



Ability to Pay and Other Nuances—An Analysis of the OCSE Final Rule

For those who truly enjoy conversations about child support policy, Santa Claus delivered an early present: on December 20, 2016, the long-awaited final federal rule was published. The 78 three-column pages of the Federal Register included OCSE's responses to 2,077 comments to the rule that was proposed on November 17, 2014. For those who just couldn't wait to read the news, an easier-to-read public version of the final rule (318 pages in a far kinder font size) was available the day before.

In contrast to the length of the final rule and preamble, the material changes for the future of child support in the rule can be summarized in only five words:

1. Imputation
2. Contempt
3. Inmates
4. Closure
5. Medical

Actually, this list could be even shorter, because the central theme of the first three topics is the same: actual ability to pay.

These same five topics were at the center of the 2014 proposed rule, but make no mistake: OCSE made abundant improvements in the final rule. Those who commented on the proposed rule, particularly the members of the workgroups from NCSEA, the National Council of Child Support Directors (NCCSD), and the Eastern Regional Interstate Child Support Association (ERICSA), will see much in the final rule that responds to the hard work and input of those organizations, including areas where commenters disagreed with OCSE's proposed approach. OCSE also was very understanding regarding the amount of time that child support programs will need to implement certain parts of the final rule (please see OCSE's website for a convenient summary of the final compliance date for various provisions in the final rule).

Imputation

Right or wrong, the proposed rule worried many child support agencies that imputation of income would be so heavily restricted as to be functionally prohibited. The proposed rule indicated that imputation would need to be based on a parent's actual ability to pay, and reserve to the parent a subsistence level of income. The problem is this: what if the child support agency simply doesn't know the parent's income, despite best efforts to find out? Or what if the parent is able-bodied and simply lacks the inclination to work and earn income from which he or she could pay child support?

The proposed rule certainly succeeded as a catalyst for a national debate on the proper role of imputed income in modern child support programs. NCSEA and other commenters expressed strong concern that the permitted use of imputed income under

the proposed rule was too narrow. Child support agencies know too well that in many cases, using default processes and imputed income is the only way to establish an enforceable obligation and not reward a parent's malingering or failure to respond to the establishment action.

The final rule settles the matter with an understandable and workable requirement. Instead of the provision in the proposed rule saying that the guidelines must consider the "actual earnings and income of the noncustodial parent" (from which one could infer exclusion of the use of imputed rather than actual income), the final rule simply says imputation of income must take into account the parent's ability to pay and specific circumstances. The key guidance is found in the preamble, which condones the use of imputed income to fill any "evidentiary gaps" in the information that can be gathered about a parent's income. This is a key distinction, and is reiterated separately in the preamble when OCSE describes the appropriate use of imputed income as one of "last resort."

Interestingly, when the state IV-D directors were surveyed whether imputed income was used in their state as a "last resort," 48 directors said yes and only two said no. It seems clear that OCSE believes actual practice in child support cases may be different from what state IV-D directors intend the practice to be. The federal requirement that guidelines be based on a parent's ability to pay is hardly new; it dates back to an [Action Transmittal written in 1993](#). The alignment of the final rule with the consensus of the state IV-D directors will likely lead to ongoing discussion at the state and local levels on whether actual processes are consistent with state and federal policies on the use of imputed income.

Contempt

The proposed rule similarly required that contempt of court proceedings take into account the subsistence needs of the noncustodial parent, and also mandated certain findings and conditions for any amount ordered by the court as a condition of purging the contempt. Many commenters were concerned that the proposed rule would set the child support program on a collision course with the judiciary, which in most jurisdictions is a co-equal branch of government and not subject to state laws enacted to fulfill federal mandates. The proposed rule also raised a similar concern about holding a parent in contempt when he or she willfully lacks income or successfully hides his or her income.

The final rule responds in a good way to these concerns by shifting the focus to steps that can be controlled by child support agencies: screening cases for evidence of ability to comply with the order and providing adequate notice to a parent before a contempt hearing that his or her ability to pay will be the central issue in the hearing. Although this may require additional resources, it will likely be time well spent. Not only will this improve the fairness of such proceedings for unrepresented parents, it may also result in a slight decrease in such hearings when the notice leads to an agreement between the parent and the child support agency on future child support payments.

Inmates

Both the proposed rule and the final rule prohibit states from considering incarceration to be a form of “voluntary unemployment” for purposes of using pre-incarceration earnings as the basis for establishing or modifying a child support order. Child support agencies are also prohibited from considering incarceration to be “voluntary unemployment” for purposes of determining whether the change in the obligor’s income is sufficient to warrant a change in the child support obligation. As discussed in the preamble, this prohibition aligns with the approach in the large majority of states; however, there is no doubt that the final rule overrides state law or court precedent in the few jurisdictions that still deny incarcerated parents a decrease in child support because it would reward bad behavior. Similarly, despite many comments that the incarceration provisions should have an exception when the crime is against the supported child or perhaps for criminal nonpayment of support, OCSE held firm in its position that accrual of child support in excess of the inmate’s actual ability to pay should not be considered an extra punishment for the crime. To some, at least, it will feel very strange to pursue a conviction of a noncustodial parent for willful nonpayment of support and reduce or eliminate the same obligation as a result of that incarceration.

In addition to changing the amount of child support obligations due from inmates, OCSE also required changes in the frequency with which those obligations are reviewed. The proposed rule mandated reviews when the child support agency learns that the noncustodial parent has been incarcerated for at least 90 days; in response to comments, this timeframe was extended to 180 days. For incarceration of 180 days or longer, a state has three choices:

1. Initiate a review of the obligation without waiting for a request from one of the parents;
2. Notify both parents of the right to ask the state to review and, if appropriate, pursue a change in the order; OR
3. Provide by operation of law or rule that the obligation of a noncustodial parent who is incarcerated for 180 days or more will be modified.

The third option above deserves attention, and was added in response to comments. For states where incarcerated parents do not earn income above a nominal level while serving their sentence, there are usually no disputed facts on which a hearing would be beneficial. Rather, the inmate’s obligation could be suspended altogether or set at a nominal amount by operation of law or rule. Not only would this approach avoid the time and expense of litigation when the outcome is pre-determined, it would also allow for immediate suspension or reduction in the child support obligation. As noted by OCSE in the preamble of the final rule, once arrears accrue, it is a prohibited retroactive modification of arrears to eliminate arrears that accrued after incarceration but before a motion to reduce or suspend child support can be filed. This author believes states would be well-served by looking closely at adopting a state law or rule regarding inmate

obligations in lieu of implementing the provisions in the new rule requiring a case-specific review for any incarceration of 180 days or more.

Many commenters noted to OCSE that if a review was mandated upon incarceration, a similar review should be mandated when the inmate is released. OCSE was not persuaded to mandate such reviews, but did encourage them, explaining in the preamble that child support agencies have discretion to conduct reviews more often than the minimum required by federal law or the final rule. Nevertheless, many will still feel there is an imbalance in the mandated approach.

Case Closure

Finally! For many, the most long-awaited provisions in the entire federal rule are the expansions to case closure. Closure is now permitted in any case where there is no current support obligation and all arrears are assigned. Closure is also permitted for low-income noncustodial parents who are in long-term care arrangements. The previous case closure provisions for a parent whose location is unknown have been shortened from three years and one year to two years and six months, respectively, depending on whether the parent's social security number is known or unknown. There is a related new provision for when a social security number cannot be verified.

Two case closure provisions that will warrant further review and analysis are when the noncustodial parent is living with the minor child and the child support agency has determined that services are not appropriate, and when a noncustodial parent is incarcerated with no evidence of support potential. The latter provision used to look at the duration of the child's minority, but as reworded is unclear when closure may be permitted or prohibited when the child has reached the age of majority and all arrears are unassigned.

And at long last, child support agencies can leave SSI recipients alone, whether they receive SSI exclusively or receive nominal amounts of SSDI benefits under Title II in addition to the SSI benefit. This is one of several areas mentioned in the preamble where existing or new interfaces between OCSE and other agencies will be very helpful in fully utilizing the authority in the final rule.

For states and tribes with cases in common, the new case transfer process will help conserve IV-D resources by allowing the two programs to reach agreement on the best program to handle the case. Importantly, a parent is deemed to consent to the transfer if he or she is notified by the state of its intent to transfer the case and does not express an objection. It is truly regrettable that OCSE did not extend a similar opt-in concept to interstate cases where multiple states are providing redundant services and lack the ability to transfer the case to the state that is in the best position to provide services to the case. The overlap in state and tribal caseloads will also be helped by the provision clarifying that a Medicaid case for an IHS-eligible child should not be referred.

What is most interesting to this author about the new case closing regulations will be how states react to the new authority. Under the previous rules, which were much

narrower, states would usually close a case as soon as one of the closure provisions allowed it. Under the broader new rules (particularly arrears-only cases where all arrears are assigned, arrears-only cases for incarcerated obligors with unassigned arrears, and cases where the obligor now lives with the child), states may need to regulate themselves in terms of the value of keeping a closeable case open. Literally, an obligor could be making regular arrears payments and the child support agency could still close the case in an effort to dump a case that is more difficult to enforce or inflate its performance numbers.

Medical Support

The final rule responds to the enactment of the Affordable Care Act by removing some selected provisions and otherwise adopting language giving states the latitude to decide whether public health coverage is adequate. Unfortunately, for cases where private or public coverage is not available for the child, child support agencies continue to be required to pursue cash medical support. The preamble explains that this is the area of medical support that is driven by federal law and cannot be fully reconciled with the ACA.

Of all the areas addressed in the final rule, medical support will perhaps warrant the most extensive analysis for implementation. The ability to accept public coverage is helpful, but the economics of health care coverage with the associated tax penalties and premium subsidies will challenge states to develop guidelines for considering all facts in a case and fairly allocating the costs of medical support between the parents. If Congress acts to repeal or substantially change the ACA, child support agencies could be in limbo again in determining what to do regarding medical support.

Other Changes

The discussion above captures the major changes in the final rule, but there are other changes that promote improved customer service to parents:

- Child support agencies can discontinue services to former federal foster care families unless the agency feels that continued services would be appropriate. Sadly, similar authority to let parents opt-in to continued child support services was not authorized for former Medicaid cases, even if the family previously opted-out of child support services while receiving Medicaid benefits.
- Limited services are optional for states, but only for paternity and (in light of strong comments to the proposed rule) only in intrastate cases. OCSE will be working on revisions to the 157 Child Support Enforcement Annual Data Report to reflect this change.
- Distribution of child support payments on behalf of a family will be limited to the parent, guardian, conservator, or (based on comments to the proposed rule) authorized caretaker of the child. This list does not include private collection agencies or private attorneys.
- The quadrennial review of child support guidelines must be transparent to the public and involve a heightened level of data analysis. The review also must

include input from the state child support agency, if that input is not already included in the review process.

- If a state still has an open case with a noncustodial parent who receives SSI, any seizure of protected funds from a financial account must be returned within five business days (expanded from two days in the proposed rule based on comments).
- Many references in the former rules to written communication have been revised to include electronic records. Case closure notices still need to be in writing but, in response to comments, there is authority for a parent to agree to receive such closure notices electronically.
- Several provisions in the proposed rule were removed, including:
 - Express authorization for use of federal financial participation for job services.
 - Clarification of ability to make *de minimis* use of IV-D resources to adopt a parenting schedule developed by the parties.
 - An additional case closing provision for a parent who receives multiple service referrals, based on widespread misunderstanding of the types of referrals intended to be covered.

The final rule was published in the last few weeks of the Obama administration, and the new Congress and administration have the prerogative to review the rule to determine whether they agree with the approach. NCSEA has gone on record in support of the final rule as the culmination of a long process that included input from child support agencies. The changes between the proposed rule and the final rule demonstrate that the comments and concerns expressed to OCSE were taken into account and led to an improved final rule.

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Jim was the recipient of the 2009 Family Support Council Program Awareness Award and the 2004 Freedom Award from the North Dakota Newspaper Association. He also serves on the board of directors of the North Dakota Newspaper Association Education Foundation. He earned his Bachelor of Arts degree from the University of North Dakota in 1989 and his Juris Doctorate from Notre Dame Law School in 1993. A second-generation attorney and native of Cavalier, North Dakota, Jim and his wife Terri live in Bismarck and are blessed with four daughters. In his spare time, Jim likes to sing, cook, garden, follow UND hockey, and do woodworking.