

Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs

Pages 93492 -93569 [FR DOC# 2016-29598]

Discussion in drafting 45 C.F.R 302.56:

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In paragraph (c) (1) (i), based on comments, we retained "all income and earnings" and did not change "all" to "actual" income and earnings as we had proposed in the NPRM. Based on comments, we also added "(and at the State's discretion, the custodial parent)." Based on comments, we made the following revisions in paragraph (c) (1). We revised proposed paragraph (c) (4) and redesignated it as (c) (1) (ii). We added "basic" before subsistence needs to clarify scope. We also added "(and at the State's discretion, the custodial parent and children)," giving States the option of considering the custodial parent's and children's basic subsistence needs in addition to the subsistence needs of the noncustodial parent. We also granted more flexibility to States in how they will consider basic subsistence needs by adding "who has a limited ability to pay by incorporating a low-income adjustment, such as a self-support reserve or some other method determined by the State." We also removed language from the NPRM that the guidelines "provide that any amount ordered for support be based upon available data related to the parent's actual earnings, income, assets, or other evidence of ability to pay, such as testimony that income or assets are not consistent with a noncustodial parent's current standard of living." We also added paragraph (c) (1) (iii) related to imputed income.

OCSE redesignated proposed paragraph (c) (5) as paragraph (c) (3) in the final rule. This paragraph prohibits the treatment of incarceration as "voluntary unemployment" when establishing or modifying support orders because State policies that treat incarceration as voluntary unemployment effectively block application of the Federal review and adjustment law in section 466(a) (10) of the Act. This section of the Act requires review, and if appropriate, adjustment of an order upward or downward upon a showing of a substantial change in circumstances.

Response: Based on the comments that we received on proposed paragraph (c) (1), redesignated as paragraph (c) (1) (i), we did not make the proposed revision, but instead codified the longstanding guidelines standard that orders be based upon earnings, income, and other evidence of ability to pay." We also retained the provision in the former rule to require consideration of "all earnings and income" in paragraph (c) (1). To be clear, the guidelines must provide that orders must be based upon evidence of the noncustodial parent's earnings and income and other evidence of ability to pay in the specific case. In addition, the guidelines must provide that if income is imputed, the amount must reflect the specific circumstances of the noncustodial parent to the extent known, and may not order a standard amount imposed in lieu of fact-gathering in the specific case. The expectation is that in IV-D cases, the IV-D agency will investigate each case sufficiently to base orders on evidence of the noncustodial parent's ability to pay. Orders issued in IV-D cases should not reflect a lower threshold of evidence than applied in private cases represented by legal counsel

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agency's responsibility to conduct an investigation, including contact with the custodial parent to seek information. At a minimum, child support agencies generally will know the noncustodial parent's address.

Imputed or default orders based on income imputation are disfavored and should only occur on a limited basis. Imputation does not by any means ensure support payments for children. In fact, an order based upon imputed income that is beyond the noncustodial parent's ability to pay typically results in more unpaid support and other unintended consequences that do not benefit children.<sup>32</sup> It is critical for the integrity of the order-setting process that IV-D agencies put resources into case-specific investigations and contacting both parents in order to gather information regarding earnings, income, or other specific circumstances of the noncustodial parent when evidence of earnings and income is nonexistent or insufficient.

Response: The final rule amends existing OCSE regulations implementing Federal statutory requirements. State child support guidelines were adopted pursuant to a title IV-D State plan requirement and a condition of Federal funding, and specific guidelines requirements derive from Federal law. Our rule is modeled on the best practices currently implemented in a number of States to improve order accuracy and basic fairness, and is based on OCSE's authority to set standards to establish requirements for effective program operation under section 452(a) (1) and State plan provision that the State will comply with such requirements and standards under section 454(13) of the Act. In promulgating these rules, our primary concern is that in some jurisdictions, orders are not based on a factual determination of a particular noncustodial parent's ability to pay, but instead are based upon standardized amounts that are routinely imputed to indigent, typically unrepresented, noncustodial parents.<sup>33</sup> Imputed income is fictional income, and without an evidentiary foundation of ability to pay, orders cannot be considered fair and accurate.

18. Comment: One commenter asked if a person should be ordered to pay a minimum amount of support regardless of his or her circumstances to recognize the responsibility for the child's support, with less regard for the income capacity. The cases that the commenter noted included incarcerated individuals, minor parents, parents in drug or alcohol treatment programs, and others. The commenter further explained that while a strong argument can be made in these cases to set a minimum amount of support, setting a minimum order could be problematic. At one end is a token order (\$1.00 per month); on the other hand is a true minimum order (such as \$250 per month). This commenter suggested that these situations not be included in the "imputation of income" arguments as they are different. The commenter was hopeful that the final regulation would leave setting the amount of a minimum order to State or local discretion and policy.

Response: The foundation of Federal guidelines law and policy is the establishment of income-based orders. The rule is evidence-based and codifies longstanding Federal policy that orders must be based upon a determination of the noncustodial parent's ability to pay. High minimum orders that are issued across-the-board without regard to the noncustodial parent's ability to pay the amount do not comply with these regulations.

19. Comment: One commenter was concerned that the NPRM would unduly favor those obligors who attempt to avoid their obligations to their children by failing to respond or hiding assets, as well as favor incarcerated obligors simply because they are incarcerated.

Response: We do not agree. The final rule requires States to investigate, not make assumptions. The rule removes a collateral consequence of incarceration by requiring that orders for incarcerated parent s be set based on the same standard as every other parent: Ability to pay. We believe our rule will bolster a sense of fair play and compliance, and increase the likelihood that formerly incarcerated parents will engage in legitimate work and support their children upon release.

§ 302.56 Guidelines for setting child support orders.

(a) Within 1 year after completion of the State's next quadrennial review of its child support guidelines, that commences more than 1 year after publication of the final rule, in accordance with § 302.56(e), as a condition of approval of its State plan, the State must establish one set of child support guidelines by law or by judicial or administrative action for setting and modifying child support order amounts within the State that meet the requirements in this section.

(b) The State must have procedures for making the guidelines available to all persons in the State.

(c) The child support guidelines established under paragraph (a) of this section must at a minimum:

(1) Provide that the child support order is based on the noncustodial parent's earnings, income, and other evidence of ability to pay that:

(i) Takes into consideration all earnings and income of the noncustodial parent (and at the State's discretion, the custodial parent);

(ii) Takes into consideration the basic subsistence needs of the noncustodial parent (and at the State's discretion, the custodial parent and children) who has a limited ability to pay by incorporating a low-income adjustment, such as a self-support reserve or some other method determined by the State; and

(iii) If imputation of income is authorized, takes into consideration the specific circumstances of the noncustodial parent (and at the State's discretion, the custodial parent) to the extent known, including such factors as the noncustodial parent's assets, residence, employment and earnings history, job skills, educational attainment, literacy, age, health, criminal record and other employment barriers, and record of seeking work, as well as the local job market, the availability of employers willing to hire the noncustodial parent, prevailing earnings level in the local community, and other relevant background factors in the case.

(2) Address how the parents will provide for the child's health care needs through private or public health care coverage and/or through cash medical support;

(3) Provide that incarceration may not be treated as voluntary unemployment in establishing or modifying support orders; and

(4) Be based on specific descriptive and numeric criteria and result in a computation of the child support obligation.

(d) The State must include a copy of the child support guidelines in its State plan.

(e) The State must review, and revise, if appropriate, the child support guidelines established under paragraph (a) of this section at least once every four years to ensure that their application results in the determination of appropriate child support order amounts. The State shall publish on the internet and make accessible to the public all reports of the guidelines reviewing body, the membership of the reviewing body, the effective date of the guidelines, and the date of the next quadrennial review.

(f) The State must provide that there will be a rebuttable presumption, in any judicial or administrative proceeding for the establishment and modification of a child support order, that the amount of the order which would result from the application of the child support guidelines established under paragraph (a) of this section is the correct amount of child support to be ordered.

(g) A written finding or specific finding on the record of a judicial or administrative proceeding for the establishment or modification of a child support order that the application of the child support guidelines established under paragraph (a) of this section would be unjust or inappropriate in a particular case will be

sufficient to rebut the presumption in that case, as determined under criteria established by the State. Such criteria must take into consideration the best interests of the child. Findings that rebut the child support guidelines shall state the amount of support that would have been required under the guidelines and include a justification of why the order varies from the guidelines.

(h) As part of the review of a State's child support guidelines required under paragraph (e) of this section, a State must:

(1) Consider economic data on the cost of raising children, labor market data (such as unemployment rates, employment rates, hours worked, and earnings) by occupation and skill-level for the State and local job markets, the impact of guidelines policies and amounts on custodial and noncustodial parents who have family incomes below 200 percent of the Federal poverty level, and factors that influence employment rates among noncustodial parents and compliance with child support orders;

(2) Analyze case data, gathered through sampling or other methods, on the application of and deviations from the child support guidelines, as well as the rates of default and imputed child support orders and orders determined using the low-income adjustment required under paragraph (c)(1)(ii) of this section. The analysis must also include a comparison of payments on child support orders by case characteristics, including whether the order was entered by default, based on imputed income, or determined using the low-income adjustment required under paragraph (c)(1)(ii). The analysis of the data must be used in the State's review of the child support guidelines to ensure that deviations from the guidelines are limited and guideline amounts are appropriate based on criteria established by the State under paragraph (g); and

(3) Provide a meaningful opportunity for public input, including input from low-income custodial and noncustodial parents and their representatives. The State must also obtain the views and advice of the State child support agency funded under title IV-D of the Act.

§ 303.4 Establishment of support obligations.

For all cases referred to the IV-D agency or applying under § 302.33 of this chapter, the IV-D Agency must:

- (a) When necessary, establish paternity pursuant to the standards of § 303.5;
- (b) Use appropriate State statutes, procedures, and legal processes in establishing and modifying support obligations in accordance with § 302.56 of this chapter, which must include, at a minimum:
  - (1) Taking reasonable steps to develop a sufficient factual basis for the support obligation, through such means as investigations, case conferencing, interviews with both parties, appear and disclose procedures, parent questionnaires, testimony, and electronic data sources;
  - (2) Gathering information regarding the earnings and income of the noncustodial parent and, when earnings and income information is unavailable or insufficient in a case gathering available information about the specific circumstances of the noncustodial parent, including such factors as those listed under § 302.56(c)(1)(iii) of this chapter;
  - (3) Basing the support obligation or recommended support obligation amount on the earnings and income of the noncustodial parent whenever available. If evidence of earnings and income is unavailable or insufficient to use as the measure of the noncustodial parent's ability to pay, then the support obligation or recommended support obligation amount should be based on available information about the specific circumstances of the noncustodial parent, including such factors as those listed in § 302.56(c)(1)(iii) of this chapter.
  - (4) Documenting the factual basis for the support obligation or the recommended support obligation in the case record.
- (c) Periodically review and adjust child support orders, as appropriate, in accordance with § 303.8.
- (d) Within 90 calendar days of locating the alleged father or noncustodial parent, regardless of whether paternity has been established, establish an order for support or complete service of process necessary to commence proceedings to establish a support order and, if necessary, paternity (or document unsuccessful attempts to serve process, in accordance with the State's guidelines defining diligent efforts under § 303.3(c)).
- (e) If the court or administrative authority dismisses a petition for a support order without prejudice, the IV-D agency must, at the time of dismissal, examine the reasons for dismissal and determine when it would be appropriate to seek an order in the future, and seek a support order at that time.
- (f) Seek a support order based on a voluntary acknowledgment in accordance with § 302.70(a)(5)(vii).

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