlling order is responsible for the triennial notice of the right to review. 68 *Fed. Reg.* 25298.

If a state uses the guidelines review method for its triennial process, a judicial or quasi-judicial body or an administrative agency must conduct an objective evaluation and apply the state's guidelines. The decision-maker must determine the correct amount of cash support under the guidelines and address the child's health care needs. If an upward or downward modification of cash support is required, that change is to be made. If the conditions for ordering private health care coverage are met, that change must also be made. 45 CFR § 303.8(b)(3). In this process, there is no need for a parent to show that a "substantial change in circumstances" has occurred. 45 CFR § 303.8(b)(4).

If a state uses the automated match method, it must establish a standard for determining when a modification will be sought. This must be a quantitative standard based on a fixed dollar amount, a percentage of the underlying order, or both. 45 CFR § 303.8(c).[8] For example, assume a guidelines order of $250 in a state whose standard for adjustment was change of 10 percent or $50. An automated New Hire match indicates that the obligated parent has somewhat higher wages than at the time the order was set. Under the guidelines, the obligated parent would now owe $290 in monthly support. This change is less than $50, but more than 10 percent of the original order, so an adjustment would be processed. The state would then notify both parents of the proposed adjustment and provide them with 30 days in which to contest the change. Similarly, if a state uses the cost-of-living method of adjustment, it must offer both parents a 30-day opportunity to contest the adjustment and seek a guidelines adjustment instead. 45 CFR § 303.8(b)(2).

Finally, whichever review and adjustment method the state chooses, its law must allow an adjustment of the order to meet the child's health care needs, even if no change in cash support is warranted. The fact that the child is covered by Medicaid is not sufficient. If private health insurance is available, it must be pursued. 45 CFR § 303.8(d).

Once a state receives a request for triennial review, it has 180 calendar days from the later of the date the request is received or the date the non-requesting party is located to conduct the review and make the adjustment/determine that no adjustment is warranted. 45 CFR § 303.8(e). In interstate cases, the state with jurisdiction to modify is responsible for the timely conduct of the process. That state will employ its review and adjustment

[8] The Response to Comments indicates that if the state uses either guidelines review or cost-of-living as its review and adjustment method, it *cannot* have a quantitative threshold standard for making the adjustment. Only when the state uses the automated adjustment method is a quantitative standard allowed. 68 *Fed. Reg* .25298. In other words, even if the guidelines or cost-of-living review would make a small change in the order, the adjustment must be made.

procedures and its child support guidelines in making the determination of whether an adjustment is warranted. 45 CFR §303.8(f).

45 CFR § 303.31 Securing and Enforcing Medical Support Obligations

As noted above, the new regulations make explicit that states must adjust orders to provide for children's health care needs even if no change in cash support is necessary. 45 CFR § 303.8(d). The Final regulations do not make other major changes in medical support. However, the Response to Comments does discuss what happens when an order requires the noncustodial parent to provide private health care coverage, but the custodial parent already provides such coverage and does not wish to switch to the noncustodial parent's coverage. The Response states that the state agency should seek to have the order changed. As long as the order requires the noncustodial parent to provide private coverage and such coverage is available, the agency must enforce the order and send the noncustodial parent's employer the National Medical Support Notice. 68 *Fed. Reg.* 25300. While consistent with the law, the guidance is at odds with common sense as well as the recommendations of the Congressionally established Medical Child Support Working Group (MCSWG). In 2000, the MCSWG recommended a series of changes in the law and regulations that would address this issue (and many others). OCSE states that separate regulations will be issued in the medical support area, but provides no time frame in which this will happen.

45 CFR §303.100 Procedures for Income Withholding

The Interim Final regulations inadvertently eliminated sections providing due process standards and what law to apply in interstate income withholding cases. 68 *Fed. Reg.* 25300. These are restored in the Final regulations, 45 CFR §§ 303.100 (f)(4) and (5).

In addition, there is some clarification on time frames for action. When the state receives information through the State New Hire Directory or the statewide automated system indicating an employer and/or income source subject to withholding, it must send a withholding notice within 2 days. When information is obtained in any other way, the state has 15 days in which to issue the withholding notice. 45 CFR §§ 303.100(e)(2) and (e)(3).

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Finally, it is worth noting that several commenters raised data privacy concerns. Rather than dealing with them here, OCSE convened a work group and is planning to issue guidance in this area in the near future.