Same-Sex Parents and Child Support Program Requirements

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POLICY INTERPRETATION QUESTIONS

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DATE: March 29, 2022

TO: State IV-D Directors

FROM: Tanguler Gray, Commissioner, Office of Child Support Enforcement

SUBJECT: Same-Sex Parents and Child Support Program Requirements

Our goal in issuing this PIQ is to emphasize the flexibility that title IV-D of the Social Security Act affords states in enacting laws and policies to best serve diverse families.

The diversity of the millions of families served by the child support program continues to grow. Child support programs play a critical role in addressing the changing needs of modern families to provide family-centered services that best support the financial and emotional needs of children.

The law affecting these diverse families is changing as well. In *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the United States Supreme Court held that same-sex couples have a fundamental right to marry, and that state law cannot prohibit couples from exercising that right. The court recognized that marriage is part of a spectrum of personal choices concerning family relationships, procreation, and childrearing protected by the Constitution, and that same-sex couples—like different-sex couples—have the right to marry, establish a home and bring up children. In 2017, the Supreme Court held that a state may not, consistent with *Obergefell,* deny married same-sex couples inclusion on their children's birth certificates that the state grants to married opposite-sex couples. *Pavan v. Smith*, 137 S. Ct. 2075 (2017). In addition, to meet the needs of unmarried same-sex couples, a diverse array of jurisdictions from Alaska to West Virginia now

make up the majority of states that recognize parental rights for intended, but not genetically related, *de facto* parents.[1]

In 2017, the Uniform Law Commission revised and adopted the Uniform Parentage Act (UPA) in response to these momentous changes. Recognizing that the child support program is an important voice on changes to the UPA, the Uniform Law Commission invited OCSE and the National Child Support Enforcement Association to participate as official observers in the drafting process. The 2017 UPA includes gender-neutral language as well as parentage establishment processes based on the marital presumption and voluntary acknowledgement of parentage for *de facto* parents; i.e., individuals who are not related to the child biologically or by adoption. OCSE determined that these updates, if adopted by states, would not be inconsistent with requirements in title IV-D of the Social Security Act. Currently six states have adopted the 2017 UPA, and 10 states have enacted laws and adopted forms allowing for voluntary acknowledgment of parentage by same-sex parents. In addition, all states have enacted the Uniform Interstate Family Support Act (UIFSA 2008), which uses the term "parentage" in matters regarding interstate child support cases.[2]

Despite these recent changes to parentage and marriage laws, and family structure, federal law and regulations for the title IV-D program established in 1996 still focus on "paternity" establishment for traditional father-mother families. Several states have asked OCSE for guidance on these federal requirements as they move forward on new state laws and child support program policies to meet the needs of same-sex parents and their families.

Question 1: Do the provisions in title IV-D of the Social Security Act mandating paternity establishment laws preclude states from adopting parentage laws for same-sex parents?

Answer 1: No. Sections 454 and 466 of the Act require states to have certain laws for paternity establishment in cases involving traditional father-mother families. The Act does not preclude states from adopting additional laws on parentage, surrogacy, and assisted reproduction that define and afford parental rights to same-sex parent families. As long as a state has the parentage establishment laws that include establishment of paternity for traditional father-mother families as required under title IV-D, states may enact broader or additional parentage laws for same-sex parent families without risking state plan compliance.

Question 2: Do the provisions in title IV-D of the Act mandating that states have a voluntary acknowledgment of paternity procedure preclude states from adopting a gender-neutral acknowledgment process?

Answer 2: No. Section 466(a)(5)(C) of the Act requires that states have procedures for a simple civil process for a mother and putative father to voluntarily acknowledge paternity; section 466(a)(5)(D) requires that the acknowledgment, if not timely rescinded, is considered a legal finding of paternity that can be challenged only on the basis of fraud, duress, or material mistake of fact; and section 466(a)(5)(E) bars

ratification of the acknowledgment. Such procedures need not include gender-specific terms. States may adopt a single set of gender-neutral voluntary acknowledgment of parentage provisions consistent with title IV-D, including a gender-neutral acknowledgment process and forms, provided such provisions, process and forms also encompass the voluntary paternity acknowledgment procedures required under title IV-D.

Question 3: How do the genetic testing provisions in title IV-D of the Act apply to children born to same-sex couples?

Answer 3: Title IV-D contains provisions related to genetic testing in traditional paternity cases involving a father and mother that generally will not be applicable to parentage establishment for same-sex parent families. Section 466(a)(5)(B) of the Act requires that states have procedures for genetic testing in a contested "paternity" case upon request by a party "alleging paternity, and setting forth facts establishing a reasonable possibility of the requisite sexual contact between the parties." This provision also states that genetic testing may not be required if "otherwise barred by State law" and recognizes that "good cause and other exceptions for refusing to cooperate" with genetic testing may exist. Section 466(a)(5)(B), therefore, generally will not impact parentage laws for cases involving same-sex parent families.

Similarly, section 466(a)(5)(G) of the Act requires that states have "[p]rocedures which create a rebuttable or, at the option of the State, conclusive presumption of paternity upon genetic testing results indicating a threshold probability that the alleged father is the father of the child." Congress added this provision to the Act in 1993, when genetic testing was emerging as scientifically reliable evidence to establish whether a man was biologically related to a child. As OCSE explained in its final rule issued in 1994, the presumption based on genetic test results was intended to "expedite paternity resolution"[3] by requiring that "a presumption of paternity be based upon genetic test results indicating a threshold probability of the alleged father being the father of the child.[4]

For same-sex parent families, parentage may be established under state law through *de facto*, holding out, or intended parent laws—not genetic test results—thereby rendering section 466(a)(5)(G) inapplicable. As OCSE recognized in its final rule implementing section 466(a)(5)(G), "States may have laws which establish additional presumptions [of parentage] and rules for resolving apparent conflicts."[5] In addition, section 454(4)(A) of the Act requires states to provide paternity establishment services "as appropriate." Such laws and policies allow states flexibility to fulfil the core functions of the child support program for establishment of the legal parent-child relationships as necessary under state law to secure and enforce child support obligations.

Question 4: Can a state child support agency provide parentage establishment services for same-sex parent families? Is federal financial participation (FFP) available for such activities?

Answer 4: Yes. While title IV-D and federal regulations require state child support agencies to have procedures for "paternity" establishment, as stated in the response to Question 1, title IV-D does not preclude states from having parentage establishment laws and procedures for same-sex parent families. OCSE recognizes that all children are entitled to child support regardless of the gender or sexual orientation of their parents, and that the main purpose of the program is to ensure that assistance in obtaining support is available to all children for whom such assistance is requested.[6] We also recognize that establishment of the parent-child relationship is a matter of state law and state child support programs need flexibility to provide core child support services, which include establishing support orders against the parent who, under state law, has a duty to provide support. Therefore, parentage establishment services provided to same-sex parent families, though not required under title IV-D, are permissible and eligible for FFP under 45 CFR 304.20(a)(1), which authorizes FFP for reasonable and necessary expenses related to the core title IV-D program functions of establishing and enforcing support orders.

INQUIRIES: Contact OCSE at **OCSE.DPT@acf.hhs.gov**.

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[1] *Conover v. Conover*, 141 A.3d 31, 47-48 (Md. 2016).

[2] In 2014, Congress passed and the President signed Public Law (P.L.) 113-183, the Preventing Sex Trafficking and Strengthening Families Act, requiring all states to enact UIFSA 2008 as a condition of state plan approval.

[3] 59 FR 66204, at 66208.

[4] 59 FR 66204, at 66228.

[5] *Id.*

[6] *See* 42 U.S.C. § 651, *Appropriation*.

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