

MEMORANDUM

TO: Interested People

FROM: Paula Roberts

DATE: March 23, 2001

RE: Grievance Procedures for Participants in the Child Support (IVD) Program

On December 27, 2000, final regulations were issued on a number of topics of concern to state child support enforcement (IVD) program administrators and their clients. 65 *Federal Register* 82178 - 82216. These regulations include new audit and incentive payment rules. They became final on the date they were issued.

As part of the package, and despite strong opposition from some state IVD administrators,¹ the final regulations require every state to provide individual users of the IVD system access to a complaint resolution process. The regulation and what it means are described below.

Advocates in states that do not have a complaint resolution process can use this regulation to insist that one be developed. Advocates in states with an inadequate process may be able to use the new regulation to encourage revisions in the state's existing process. Thought might also be given to using the new regulation as the basis for state legislation providing full due process rights to users of the IVD system. California has statutes that may be used as a model in this regard (see discussion below).

In any case, whether working with the administrative agency or the legislature, given the degree of state opposition to this provision, advocates will have to develop strong, well-reasoned arguments to make sure the process developed truly serves client needs.

¹ A proposed regulation calling for a grievance procedure in every state was published on October 8, 1999. Twenty-six public comments were filed in response to this proposal. Four were filed by advocacy organizations that favored the proposal. Twenty-two were filed by state IVD directors who opposed the idea and asked that it be deleted from the final regulations. See, 65 *Fed. Reg.* 82193 (December 27, 2000).

THE REGULATION

New 45 CFR §303.35 reads as follows:

Administrative Complaint Procedure

- (a) Each State must have in place an administrative complaint procedure, defined by the State, to allow individuals the opportunity to request an administrative review, and take action when there is evidence that an error has occurred or an action should have been taken in their case. This includes both individuals in the State and individuals from other States.
- (b) A State need not establish a formal hearing process but must have clear procedures in place. The State must notify individuals of the procedures, make them available to recipients of IVD services to use when requesting such a review, and use them for notifying recipients of the results of the review and any actions taken.

THE SCOPE OF THE NEW REGULATION

What statutory authority exists for this regulation?

There is no specific federal statute requiring states to offer grievance procedures to families using the IVD system. For this reason, some states argued that it was beyond HHS' authority to mandate one. 65 *Fed. Reg.*82194.

HHS responded by pointing out that Section 1102 of the Social Security Act gives the Secretary of HHS authority to promulgate regulations deemed necessary for the efficient administration of the IVD program. Using this authority, the Secretary has determined that an administrative complaint procedure is a necessary component of an efficient and effective IVD program. Moreover, it is a necessary component of the transition from the old *processes-focused* audit system to the new *performance-based* system required by the Personal Responsibility and Work Opportunity Act of 1996 (PRWORA) and the Child Support Performance and Incentive Act of 1998 (CSPIA).² As the Response to Comments to the regulations explains: “ The administrative complaint procedure represents a key element to identify case management problems that would have been captured in the previous process-based audit system [but will not be under the new system].”65 *Fed. Reg.*82194. In other words, the grievance process should not only help clients resolve individual problems, it should also help states identify systemic problems and make sure they are addressed.

What funding is available to implement the process?

Federal funding for administrative review process is available at the 66 percent matching rate. 42 USC §655 and 45 CFR §304.20(b). See also, 65 *Fed. Reg.*82180 and 82194.

² HHS notes that, in the past, IVD-program audits would identify problems such as the failure to provide services in a timely manner, insufficient efforts to enforce orders, and improper distribution of collected support. However, this new system will not capture information about state compliance with timeframes and distribution rules. Thus, another mechanism is needed to obtain this information.65 *Fed. Reg.*82179-82180 and 65 *Fed. Reg.* 82194.

What are the minimum regulatory requirements for an acceptable grievance process?

The regulation clearly states that the administrative procedure, while required, is to be “defined by the state”. 45 CFR §303.35(a). Informal processes, as well as formal ones, are acceptable. 45 CFR §303.35(b).

OCSE does not intend to tell the states what their complaint procedures must look like.³ Nonetheless, some minimum standards can be gleaned from the regulation itself and the explanation contained in the Response to Comments to the regulations.

- The procedures must be clear. 45 CFR §303.35(b).
- The procedures must give individuals the opportunity to request an administrative review of their cases. *Id.* §303.35(a).
- States have some latitude in determining what subjects will be considered through the complaint process. Proper subjects for review include challenges to how collected support was distributed and whether timely action was taken.⁴ 65 *Fed. Reg.* 82194. However, the process need not be open to challenges concerning state discretion about whether or not to use a particular enforcement tool. 65 *Fed. Reg.* 82195.
- States are free to establish parameters that avoid excessive or repeated review of the same case. 65 *Fed. Reg.* 82194. They can also place a limit on how long the IVD participant has to file a complaint. *Id.* 82196.
- Recipients of IVD services must be told that administrative review processes exist. 45 CFR §303.35(b). The Response to Comments suggests—but does not require—that notification be included with the initial information provided to applicants and those referred for program services. 65 *Fed. Reg.* 82193.
- The burden is on the recipient to provide evidence that an error has occurred or a required action has not been taken. 65 *Fed. Reg.* 82180 and 82195.
- If review indicates that an error has occurred, the error must be corrected. If the review indicates that an action should have been, but was not taken, then the action must be taken. 45 CFR §303.35(a). See also, 65 *Fed. Reg.* 82194.
- Recipients must be notified of the results of the review and any actions taken. 45 CFR §303.35(b).
- Existence of a complaint resolution process does not establish or infer that the aggrieved party has a private right of action to pursue judicial remedies for failure to provide specific IVD services. 65 *Fed. Reg.* 82194.

³ The Response to Comments states this in several different places. For example, “The rule does not dictate how States must implement the complaint procedure” ... “The rule sets minimal requirements and States are able to set their own procedures.” 65 *Fed. Reg.* 82193.

⁴ For example, a custodial parent might request a review if she had provided information about the non-custodial parent’s place of employment, but no action had been taken within the prescribed timeframe to institute income withholding. 65 *Fed. Reg.* 82195.

Do these procedures apply in interstate cases?

Yes, see 45 CFR §303.35(a). Recipients of IVD services must be able to file a complaint in the initiating state. That state will then determine whether the complaint involves its own actions or the actions of a responding state. If the complaint involved the actions of the initiating state, that state will conduct the review under its procedures. If the complaint involves the actions/inactions of a responding state, the initiating state will refer the complaint to the responding state for resolution under that state's grievance processes. *65 Fed. Reg.*82196.

How do grievance procedures fit into the state self-assessment process?

The regulations do not require that the state self-assessment include an analysis of administrative complaints filed. However, in response to comments, OCSE encourages states to regularly examine the types of complaints they are receiving in order to identify and correct any systemic or chronic problems. *65 Fed. Reg.*82193.

What additional protections might be sought?

OCSE specifically declined to provide a timeframe within which states must respond to administrative complaints. *65 Fed. Reg.*82193. As a result, advocates will have to press their states to adopt a timeframe for response. Otherwise, complaints might languish and the entire point of having a complaint resolution process would be defeated.

OCSE also declined to require states to refer complaints to independent decision-makers. It concluded, "... we are not convinced that an independent decision-maker is necessary to ensure fairness and we wish to provide the maximum flexibility to states in designing and implementing their administrative review process. States may utilize an independent reviewer to maximize fairness and due process for all parties involved." *65 Fed. Reg.*82193. Despite this statement it seems evident that a good process would involve an independent decision maker with actual authority to correct problems, and advocates will want to push for this as part of their state processes.

In addition, there is no requirement that complainants have access to information in their files. In fact, OCSE seems to be heading in the opposite direction saying that "States must design their administrative complaint procedures to ensure safeguarding requirements are met and that the information provided does not violate the privacy rights of one or both parties." *65 Fed. Reg.*82196. This is troubling given an individual's need to know what is in the case file to make out a case that an error has occurred. Advocates may want to push for access to materials in the file as part of the administrative process.

Can more be required?

While a step in the right direction, the regulation does not provide true due process rights to aggrieved citizens. Advocates may want to develop arguments based on state or federal constitutional due process provisions to bolster their arguments for more robust

processes.⁵ Some states also have state administrative procedure laws that might be useful. Arguably, IVD grievance procedures should follow the formal requirements of the state administrative procedure act and provide a full range of notice, hearing and appeal rights.

State legislation might also be considered. California has recently enacted laws that might serve as a model for other states.⁶ It has established a three-level complaint resolution process that can be used by both custodial and non-custodial parents.⁷ The *first* level is informal. An aggrieved person files a complaint with the local child support agency. The complaint must be filed within 90 days of the date the person learned about the problem. The local agency has 30 days to respond to the complaint and must do so in writing.⁸ If the aggrieved person is not satisfied with the resolution or does not receive a response within the 30 day period, he/she can move to the *second* stage by seeking a formal hearing within 90 days. A hearing must be provided if the case involves 1) the denial of an application for services; 2) fairly to timely process an application for services; 3) an alleged violation of any state or federal law, regulation, or department letter ruling; 4) failure to distribute a child support collection; 5) incorrect distribution of a child support collection; or 6) an improper case closure. The hearing is conducted using the same formal procedures as are used in state welfare hearings. If the person is still not satisfied, he/she may go to the *third* stage and request judicial review of the agency decision.

Parents are informed about the availability of this process in several ways. Information is provided in the summons and complaint forms, the child support booklet published by the state Department of Child Support Services, and many of the notices distributed by the local child support offices.

While some states may balk at such an extensive system, many will see the advantage of improving customer satisfaction and reducing the number of complaints about the program that are brought to the desks of state legislators. Some state administrators may also be persuaded that, by tracking complaints filed, they will be better able to identify and correct systemic problems as well as identify areas in which staff may need additional training. Persuasive arguments can be made in favor of a system that serves individual client's needs as well as the needs of the state.

⁵ There has been some litigation around the constitutional need for complaint resolution processes. See, e.g. *Beasley v. Harris*, 671 F.Supp. 911 (D. Conn. 1987); *Berg v. Gardebring*, 708 F.Supp. 238 (D. Minn. 1989). See, also *Barnes v. Anderson*, No. 95-15969. Papers on this case are available from the National Clearinghouse, C.H. No. 51,047.

⁶ See, California Family Code §§17800-17804 and §17401.

⁷ This is an important point. The federally mandated process need only consider complaints from recipients of IVD services. These are overwhelmingly custodial parents. Thus, there is no opportunity for non-custodial parents to contest an action in their case such as failure to credit a payment or misapplication of a payment of current support to arrears.

⁸ To implement this part of the law, each county will shortly have an ombudsperson whose job is to “resolve complaints at the earliest possible time with the highest degree of customer satisfaction possible within the parameters of the state and federal child support program requirements.” CS Letter 00-07 (November 7, 2000).