



Overall, the National Child Support Enforcement Association (NCSEA) supports the rulemaking, with specific exceptions, because of the improved efficiencies such as more liberal rules for closing uncollectible cases and expanded services that are eligible for federal matching dollars. NCSEA also appreciates the effort by the Office of Child Support Enforcement (OCSE) to modernize the program. NCSEA fully supports changing the perception that the child support program is a pure enforcement program with the goal of collecting as much money as possible with no regard to the circumstances of the obligor. NCSEA applauds OCSE for proposing regulatory changes that recognize the benefit of promoting obligor ability and inclination to pay, in addition to more traditional “direct” enforcement techniques.

However, there are a few proposals, in NCSEA’s view, that exceed what is desired from both a guidance perspective (overreaching use of regulatory authority) and a policy perspective (overlenience toward noncustodial parents.) NCSEA has substantial concerns with a few proposed rules that would undermine OCSE’s established purpose to “promote parental responsibility so that children receive reliable support from both of their parents as they grow to adulthood.” These proposals, including restrictions on judicial contempt power and imputation of income, would eliminate essential tools that state, county, and tribal IV-D programs (IV-D agency(ies)) use to motivate obligors to support their children. NCSEA believes that custodial parents and children will suffer, and the goal of parental responsibility will be depreciated, unless OCSE reconsiders these proposals.

While NCSEA fully supports meeting obligors “where they are,” NCSEA is mindful that the purpose of the child support program remains to collect support for families. A few of the proposed provisions will make it more difficult for IV-D agencies to motivate obligors to improve their life circumstance and will provide relief to obligors at the expense of custodial parents and children.

NCSEA also observes that some proposals markedly depart from the approach taken in current regulations and the historical partnership of OCSE and IV-D agencies. The proposed rules that require specific guideline components, restrict contempt powers, and mandate certain review and adjustment policies effectively strip IV-D agencies of the discretion and flexibility to develop programs and policies best suited to the families they serve. Because IV-D agencies have vastly different economic and social conditions, NCSEA believes that federal rules should guide in general terms and not unduly restrict or proscribe specific state practices. Further, innovation and the development of best practices at the IV-D agency level is the cornerstone of Title IV-D, and largely responsible for its steadfast success. Because universal requirements and prohibitions stifle effective program development, NCSEA urges OCSE’s reconsideration of these proposed rules. Since there have been no intervening amendments to Title IV-D of the Social Security Act, one could question such extensive regulatory proposals in areas like child support guidelines,

contempt of court, and review and adjustment over which states have historically had broad discretion.

NCSEA appreciates OCSE's thoughtful consideration of all comments and looks forward to OCSE's replies to these comments in the final rule.

OCSE Request for Comments on Implementation

The amount of time a state will need to implement the final rule depends heavily on the extent to which the final rule reflects the recommendations of NCSEA and other commentators, particularly NCSEA's suggestions regarding Sections 302.3 (limited services), 302.56 (guidelines), 303.6 (contempt of court), and 303.8 (review and adjustment). Accepting NCSEA's comments to those sections may help shorten the amount of time needed to implement the final rule.

Many of the proposed changes are beneficial and should be made effective as soon as possible. Therefore, NCSEA recommends that the effective date be stated in terms of "no later than one year after publication."

State legislation may be required for implementation of several proposed changes identified in this document, either to amend governing state law or to appropriate sufficient funds to make required changes in state systems.

Topic 1: Procedures to Promote Program Flexibility, Efficiency, and Modernization

Section 302.32: Collection and disbursement of support payments by the IV-D Agency

NCSEA neither supports nor opposes the amendments in this section. We agree that employers are vital partners to child support, and have no basis to disagree with the problems described in the preamble.

In response to OCSE's question whether the general approach in the regulations will address effectively the problems with State Disbursement Unit (SDU) payment processing on non-IV-D orders, the proposed amendments merely re-state or paraphrase the language in current federal law, and therefore would not appear to assist in resolving those problems.

Section 302.33: Services to individuals not receiving Title IV-A assistance

Post-Foster Care

NCSEA supports the proposed rule change to section 302.33(a)(4) in which continuation of child support services is no longer automatic in post-foster care cases. NCSEA appreciates the flexibility afforded to the states to be able to make a case-by-case determination on whether continuation of services is appropriate. We know that states have struggled with the logic of sending the notice of continued services, particularly after the family has reunified. Oftentimes,

the period of foster care is so short that there was no time to establish a support obligation. Therefore, no arrearages exist and there are no applicable services to be continued.

Limited Services

NCSEA supports the flexibility afforded to the states in deciding whether to provide limited services based on the proposed new paragraph in section 302.33(a)(6). We believe that providing the option of limited services to applicants will promote the application for IV-D services in circumstances that otherwise would dissuade an applicant. For example, an alleged father might seek a determination of parentage, but then is able to work an agreement (or is co-habiting) with the mother for child support and custody, and therefore does not desire the additional child support services. The reasons for establishing parentage are well established, and we believe that offering limited services will promote applications for paternity establishment only.

There may also be some parents who would like to receive child support services, but avoid doing so because they do not want to subject the other parent of their child to the many enforcement tools. If they were able to obtain the services associated with establishing parentage, child support and income withholding, this may be all they need. They could opt in for the full array of enforcement tools if it becomes necessary.

NCSEA supports allowing the states to determine whether to provide limited services as a state policy decision from the intrastate perspective. However, implementation of an optional service tends to become more problematic in interstate cases. If the initiating state implements limited services requests, and the responding state does not, the applicant must be made very aware that he or she will be subject to the full gamut of services because the responding state does not accept limited services requests. NCSEA requests that OCSE address this issue in the final rule by either:

1. Allowing the “full-services only” responding state to decline incoming requests for limited services. This should also be a state option, as the responding state may choose to take the case and inform the initiating state that the case will be worked using the traditional “all or nothing” approach; or,
2. Providing that limited services are not available to applicants in interstate cases where long-arm jurisdiction is not an option. This is not the option NCSEA prefers, as there could be two states sharing cases and both states do provide limited services.

In either option, we remind OCSE to add whether a state offers limited services as a line item in the Interstate Referral Guide.

If the proposed amendments to this section become final, we ask OCSE for guidance on reporting limited services on the 157 report. Specifically, how do limited services cases affect the existing measures? Do these cases count in the denominator (and numerator where applicable) for measures in which a percentage of the caseload is calculated?

Section 302.38: Payments to the family

NCSEA welcomes the intent expressed in the preamble that states should not be placed in the position of potentially facilitating inappropriate business practices of private collection agencies. However, by proposing to require that disbursements be made “directly” only to the custodial parent or certain other listed parties with custody or a fiduciary relationship with the child, the proposed regulation omits other, less formal requests from custodial parents to disburse funds to a relative or family friend with whom the child may be living on a temporary basis.

NCSEA suggests that the intent of the proposed amendment could be achieved if disbursement to a third party is *authorized* at the request of the custodial parent, but not required (an interpretation that is permitted under current regulations). This would allow states to establish policy identifying categories of third parties, such as attorneys or conservators, to whom disbursements can be made without posing a risk of states facilitating inappropriate business practices.

Section 302.56: Guidelines for setting child support awards.

NCSEA supports setting child support obligations based on an actual ability to pay, commonly referred to as “right sizing.” Right sizing orders has many benefits to parents as well as to the IV-D program, detailed in NCSEA’s position paper “Setting Current Support Based on Ability to Pay”¹ and the explanation within the NPRM.

However, as set forth in our introduction and further developed in these comments, the proposed universal guideline restriction on imputation of income will undermine the program’s fundamental purpose to collect support for children in difficult cases where the noncustodial parent refuses to cooperate. It also will restrict IV-D agencies from developing best practices for these cases given the economic and social needs of the families that they serve.

Finally, the proposals would apply to govern both IV-D and non-IV-D cases, thereby imposing substantial restrictions on the private bar and judiciary without justification. For these reasons, NCSEA urges OCSE to withdraw the proposed restriction on imputation of income in Section 302.56(c)(4). In the alternative, NCSEA respectfully recommends a different proposal for subsection (c)(4) set forth at the end of this section.

NCSEA appreciates OCSE’s suggestion that the effective date of these changes coincides with the next quadrennial review of state child support guidelines. However, for states whose quadrennial review will commence shortly after the rule is finalized and need time to conduct further analysis and research on implementation issues and potential system changes, NCSEA recommends an additional extension of one year. In other words, the guidelines changes in (a) would be required to be in effect within one year after completion of the first quadrennial review of its guidelines that commences more than one year after the adoption of the final rule.

Consideration of health care needs

¹ http://www.ncsea.org/documents/Ability_to_Pay-final.pdf

In section 302.56(c)(3), NCSEA proposes to delete the following “...in accordance with 303.31 of this chapter”. Thus the revised sentence would read: “Address how the parents will provide for the child(ren)’s health care needs through health insurance coverage and/or through cash medical support.” At this point, section 303.31 has not yet been revised to align with the provisions of the Affordable Care Act (ACA). Until this happens, and the related statutory provisions are revised, the current reference creates conflicts with ACA provisions.

Noncustodial parent’s subsistence needs

The first proposed change to this section would require state guidelines to take into account the noncustodial parent’s subsistence needs when setting a support obligation. Consideration of a parent’s subsistence needs has several benefits that include reducing the amount of unpaid arrears, a perception of fairness, and reducing the likelihood of a noncustodial parent being forced to leave the formal economy. NCSEA believes that states should have the flexibility to define “subsistence needs” that the language of the proposed rule appears to effectuate. This flexibility is necessary because of the differing methods and formulas utilized by states to calculate child support, specifically in complex family situations, such as those with multiple partner fertility and shared or split placement of the children.

Some states have already begun to implement a subsistence needs analysis through a self-support reserve built into the guideline tables or other methods. Affording states the latitude to determine the methodology that best works within each state’s guideline framework will enable states to develop best practices for setting standards that optimize situations for both noncustodial parents and their children.

Actual earnings

The proposed rule supplements current parameters related to setting child support with a requirement that the support amount 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.” NCSEA believes that right sized orders are in the best interest of families. In the majority of cases where there is reliable evidence related to the noncustodial parent’s income, or sufficient lifestyle information to infer income, the proposed rule helps ensure a right sized order.

The proposed rule as written, however, fails to account for the substantial number of cases where the IV-D agency has no income data or lifestyle evidence and the noncustodial parent refuses to provide any reliable income information, either by not appearing for court, or by appearing and misrepresenting his employment situation. As detailed below, NCSEA believes that courts and state laws must have the flexibility to set support in these circumstances; otherwise, children and custodial parents will be irrevocably harmed. NCSEA, therefore, respectfully suggests an alternate rule set forth at the conclusion of this comment to resolve this issue.

Unreported income represents one of the largest barriers to the IV-D agency acquiring the reliable data and evidence necessary to set support as proposed in the rule. A 2011 study by researchers from the University of Wisconsin and Jacksonville University estimates the size of

the underground economy at \$2 trillion annually, representing 18-19% of total reportable income in the United States.² By definition, this is income for which the child support program will have no data other than that which may be self-reported by the noncustodial parent, or for which the custodial parent may have anecdotal, but rarely admissible, evidence. Since this type of income represents almost 1 in 5 dollars earned and is disproportionately present in IV-D cases, it presents an insurmountable barrier to setting an appropriate child support obligation in IV-D cases unless the noncustodial parent appears and volunteers to disclose this income or lifestyle information.

The noncustodial parent who fails to report income is already intentionally hiding income from the Internal Revenue Service, thereby creating strong motivation to further obfuscate this income, and any resultant assets proving lifestyle, in the IV-D context.³ While extensive discovery such as investigators, depositions, interrogatories, and subpoenas duces tecum might lead to admissible evidence related to unreported income and lifestyle, IV-D agencies simply do not have the resources necessary to conduct such discovery. Absent this, the practical ability to establish a support obligation through lifestyle evidence is minimal. For example, if an adjudicator of facts determines that a parent, despite no reported income, lives in an apartment with monthly rent of \$800 or drives a car worth \$5,000, this still does not present enough evidence to derive an actual income amount. Further, such lifestyle evidence is frequently and easily countered by an assertion that the parent is living on borrowed money to pay the monthly rent or pay for the car.

These problems are even more pronounced when dealing with undocumented workers because many do not have Social Security numbers to track earnings. Also, undocumented workers often hide employment activity for fear of notice by the U.S. Immigration and Customs Enforcement and possible deportation.

Similarly, although NCSEA supports reducing the use of default orders as outlined in our position paper “Setting Current Support Based on Ability to Pay,” default orders continue to be necessary when the noncustodial parent refuses to appear, despite multiple opportunities provided by the court and IV-D agency. While the proposed rule does not expressly prohibit default orders, there appears to be no ability within the framework of the rule to impute income based on other types of evidence—such as the noncustodial parent’s past income, employment history, and/or employment available in the local community. If the IV-D agency cannot obtain current data of income or evidence or current lifestyle, the proposed rule seems to disallow a support order altogether.

This result could give parents with reported income an incentive to intentionally end employment after being notified of the support proceedings and refuse to appear in order to force a zero dollar order. This perverse incentive to avoid support cannot be in the best interest of the children and families, nor in the interest of justice. So too with parents who refuse to work, despite having the ability and opportunity. The inability to impute income when a parent elects

² Richard Cebula and Edgar Feige, “America’s underground Economy: Measuring the Size, Growth and Determinant of Income Tax Evasion in the U.S.”

³ For information related to the IRS’ approach to such hidden income, see generally “IRS Cash Intensive Business Audit Techniques Guide – Chapter 8 The Underground Economy.”

not to work would unduly punish the custodial parent and children, and would disproportionately impact the most socioeconomically deprived, at-risk children.⁴

In addition to the difficulties related to unreported income, lifestyle evidence, and uncooperative noncustodial parents, there are challenges related to the proposed rule as it applies to complex families. For example, the inability to impute income, other than by lifestyle evidence, where parents share placement, but one parent works in the underground economy or is a stay at home mom/dad would create inequitable results. Specifically, even should a stay-at-home parent give accurate, honest lifestyle evidence, it is difficult to ascribe enough meaning to utilize that information in the context of setting support in a shared or split placement context because there is still no actual income, and any lifestyle income may be attributable to a new partner's income.

The IV-D child support program was founded on the belief that noncustodial parents should support their children. Society has a fundamental interest in encouraging parents to do so. A broad proscription against imputing income where the noncustodial parent refuses to cooperate, misrepresents his income, and/or derives income from the underground economy, is contrary to public policy.

NCSEA is in favor of right sized orders, but believes the current proposed language is too limiting to allow setting a fair order in many circumstances. For these reasons, NCSEA urges OCSE to withdraw the proposed restriction on imputation of income.

If OCSE does not accept NCSEA's recommendation to withdraw the proposed amendment, the rule change should maximize right sizing and reduce the use of default orders, but be less proscriptive of imputing income where necessary. NCSEA proposes adding the following language to the proposed rule allowing reasonable imputation of income when data is otherwise insufficient to set support based on actual income or lifestyle evidence:

302.56(4) "...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. If such evidence is insufficient, support may be set on other evidence such as past income and employment, income that could be reasonably earned by the parent, or other reasonable basis."

The rule could further prescribe that a determination of income that could be reasonably earned must include consideration of the parent's education, work history, criminal record or any other information available related to earning capacity.

Incarceration as "voluntary unemployment"

NCSEA supports common sense limitations on the ability to use pre-incarceration earnings to set or refuse to modify support. However, as indicated in our position paper, "Setting Current Support Based on Ability to Pay", such limitation should not apply where the parent is

⁴ See "Basic Facts About Low-income Children – What are the family characteristics of low-income and poor children?" National Center for Children in Poverty. www.NCCP.org

incarcerated for a crime against the supported child or custodial parent, including intentional failure to pay child support. Strong public policy dictates against affording relief to an obligor who commits a violent crime on the custodial parent or child, or the obligor who has the means to pay child support but refuses to do so. NCSEA urges OCSE to include these important exceptions in the final rule.

While NCSEA generally believes that states must have discretion and flexibility in developing their child support guidelines, for the reasons articulated in the introduction and developed throughout this comment, NCSEA makes an exception to its general policy here and does not object to this proposed rule. NCSEA's support for guidelines providing that incarceration is not voluntary unemployment is based on the overwhelming consensus that this is the best practice for families and IV-D agencies, regardless of where they are located. As OCSE points out in the NPRM's preamble, few states still have laws that treat inmates as voluntarily unemployed. Further, NCSEA supports judicial discretion and these laws prohibit courts from granting modifications based on the actual circumstances of the case.

Therefore, NCSEA supports the provision at section 302.56(c)(5), and also supports the flexibility permitted under the proposed rules for states to determine the appropriate amount of support owed by an incarcerated obligor.

Parenting time

As applied to state child support guidelines, NCSEA neither supports nor opposes the proposed amendment, because current regulations already give states the flexibility to consider parenting time when setting an appropriate child support obligation. To the extent the preamble suggests that OCSE intends to confirm that IV-D agencies may incorporate parenting time agreements in child support orders, NCSEA welcomes that confirmation⁵ but believes the amendments are misplaced in this section, and instead are more appropriate in the sections of federal regulations pertaining to establishment of support orders and review and adjustment of support orders.

Deviations from child support guidelines

The new sentence proposed in paragraph (i) regarding deviations from child support guidelines appears redundant with the reference to rebuttal criteria in existing paragraph (g). NCSEA suggests that the new language be deleted or clarified in the final rule.

Section 302.70: Required state laws.

NCSEA supports the extension of exemptions from three years to five years.

Section 302.76: Job services.

NCSEA supports this proposed section as a state option. Because job services can be helpful in contexts other than a sanction for contempt of court or other enforcement activities, such as self-referral or the suggestion of the IV-D agency in response to a reported loss of employment of the

⁵ See http://www.ncsea.org/documents/Parenting-Time-Order_7.31.13.pdf

obligor, NCSEA recommends that much of the detail in proposed 303.6(c)(5) be relocated to this new section.

Section 303.3: Location of noncustodial parents in IV-D cases.

NCSEA supports the proposed amendments to this section as a helpful clarification of the current ability of IV-D programs to access records of corrections institutions.

Section 303.6: Enforcement of support obligations.

Contempt of court

In *Turner v. Rogers*, 564 U.S. ___, 131 S. Ct. 2507, 2519 (2011), the Supreme Court held that a defendant facing incarceration for civil contempt has a right under the Fourteenth Amendment to procedural safeguards that guarantee a fundamentally fair proceeding. While appointment of counsel is one such safeguard, the Court recognized other procedures may suffice to satisfy due process. *Id.* at 2516-19.

NCSEA believes that parents should not be incarcerated for civil contempt if they lack the ability to pay child support. And NCSEA agrees that the proceedings should be fundamentally fair to parents and ensure accurate determinations on the crucial ability to pay question. However, as set forth below, proposed 303.6(c)(4), which purports to codify the holding in *Turner*, is problematic for several reasons and should be removed in its entirety. In the alternative, NCSEA respectfully suggests the new proposed rule set forth at the conclusion of this comment.

The amendment to 303.6(c) would require that state courts:

- Consider the subsistence needs of noncustodial parents in civil contempt proceedings;
- Consider the subsistence needs and actual earnings and income of noncustodial parents when setting purge amounts to avoid incarceration; and,
- Enter written evidentiary findings that the noncustodial parent has the actual means to pay the purge amount from his or her current income or assets.

NCSEA asks OCSE to reconsider its proposed requirements because they infringe on the inherent powers of the judiciary, would be unenforceable by IV-D agencies, and are contrary to the flexible nature of due process at issue in *Turner*. The proposed new requirements also are incompatible with the other provisions in Section 303.6.

It is settled that courts have the power to enforce orders through civil contempt. *Michaelson v. United States ex rel. Chicago, St. P., M., & O.R. Co.*, 266 U.S. 42, 65-66 (1924) (explaining that the power of contempt is “inherent in all courts” and “essential to the administration of justice”); *see also Shuffler v. Heritage Bank*, 720 F.2d 1141, 1146 (9th Cir. 1983) (“A court has power to adjudge in civil contempt any person who willfully disobeys a specific and definite order

requiring him to do or to refrain from doing an act.”). The procedures and limits of civil contempt are governed by constitutional law, *Rogers*, 131 S.Ct. at 2517, not statutory law.

Legislation placing limits on a court’s contempt power have been struck down in several states as infringing on the inherent powers of the judiciary. For example, the Ohio Supreme Court held that contempt is “inherent in the courts and not subject to legislative control.” *City of Cincinnati v. Cincinnati Dist. Council 51*, 299 N.E.2d 686, 694 (Ohio 1973), *cert. denied* 415 U.S. 994 (1974). The Idaho Supreme Court ruled that a statute cannot constitutionally circumscribe “inherent common law contempt power.” *Marks v. Vehlow*, 671 P.2d 473, 479 (Idaho 1983).

As the Illinois Supreme Court explained, “[b]ecause [contempt] power inheres in the judicial branch of government, the legislature may not restrict its use.” *In re G.B.*, 88 Ill. 2d 36, 41 (Ill. 1981); *see also LeMay v. Leander*, 994 P.2d 546, 555 (Haw. 2000) (“[T]he courts’ inherent contempt powers to find violators of its orders in civil contempt were not and cannot be abrogated or unduly restricted.”); *State ex rel. McLeod v. Hite*, 251 S.E.2d 746, 747 (S.C. 1979) (court possesses contempt powers irrespective of specific grant by Constitution or legislation and “[s]uch powers can neither be taken away nor abridged by the legislature”); *cf. Michaelson*, 266 U.S. at 66 (contempt power cannot be “rendered practically inoperative” by Congress). The separation of powers doctrine was intended by the framers to prevent “legislative usurpation of judicial power.” Linda D. Jellum, “Which is to be Master,” *The Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 UCLA L. Rev. 837, 857 (2009).

Just as the state legislatures cannot compel courts to consider certain evidence or make specific findings in civil contempt cases, IV-D agencies similarly cannot control the court. It is impossible to envision how a IV-D agency would enforce the proposed procedural requirements that the court take into account the subsistence needs of a noncustodial parent and enter written evidentiary findings regarding purge amounts.

Moreover, the U.S. Solicitor General argued in *Turner* that the constitutional requirements of due process must be flexible, not absolute, and allow for states to adopt varied approaches to civil contempt proceedings. The U.S. Supreme Court agreed. 131 S.Ct. at 2516-18. But the proposed rule does exactly the *opposite* in demanding specific universal procedures in civil contempt proceedings. As OCSE recognized in Action Transmittal (AT) 12-01:

In light of *Turner*, states continue to have latitude in determining the precise manner in which the state implements due process safeguards in the conduct of contempt proceedings, including the respective roles of the IV-D agency, prosecuting attorneys, and court.

Finally, the proposed amendment is irreconcilable with the intent and other terms of Section 303.6. The current rule (“Enforcement of support obligations”) requires IV-D agencies to enforce child support obligations in all IV-D cases with established support orders. It mandates that the IV-D agency monitor compliance (45 C.F.R. §303.6(a)), identify cases with past-due support obligations (*Id.* at §303.6(b)), and enforce support obligations through income withholding (*Id.* at §303.6(c)(1)) and through other actions such as income tax refund offsets (*Id.* at §§303.6(c)(2),

(c)(3)). If the enforcement actions are unsuccessful, the IV-D agency must examine the reason why and determine whether future enforcement actions are appropriate (*Id.* at §303.6(c)(4)).

The current rule guides certain IV-D agency enforcement actions. The proposed amendment intends to restrict judicial enforcement actions in all civil contempt cases. The stark contrast between empowering the IV-D agency with tools and timeframes to enforce support obligations, and forbidding courts from utilizing their common law contempt powers except on OCSE's dictated terms, highlights the irreconcilable nature of the proposed rule. For all these reasons, NCSEA asks OCSE to strike the proposed rule in its entirety.

In the alternative, NCSEA proposes a different amendment that it believes will not infringe on the inherent contempt powers of the judiciary, would preserve the flexibility of court proceedings advocated in *Turner*, and would guide the IV-D agency's civil contempt enforcement action by focusing on the initial screening process. As OCSE recognized in its AT, "*Turner* highlights the importance of carefully screening cases prior to initiating contempt proceedings" and will "save child support program costs, preserve scarce judicial resources, avoid unnecessary court hearings, and avoid the risk of constitutional violations."

The following strikethrough version includes NCSEA's proposed changes to paragraph (c):

Enforcing the obligation by:

(1) Initiating income withholding, in accordance with § 303.100;

(2) Taking any appropriate enforcement action (except income withholding, ~~and~~ Federal and State income tax refund offset, and initiating civil contempt proceedings) unless service of process is necessary, within no more than 30 calendar days of identifying a delinquency or other support-related non-compliance with the order or the location of the noncustodial parent, whichever occurs later. If service of process is necessary prior to taking an enforcement action, service must be completed (or unsuccessful attempts to serve process must be documented in accordance with the State's guidelines defining diligent efforts under § 303.3(c)), and enforcement action taken if process is served, within no later than 60 calendar days of identifying a delinquency or other support-related non-compliance with the order, or the location of the noncustodial parent, whichever occurs later;

(3) Submitting once a year all cases which meet the certification requirements under § 303.102 of this part and State guidelines developed under § 302.70(b) of this title for State income tax refund offset, and which meet the certification requirements under § 303.72 of this part for Federal income tax refund offset; and

(4) ~~Having 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; Initiating and pursuing civil contempt proceedings where appropriate after considering the noncustodial parent's actual earnings and income and subsistence needs if known.~~

Job Services

NCSEA supports proposed new paragraph (5) regarding job services. However, because job services can be helpful in contexts other than a sanction for contempt of court or other enforcement activities, such as self-referral or at the suggestion of the IV-D agency in response to a reported loss of employment, NCSEA recommends that much of the detail in this paragraph be relocated to Section 302.76.

Section 303.8: Review and adjustment of child support orders.

Incarceration

NCSEA opposes the proposed amendments in subsection (b). Section 466(10) of the Social Security Act refers to periodic reviews and establishes a minimum three-year review cycle “or such shorter cycle as the State may determine.” This provision clearly empowers states, rather than OCSE, to create exceptions to the three-year review process. NCSEA’s paper on right sizing specifically lists similar improvements to the review and adjustment process as being legislative changes, rather than regulatory changes

NCSEA supports right sizing, as discussed earlier in these comments. In addition to proposing exceptions to the three-year review cycle without authorization from Congress, NCSEA disagrees with the proposal in several key respects.

First, there are other circumstances affecting an obligor’s ability to pay. By limiting its proposal to incarcerated obligors, OCSE is curiously limiting its proposal to a segment of the caseload where the obligor’s inability to pay is caused by the obligor’s intentional commission of criminal acts, but not those cases where the inability is due to circumstances beyond the control of the obligor.

Second, the proposed amendments do not include a comparable provision requiring states to initiate or suggest a review within a reasonable time after the obligor is released and able to find a job. This gives the impression to custodial parents that the true motive of the child support program is to lower obligations and improve collection rates rather than set obligations at appropriate levels. If OCSE includes the proposed amendments in the final rule despite NCSEA’s suggestions to the contrary, NCSEA strongly urges OCSE to include a comparable review provision for when the obligor is released. Since a custodial parent is often not immediately aware when the obligor is released from incarceration, the clarification of authority of IV-D agencies to initiate a review upon release without a request from a parent is even more important.

Third, NCSEA believes that setting the trigger for incarceration at 90 days is too short, given the typical length of time necessary to request and obtain an amended child support obligation. NCSEA suggests changing this timeframe to nine months. For incarceration less than nine months, the reduction in child support will often be exceeded by the costs of the effort to modify the obligation.

Medicaid as meeting health care needs

NCSEA supports this proposed rule change. This provision is supportive of current requirements of the Affordable Care Act and of current regulatory provisions for requesting a review or adjustment to a case. Although we are supportive, there is significant concern that this does not address and may further complicate the inconsistent and incompatible provisions still existing in federal laws. It should be noted that this will require legislative and regulatory changes in many states and in particular will necessitate guideline statutory changes for states who choose this option.

Section 303.11: Case closure criteria

Documentation of closure decision

NCSEA supports the additional requirement in Section 303.11(b) to maintain documentation of the case closure decision in the case record.

No current support; all arrears assigned to State

NCSEA supports the flexibility that Section 303.11(b)(2) provides to the individual states to manage their respective state caseloads while still maintaining the future possibility of collecting on the arrearages. As written, the breadth of the criterion could lead to a wide variance of treatment of such cases among states. If so, this raises potential complications and frustrations in enforcement and perhaps even setting up performance measure disparities that create a “race to closure,” leading states to close cases they otherwise would not to avoid losing performance status and incentives share. NCSEA recommends mitigating that risk by including an additional requirement that the case has not received a payment for a certain period of time, such as two years. Such a requirement avoids the possibility of the closure of paying cases. In addition, or as an alternative, NCSEA recommends that this criterion be limited to cases where all remaining debt is owed to the state seeking to close the case. This would leave the decision to the state to which support is owed.

No current support; kids at majority; NCP in long-term care and no assets

NCSEA supports the policy underlying Section 303.11(b)(3) and its inclusion in the case closure criteria. In the discussion section, OCSE mentions this proposed criterion as applying to “senior citizens,” but the text of the proposed rule does not include an age threshold. NCSEA only notes that fact, however, and is not recommending inclusion of the requirement since NCSEA supports the policy as it applies to a noncustodial parent of any age. NCSEA suggests tightening the language of the last requirement by including language similar to “***health care), and *the IV-D*

agency has determined that the noncustodial parent has no income or assets available... attached for support and no potential for future income or assets[.]” Adding the requirement about potential also aligns this criterion with 303.11(b)(8).

In addition to recommending that this criteria be applied regardless of age, NCSEA further notes that the proposed new criteria for long-term care and the amended criteria for medically-verified total and permanent disability do not cover an additional population of obligors for whom case closure is appropriate for similar reasons. Some adult obligors are placed in the care of adult protective services because they are challenged in various ways. Although a disability has not always been diagnosed by a medical provider in these cases, the government program has nevertheless determined that the individual is not able to take sufficient care of himself or herself and is taking care of the individual’s affairs on that basis. NCSEA recommends that OCSE consider expanding the new criteria to consider being placed in the care of adult protective services as a form of long-term care and thus eligible for case closure if the other conditions in the proposed regulation are satisfied.

NCP living with minor child; IV-D agency determines services not appropriate

NCSEA supports Section 303.11(b)(5). As written, however, it appears to allow the possibility that a state could find that services are not appropriate even if there is current support or arrears owed on the case, which if so interpreted, could have impact on intergovernmental cases where states take significantly different approaches (such as noted in the comment regarding 303.11(b)(2)) and reach further than OCSE’s intent. NCSEA recommends that this criterion be limited to intrastate cases or the initiating state on a UIFSA case; once the initiating state determines closure is appropriate, the responding state can close pursuant to the existing “initiating state requests closure” criterion of (b)(19).

NCP location unknown; timeframes

NCSEA supports the shortening of timeframes in proposed Section 301.11(b)(7), and the addition of lack of Social Security number verification.

IV-D agency determination of NCP inability to pay or pay potential

NCSEA supports the expansion of proposed Section 303.11(b)(8) to include arrearages-only cases. NCSEA supports removal of the “no chance of parole” limitation on incarcerated noncustodial parents. NCSEA supports the inclusion of the “subsistence level” limitation on income or assets available for support.

NCSEA supports generally the policy implication underlying the addition of the proposed criterion regarding “multiple referrals for services by the State over a 5-year period which have been unsuccessful” if we are correct in our understanding that OCSE wishes to expand states’ flexibility to identify uncollectible cases in the context of their particular state employment and service opportunities. That said, the language of that criterion is so broad that it leaves states with little guidance on a number of terms (i.e., 'multiple', 'referrals', 'services', 'unsuccessful'). The resultant flexibility is expansive and could lead to widely disparate approaches state to state. The

terms themselves are undefined and subject to wide interpretation, which diminishes clear expression of the underlying policy and could lead to results contrary to OCSE's intentions and that appear arbitrary from a national perspective. OCSE's discussion of this proposed provision does little to illuminate the federal policy (and choice and definition of terms) other than OCSE's intent to expand state discretion.

Further, the syntax itself leads to ambiguity that could create significant interpretive differences from state to state: Does "referral for services by the State" mean that only the *referrals must be made by the State* or does the phrase mean *only services provided by the State* (or both?). And does "which have been unsuccessful" refer to unsuccessful *referrals* or *services that have been unsuccessful* in attaining the desired outcome (and is that outcome paying child support)?

NCSEA recommends that OCSE remove the provision related to multiple referrals unless it can clarify its policy goal through more precise language and defined terms. While we believe that sufficient discretion should be provided for the states, without sharper parameters, the benefit of flexibility is outweighed by the confusion and interstate conflicts likely to arise as currently written. Clearer language will increase the likelihood of implementation and realization of the policy goal.

NCP sole income from SSI or other needs-based benefits

NCSEA supports the language of proposed Sections 303.11(b)(9)(i) and (b)(9)(ii). However, NCSEA recommends withdrawal of proposed (b)(9)(iii), the "other needs-based benefits." Because IV-D programs are still able to close cases if a party is on SSI, we do not believe this provision is needed, and in fact could lead to unnecessary confusion or even raise a risk of repeated closing and reopening of cases.

Completion of limited service

NCSEA supports proposed Section 303.11(b)(13) and recognizes its correlation to proposed 302.33(a)(6).

Non-IV-A case; method; timeframe

NCSEA supports the proposed amendment to 303.11(b)(15) to the extent of its recognition of modern methods of communication, practicality, and support of effective notice. However, the increased requirement to attempt "at least two different methods" obviates most of the benefit of allowing alternative methods to provide notice. There are times when IV-D programs have only one method to contact a party. This expansion of methods should offer an alternative or an additional method, but not require such. NCSEA acknowledges OCSE's stated desire to increase the likelihood of effective notice, but more does not necessarily mean better. It is sufficient for the text to read "despite a good faith effort to contact the recipient through one or more methods" and NCSEA recommends that change.

Inappropriate referral from another assistance program

NCSEA supports the expanded flexibility in proposed Section 303.11(b)(20) for IV-D programs to work with other assistance programs to define, based on their shared interface and interactions, “inappropriate” referrals and allow case closure when a case was opened based on an inappropriate referral. NCSEA believes that the proposed provision as written encourages collaboration among IV-D and other agencies to best serve their shared clients.

Case transfer to Tribal IV-D agency

NCSEA fully supports the inclusion of proposed Section 303.11(b)(21) and its notice requirements. Further, NCSEA supports flexibility for states to transfer and close IV-D cases regardless of a State assignment.

Indian Health Service

NCSEA supports the inclusion of Section 303.11(b)(22).

Notifications regarding closure

NCSEA supports necessary and effective notifications regarding case closure, and acknowledges that, as it has stated, OCSE wishes to strike a balance between expanded case closure criteria and notification. That said, the proposed notification requirements in provisions 303.11(d)(4)-(6) may create unnecessary burden, possible client confusion, and undermine streamlining goals without contributing to the purpose of effective notice.

Regarding the inappropriate referral cases of 303.11(b)(20) addressed in (d)(4)-(5), the notification and 60-day period in (d)(4) are unnecessary. The IV-D agency and referring agency will have already worked out their criteria for inappropriate referrals, which serve as constructive notice of closure to the referring agency. Further, the inappropriate referrals nearly always occur at case initiation. Therefore, the 60-day delay could create significant case set-up for the IV-D agency for a case destined for closure. The notice requirement of (d)(5) is also unnecessary and could lead to confusion, especially if a case is closed immediately before notice has been sent to the recipient that the case was opened. As noted by OCSE in the discussion, inappropriate referrals should be rare.

Regarding the limited services cases of 303.11(b)(13), it would be more effective to notify the recipient 30 days *prior* to closing rather than after closure. Doing so would avoid confusion, especially in limited services cases open for a long period of time, and allow any questions, changes, or objections to be addressed prior to closure, when it is easiest for the IV-D agency to do so.

Section 303.31: Securing and enforcing medical support obligations.

NCSEA supports the proposed change in 303.31 because it expands at state option the use of public coverage as an option for IV-D agencies to ensure that all children served by the program have health care coverage addressed. In that regard, it takes a step toward aligning the

expectations here with those of the Affordable Care Act (ACA). The change will require the majority of states to make statutory and regulatory as well as guideline changes.

However, we believe that 303.31 in its entirety and the underlying statutes need review for possible revision to ensure IV-D's medical support actions align with provisions of the ACA. Failure to do so will continue to cause families unintended negative consequences. (Consideration should then be given to whether companion revisions are needed to other sections e.g. 302.56, 303.30, 303.32, 304.20, 305.63, 308.2.) In the meantime, there are several additional changes to 303.31 that could minimize the conflict between this regulation and the ACA.

We support the additional flexibility for states to define reasonable cost that is provided by striking out the last sentence in 303.31(a)(3). However, we believe an additional revision to change the "five percent of . . . gross income" standard to a standard that more closely aligns with the ACA's affordability standard, while continuing to include the "or at State option a reasonable alternative income-based numeric standard. . .", would be appropriate. This would provide States guidance as to a reasonable cost definition that aligns with the ACA, while still providing States with the flexibility to adopt a different standard based on specific States' needs.

The proposed language of Section 303.31(b)(1)(ii) should be revised to add "and other health care costs of the child(ren)," so that the language would read: "(ii) determine how to allocate the cost of coverage and other health care costs of the child(ren) between the parents." This would address the issue that, under the ACA, it is likely that medical support responsibility will shift to the custodial parent in many or most cases, and that the parent ordered to provide health insurance can incur significant out-of-pocket costs (co-pays, deductibles, co-insurance) under either private plans or plans obtained through federal/state marketplaces.

The proposed language of Section 303.31(b)(2) should be amended from "must" to "may" because cash medical support orders to reimburse government agencies for health insurance should be a state option.

NCSEA also recommends that OCSE give strong consideration to provide for the ability of promoting and allowing the regular sharing of information with respect to who is eligible to receive IHS, or is covered under Medicaid, CHIP, an Exchange plan and/or Employer plans from the respective state and federal agencies containing that coverage information for both the establishment of an initial order as well as the review of any request for adjustment (302.8) of an existing order. This will provide the agency and tribunal with timely and sufficient information on which to establish and appropriate order.

If state IV-D agencies are expected to continue to provide medical support services, the IV-D agency needs to be viewed as a partner in the continued deployment of the ACA. If there will continue to be two separate medical support establishment efforts (i.e., IV D's petitions for court-ordered medical support and the ACA's individual responsibility mandate) and two separate medical support enforcement efforts (e.g., IV-D's NMSN and the ACA's IRS tax penalty) that are not aligned, there will continue to be the potential for negative consequences for families. As a partner, we will need access to federal and state exchange information and

relevant information from the IRS, as well as possible expanded access to states' Medicaid and CHIP information.

If states will no longer be held harmless from not complying with the 2008 medical support final rules (see AT-10-02) upon issuance of rules under this rulemaking, we recommend that the effective date take that into consideration.

With respect to OCSE's request for feedback, we provide the following:

1. Define the role of the IV-D agency – Supportive of the ACA, ensure that the costs for medical coverage are taken into consideration in the establishment of the order and to facilitate coverage when or where it is not in place.
2. Cost allocation – The guidelines are already expected to address or factor this in the setting of an order, except that new provisions are needed to ensure States adequately address coverage of out-of-pocket costs incurred by the parent that has been ordered to provide health insurance. This is a particular issue in states with percentage-of-income guidelines, but also applies to a few income shares states.
3. Enrolling – This is not the responsibility of the IV-D Agency. It is the parent's responsibility or, in response to an NMSN issued by the IV D agency, the employer or plan administrator. However, to the extent that interoperability eligibility guidance can be improved to incorporate IV-D, then enrollment could be facilitated through system exchanges/data sharing portals with parental agreement.

Section 303.72: Requests for collection of past-due support by Federal tax refund offset.

NCSEA supports the proposed amendment to this section.

Section 303.100: Procedures for income withholding.

NCSEA supports the proposed amendments to this section, but is skeptical that the modest verbiage changes will succeed in discouraging the misuse of the income withholding form that is described in the preamble. In addition, OCSE may be overestimating the ability of IV-D agencies to help ensure proper use of the income withholding form by other individuals or entities.

Section 304.20: Availability and rate of Federal financial participation.

NCSEA strongly supports the proposed amendments to this section to provide states additional options for funding activities that will improve services to obligors and obligees. We also support that the range of authorized and reimbursable activities is not limited to those listed, but can include other activities that have a similar beneficial impact on IV-D activities.

NCSEA questions whether costs for electronic monitoring should be permitted when the higher costs of incarceration have historically not been permitted, but since the proposed amendments

are a state option, such reimbursement can be sought gradually among the states on an experimental basis.

Section 304.23: Expenditures for which Federal financial participation is not available.

NCSEA does not oppose the proposed new language in this section, but questions the deletion of the current provision prohibiting the use of FFP for costs of incarceration. The proposed deletion is not explained in the preamble. If OCSE made this proposed change in light of the proposed new authority to use FFP for electronic monitoring, NCSEA suggests that it would be better to retain the existing language and add an exception to the funding prohibition for costs of electronic monitoring as authorized in section 304.21. Otherwise, IV-D agencies can expect correctional institutions to start expecting reimbursement for the costs of incarceration. Not only are IV-D agencies unprepared to fund 34% of the costs of incarceration, authorizing such reimbursement would have a negative impact on the cost effectiveness of the program.

Section 307.11: Functional requirements for computerized support enforcement systems in operation by October 1, 2000.

NCSEA agrees that it is important to not cause economic hardship for the obligor parent whose assets are reflective of SSI and benefits under Title II, but it is concerned that it may be difficult to turn around the refund within two days of the identification of the source of the funds.

There are some possibilities that may make this process easier for the IV-D agency. The first possibility is by using the proposed changes to case closure under Section 303.11(b)(9), permitting the closure of a IV-D case wherein it is identified that the sole source of income is from SSI benefits. The second possibility is using automated interfaces to obtain information faster that the obligor parent is receiving SSI payments. OCSE will play a key part in facilitating compliance with this section. Finally, due to other federal requirements to disburse funds upon receipt, it is most likely that the funds may have been sent to the custodial parent. As is well known, the recovery of those dollars from the custodial parent is very difficult and often takes extended time and effort. In most of these situations, the custodial parent has not previously received support nor are they likely to receive it in the future. Based upon this, it would benefit the IV-D agency if the return of these funds could be assessed as a cost of doing business under Section 304.20 and thus be eligible for FFP.

OCSE Request for Comment on Undistributed Collections

NCSEA defers to each state to comment on this section.

Topic 2: Updates to Account for Advances in Technology

With regard to written case closure notices to service recipients under Section 303.11, NCSEA understands the reluctance of OCSE to allow states to compel parents to receive notices in electronic rather than paper form. However, for parents who have expressed a preference for electronic communication, or who do not opt-out of electronic communication when advised by a IV-D agency in a non-electronic manner that failure to respond will be deemed agreement to

electronic communication, OCSE should permit states to send such notices electronically. See NCSEA's comments to 303.11(b)(15).

NCSEA supports the remaining proposed amendments under Topic 2.

Topic 3: Technical Corrections

NCSEA supports the changes under Topic 3, but notes that the references to OCSE-396A and OCSE-34A need to be updated as well.

Closing Comments

Although much of these comments address areas where NCSEA disagrees or has concerns with proposed amendments, NCSEA considers those areas to be relatively few in number, compared to the number of major and minor improvements proposed in this rulemaking.

In particular, NCSEA believes the limited services option, even if only available in in-state cases, will help states tailor the services delivered to meet customer demand. The significant yet selective expansion of case closure authority will gradually allow states to shift resources away from uncollectible cases, and will almost surely improve collections and cost effectiveness. Lastly, the modernization of the FFP rule and the recognition that "modern" child support activities can properly include services for obligors to help motivate and build capacity (job services) or inclination to pay (parenting time) are a significant improvement over the current uncertainty and vagueness on whether certain activities are eligible for FFP.

NCSEA encourages OCSE to consider these comments and finalize the rule as soon as possible. Bearing in mind that many state legislative sessions begin in January, and states will need time to prepare legislative proposals and budgets for system staff and any additional staff, a final rule issued after October 1, 2015, would likely extend implementation of many provisions by another year.