February 7, 2022

Commissioner Tanguler Gray
Office of Child Support Enforcement
Administration for Children and Families, U.S. Department of Health & Human Services
330 C St., S.W.
Washington, DC 20201

RE: NCSEA Request for OCSE to Interpret “Paternity” as “Parentage” in Title IV-D of the Social Security Act and Federal Regulations

Dear Commissioner Gray:

The National Child Support Enforcement Association (NCSEA) requests that the federal Office of Child Support Enforcement (OCSE) support the efforts of child support programs to meet the needs of today’s families, including same-sex parent families. NCSEA recognizes that Title IV-D of the Social Security Act and related federal regulations generally use the gender-specific term "paternity" instead of the gender-neutral term “parentage.” However, all children have the right to support from both parents regardless the composition of their family. Interpreting the law as applicable only to “paternity” establishment for men would lead to the objectionable outcome that government services and performance measure inclusion hinge on the gender and sexual orientation of the parent.

The use of “parentage” in place of “paternity” is not a new concept. The first Uniform Parentage Act (UPA) in 1973 included the principle that a court may apply a gender-specific provision in a gender-neutral manner.[1] This principle has remained in each version of the act, and in the latest version, UPA 2017, section 107 makes it clear that a

[1] UPA (2017), Final Act with Comments, https://www.uniformlaws.org/viewdocument/final-act-with-comments-61?CommunityKey=c4f37d2d-4d20-4be0-8256-22dd73af068f&tab=librarydocuments , accessed December 1, 2021. *See* section 107, comment (“This section carries over a principle followed in UPA (1973) § 21 and UPA (2002) § 106, that, where appropriate, a court may apply a gender-specific provision in a gender-neutral manner.”).

court has the authority to apply gendered provisions in a gender-neutral manner if appropriate.[2]

The millions of families served by the child support program continue to grow in diversity and increasingly include same-sex parent families.[3] Programs across the country are working to identify and address the changing needs of families in ways that best support the financial and emotional needs of all children.[4]

Many jurisdictions had laws that recognized and addressed parentage establishment for same-sex parent families even before the marriage equality case *Obergefell v. Hodges*, 576 U.S. 644 (2015).[5] These laws allowed for the establishment of "parentage" either by intent at conception through assisted reproductive technology or by conduct and consent following birth (*e.g.,* holding out provisions, *de facto* parent recognition).[6]

Moreover, a growing number of states have or are in the process of extending the voluntary acknowledgment process to same sex couples. While the law is clear that states must give full faith and credit to any affidavit signed in any other state according to its procedures and laws (*see* 42 U.S.C. § 666(a)(5)(C)(iv)), the law is unclear on whether acknowledgments signed by same sex couples may be counted as establishments like different sex couples for purpose of the federal performance measure.

If Title IV-D is interpreted by OCSE as being applicable only to "paternity" establishment services, same sex parents and their children will be harmed. First, child support programs may be hesitant to provide "parentage" establishment services. Just like

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[2] *Supra* at n. 1.
[3] NCSEA's April 2018 Resolution Endorsing the Uniform Parentage Act (2017) urges states to enact UPA 2017 to benefit children born to or raised in all families. See https://www.ncsea.org/documents/Resolution-to-Endorse-Uniform-Parentage-Act_April-2018.pdf
[4] For additional background on state policies on same sex parents, please see NCSEA's Quick Facts: Same Sex Parents https://www.ncsea.org/wp-content/uploads/2020/07/Quick-Facts-Same-Sex-Parents-2020.pdf
[5] Prior to *Obergefell*, thirty-seven states had already fully legalized same-sex marriage. https://time.com/3937662/gay-marriage-supreme-court-states-legal/
[6] *Supra* at n. 1, Prefatory Note ("Most states recognize and extend at least some parental rights to people who have functioned as parents to children but who are unconnected to those children through either biology or marriage. These states span the country; ranging from Massachusetts, to West Virginia, to North and South Carolina, to Texas.").

different sex parents, same sex parents need and should be eligible for government services that help children by enforcing the financial responsibility of both parents.

Second, states that provide parentage establishment services for same sex parents would not be able to count those establishments for purposes of the performance measure. If OCSE refuses to allow children born to lesbian parents to be counted, those children are being treated differently solely based on the gender and sexual orientation of their parents, thereby risking equal protection and due process constitutional challenges.

To address these significant problems that harm children, NCSEA requests that OCSE issue guidance indicating that it interprets all references to "paternity" in Title IV-D and the related federal regulations to be construed to mean "parentage," except for provisions regarding genetic testing. Interpreting "paternity" as "parentage" would still preserve a state's right to define family formation and would not require any state to pass a particular parentage law. And retaining the term "paternity" in the case of genetic testing would preserve the evidentiary component of genetic testing important in different sex cases.

In addition to interpreting the term "paternity" as "parentage," NCSEA respectfully requests that OCSE issue guidance that instructs states that:

a. Parentage establishment services are an allowable Title IV-D expenditure subject to federal financial participation for those states that wish to provide those services;

b. States may count gender-neutral parentage acknowledgements and judicial determinations in the federal paternity establishment performance measure; and

c. States are required under section 466(a)(5)(C)(iv) of the Act to give full faith and credit to another state's parentage acknowledgement.

In sum, interpreting the term "paternity" as "parentage" will provide a connection between the child and parents, treat all children equally, and hold both parents accountable for their child's support. It also will promote child support programs that are providing needed parentage establishment services to same sex parents.

Agency guidance will most quickly benefit child support programs. But if OCSE determines these issues cannot be addressed in guidance, NCSEA would ask OCSE to consider pursuing regulatory or statutory changes.

NCSEA would be happy to discuss these issues with OCSE. Please contact the co-chairs of the NCSEA Policy and Government Relations Committee, Diane Potts, dpotts@pubknow.com, and Amy Roehrenbeck, amy@ocda.us.

Thank you for your time and consideration.

Sincerely,

Ann Marie Ruskin
Executive Director