



Self-Represented Litigation Network¹

The Potential Impact of New Federal Regulations Proposed by the Federal Office of Child Support Enforcement on Self-Help Programs and Court Operations

On November 17, 2014, the federal Office of Child Support Enforcement (OCSE) published a Notice of Proposed Rulemaking (NPRM) entitled “Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs” in the Federal Register. OCSE is proposing to amend various sections of Title 45 of the Code of Federal Regulations, which govern the Title IV-D² child support enforcement program and is seeking public comment on their proposed changes. Comments must be received no later than **January 16, 2015**. Further Information about the NPRM and the procedures for making comments can be found at the OCSE website: <http://www.acf.hhs.gov/programs/css/resource/nprm-flexibility-efficiency-and-modernization-in-child-support-enforcement-programs>

While all of the proposed regulatory changes will impact the state Title IV-D child support programs, only some of them will impact state courts. This memo identifies and discusses those proposed changes to the regulations which may impact the courts.

Self-Help – Access to Justice

Title IV-D funding has been used to support court-based self-help child support services to parents in some states for many years under 45 CFR 304.21³. Section 304.21 provides that federal financial participation (FFP) is available for the costs of cooperative arrangements with the courts and law enforcement agencies to provide child support enforcement services. Existing section 304.20 specifies the availability and rate of FFP for child support activities. In the commentary on Page 68567⁴, OCSE acknowledges that the existing regulation is out of date and that states have been receiving FFP for many activities that are not specifically listed in 45 CFR 304.20(b). OCSE states that it is proposing

¹ The SRLN gratefully acknowledges Lee Mohar in providing this analysis in January 2015 to assist those considering comments to the proposed OCSE regulations. This document does not reflect the view of any SRLN member.

² Title IV-D refers to Title IV-D of the Social Security Act, which requires that states provide child support enforcement services as a condition for receiving federal funding for the Temporary Assistance for Needy Families (TANF) program.

³ All of the proposed changes are to Title 45 of the Code of Federal Regulations. All subsequent references will cite the section number only.

⁴ Page numbers refer to the page numbers of the NPRM found at the Federal Register /Vol. 79, No. 221 /Monday, November 17, 2014.

changes to section 304.20(b) to clarify when funding is available and to give states greater flexibility in designing and implementing cost effective practices.

With regard to access to justice, OCSE is proposing to add section 304(b)(3)(vi) to specifically authorize FFP for activities designed to increase parents' *pro se* access to child support proceedings. While this is not a change to existing practice, it is significant in that the commentary clearly acknowledges that most parents in the IV-D caseload are not represented by private attorneys and are attempting to navigate legal proceedings on a *pro se* basis. They emphasize the importance of the informed participation of both parents in child support proceedings. Court based self-help programs have proven to be a cost effective way to ensure access to the courts for self-represented litigants. Hopefully, the inclusion of *pro se* access activities in the list of services that are eligible for FFP will encourage state IV-D agencies to explore the expanded use of court based self-help programs.

Proposed Section 304(b)(3)(vi) also encourages states to develop non-adversarial dispute resolution alternatives to a standard adjudicative hearing. Dispute resolution alternatives may be provided by the IV-D agency, but in some states it may be more appropriate to provide these services in the courts. Non-custodial parents often view the IV-D agency as "the other side" and not as a neutral third party. In addition to assisting parents in preparing for hearings by completing necessary forms and gathering necessary documentation, court based self-help programs may want to approach the IV-D agency about providing alternative dispute resolution services such as mediation for disputed child support issues.

Parenting Time Orders

OCSE is also proposing to add section 304(b)(3)(vii) to allow for FFP for the "de minimus costs" associated with the inclusion of a parenting time order entered as part of a child support order and incidental to a child support enforcement proceeding. This new provision would only apply when all parties are present at the proceeding and willingly agree to the parenting time provision. The proposed amendments to this section primarily affect those courts that receive FFP for subordinate judicial officers who are hearing Title IV-D child support cases. In those courts, the judicial officer would be able to include agreed upon child parenting time orders with the child support order. This provision while only allowing for "de minimus costs" could lead to greater efficiencies and cost savings for the courts in that parents who can agree on custody would no longer have to file separate actions to obtain parenting time orders. In courts in which subordinate judicial officers enter parenting time orders under this provision, it is also possible that courts could negotiate with their state IV-D program to provide self help assistance with the preparation of parenting plans when the parties state that they are substantially in agreement on the terms of a plan.

Job Services

OCSE proposes adding section 302.76 to permit states to provide job services to eligible non-custodial parents who are not paying child support. Proposed section 303.6(C)(5) specifies the eligibility criteria to determine whether a non-custodial parent can participate in a jobs service program and the types of job services that may be offered. OCSE is also proposing to add section 304(b)(3)(ix) to allow for FFP

for job services for those states that elect to provide job services. It is possible that courts that conduct special job search calendars to motivate noncustodial parents who meet the eligibility criteria could obtain FFP for those activities. Unlike the education and outreach activities described below, these job services are being added to section 304.21(a)(1) as activities for which courts and law enforcement agencies may be reimbursed.

Education and Outreach

OCSE proposes adding a new paragraph, section 304.20 (b)(12) to allow FFP for educational and outreach activities intended to inform the public about the child support enforcement program, responsible parenting, and the financial consequences of raising children when the parents are not married to each other. In many states courts are the best location for presenting educational activities because these outreach activities and educational programs are for parents and others who are not yet part of the IV-D caseload. The only justification under current regulations for reimbursement of court assistance to persons who are pursuing child support on their own without the assistance of child support enforcement agency is the provision of “outreach and educational programs.” The proposed amendments to section 304.21(a)(1) (which sets forth the rules for FFP in cooperative arrangements with the courts and law enforcement agencies) do not include education and outreach activities as defined by proposed section 304.20(b)(12) as eligible for FFP. By not specifically referencing proposed section 304.20(b)(12) in section 304.21(a)(1) it could be argued that outreach and educational programs provided by court staff pursuant to a cooperative agreement are not reimbursable activities. This provision might result in the elimination of IV-D support for court self help support to persons with non-IV-D cases. Were section 304(b)(12) be added to the list of activities in section 304.21(a)(1) that are eligible for reimbursement through a cooperative agreement, this potential problem would be eliminated.

Child Support Guidelines

Under existing law,⁵ states are required to use statewide guidelines for setting child support orders in all cases. States are required to review their child support guidelines every four years. OCSE proposes updating section 302.56 that addresses state guidelines for setting child support orders. Should the state need to change their guidelines based on the proposed changes, they must do so within one year after the next review. The proposed regulation would among other things require states to use parents “actual” earnings instead of “all” earnings in determining the amount of a child support order and take into account the noncustodial parent’s subsistence needs. Both of these changes are intended to produce child support orders that non-custodial parents are more likely to be able to pay, and consequently to increase the actual payments and encourage more interaction between non-custodial parents and their children. Guideline changes would require training for all judicial officers, not just those hearing IV-D cases, and may require changes to guideline calculation software.

Civil Contempt

⁵ 42 U.S.C. 667

OCSE proposes to amend section 303.6 by adding a new section 303.6(C)(4) to require states to have “procedures ensuring that enforcement activity in civil contempt proceedings takes into consideration the subsistence needs of the noncustodial parent, and ensures that a purge amount the noncustodial parent must pay in order to avoid incarceration takes into consideration actual earnings and income and the subsistence needs of the noncustodial parent. A purge amount must be 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.”

This proposal in accordance with the U.S. Supreme Court’s recent decision in *Turner v. Rogers*, 564 U.S. ___, 131 S Ct. at 2507 (2011), which noted that civil contempt proceedings must assure a “fundamentally fair determination . . . whether the supporting parent is able to comply with the support order.”

It is difficult to know what impact, if any, this proposed language will have on court operations. On one hand it may lead to longer hearings in civil contempt cases brought by the IV-D agency, but on the other hand it may lead to the IV-D agency filing fewer civil contempt actions.

Collection and Distribution of Non IV-D Income Withholding Payments

OCSE proposes adding section 302.32 to restate existing law⁶, which mandates that all income withholding orders for child support cases require employers to pay to a centralized State Disbursement Unit, which is managed by the IV-D program. This includes income withholding orders made in non IV-D cases on or after October 1, 1994. Information concerning non IV-D orders including the address where payments are to be sent is supposed to be maintained in a State Case Registry that is also maintained by the state IV-D agency. In the commentary, OCSE notes that employers and parents have made complaints to OCSE because some states are not complying with the requirement that non IV-D income withholding orders be sent to and distributed through the State Disbursement Unit. OCSE notes that the reason for the problems with non-IV-D payment processing varies by state. In some instances it is because information about the non IV-D orders is not getting from the court to the State Case Registry. The commentary to the proposed regulation at page 68551 notes that FFP is available for the submission and maintenance of data in the State Case Registry, with respect to non-IV– D support orders established or modified on or after October 1, 1994.

Review and Adjustment of Support Orders

OCSE proposes amending section 303.8 to give the states the option of initiating a review of the support order upon being notified that the non-custodial parent will be incarcerated for more than 90 days without the need for a specific request for a review. If the state does not elect to initiate the review without a specific request, the state must issue a notice to both parents upon learning of the noncustodial parent’s incarceration and must initiate a review if either parent requests a review. This provision will necessarily entail an enhanced information sharing role for the courts and although the modifications

⁶ 42 U.S.C section 654b

will be granted through a largely pro forma process, the process will also increase the number of child support modifications that the court must process.

Other Proposed Regulatory Changes with No Impact on Court operations

OCSE also proposes to amend regulations concerning case management, case closure, medical support/health insurance, and family services and referral. All state judges and other judicial officers who hear Title IV-D child support cases will need to become familiar with these new provisions and the way that they are being implemented by the IV-D entity in their state.

Conclusion

The regulatory changes proposed by OCSE in the NPRM dated November 17, 2015 will not have a major impact on court operations. It is helpful that OCSE specifically recognizes that most parents in IV-D cases are *pro se* and that the informed participation of both parents in child support proceedings leads to better outcomes for children. It is also helpful that the regulations would specify that federal IV-D funding is available for programs that assist parents in actively participating in child support proceedings. Court based self-help programs have proven to be cost effective in providing meaningful access to child support proceedings for self-represented parents. However, the proposed regulations do not significantly change the existing practice concerning the provision of Title IV-D funding to support self-help programs. Hopefully, the inclusion of pro se access activities in the list of services that are eligible for FFP will encourage state IV-D agencies to explore the expanded use of court based self-help programs through cooperative agreements.

For those courts that currently receive Title IV-D funding, the new regulatory sections allowing subordinate judicial officers hearing child support matters to enter parenting plan provisions in their orders, encouraging non-adversarial dispute resolution processes, and authorizing reimbursement for job services to non-paying noncustodial parents will provide an opportunity for courts to expand the services for which they currently receive IV-D reimbursements.

However, the exclusion of “outreach and educational activities” from the category of assistance activities eligible for IV-D reimbursement leaves courts with no source of IV-D support for child support services rendered to persons who have not opened a case with the child support enforcement agency and threatens to remove IV-D funding support for some court programs that currently use IV-D funds to provide such services.