

DEPARTMENT OF HEALTH AND HUMAN SERVICES**Centers for Medicare & Medicaid Services****42 CFR Part 433**

[CMS–2343–F]

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Administration for Children and Families**45 CFR Parts 301, 302, 303, 304, 305, 307, 308, and 309**

RIN 0970–AC50

Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs

AGENCY: Office of Child Support Enforcement (OCSE), Administration for Children and Families (ACF) and the Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services (HHS).

ACTION: Final rule.

SUMMARY: This rule is intended to carry out the President's directives in *Executive Order 13563: Improving Regulation and Regulatory Review*. The final rule will make Child Support Enforcement program operations and enforcement procedures more flexible, more effective, and more efficient by recognizing the strength of existing State enforcement programs, advancements in technology that can enable improved collection rates, and the move toward electronic communication and document management. This final rule will improve and simplify program operations, and remove outmoded limitations to program innovations to better serve families. In addition, the final rule clarifies and corrects technical provisions in existing regulations. The rule makes significant changes to the regulations on case closure, child support guidelines, and medical support enforcement. It will improve child support collection rates because support orders will reflect the noncustodial parent's ability to pay support, and more noncustodial parents will support their children.

DATES: This final rule is effective on January 19, 2017. States may comply any time after the effective date, but before the final compliance date, **except for the amendment to § 433.152, which is effective on January 20, 2017.** The compliance dates, or the dates that States must comply with the final rule, vary for the various sections of the Federal regulations. The reasons for

delaying compliance dates include State legislative changes, system modifications, avoiding the need for a special guidelines commission review, etc.

The compliance date, or the date by which the States must follow the rule, will be February 21, 2017 except, as noted below:

- *Guidelines for setting child support orders* [§ 302.56(a)–(g)], *Establishment of support obligations* [§ 303.4], and *Review and adjustment of child support orders* [§ 303.8(c) and (d)]: The compliance date is 1 year after completion of the first quadrennial review of the State's guidelines that commences more than 1 year after publication of the final rule.

- The requirements for reviewing guidelines for setting child support awards [§ 302.56(h)]: The compliance date is for the first quadrennial review of the guidelines commencing after the State's guidelines have initially been revised under this final rule.

- Continuation of service for IV–E cases [§ 302.33(a)(4)], Location of noncustodial parents in IV–D cases [§ 303.3], Mandatory notice under Review and adjustment of child support orders [§ 303.8(b)(7)(ii)], Mandatory provisions of *Case closure criteria* [§ 303.11(c) and (d)], and *Functional requirements for computerized support enforcement systems in operation by October 1, 2000* [§ 307.11(c)(3)(i) and (ii)]: The compliance date is 1 year from date of publication of the final rule, or December 20, 2017. However, if State law changes are needed, then the compliance date will be the first day of the second calendar quarter beginning after the close of the first regular session of the State legislature that begins after the effective date of the final rule.

- Optional provisions (such as Paternity-only Limited Service [§ 302.33(a)(6)], *Case closure criteria* [§ 303.11(b)], *Review and adjustment of child support orders* [§ 303.8(b)(2)], *Availability and rate of Federal financial participation* [§ 304.20], and Topic 2 Revisions): There is no specific compliance date for optional provisions.

- *Payments to the family* [§ 302.38], *Enforcement of support obligations* [§ 303.6(c)(4)], and *Securing and enforcing medical support obligations* [§ 303.31]: If State law revisions are needed, the compliance date is the first day of the second calendar quarter beginning after the close of the first regular session of the State legislature that begins after the effective date of the regulation. If State law revisions are not needed, the compliance date is 60 days after publication of the final rule.

- *Collection and disbursement of support payments by the IV–D agency* [§ 302.32], *Required State laws* [§ 302.70], *Procedures for income withholding* [§ 303.100], *Expenditures for which Federal financial participation is not available* [§ 304.23], and Topic 3 revisions: The compliance date is the same as the effective date for the regulation since these revisions reflect existing requirements.

FOR FURTHER INFORMATION CONTACT: The OCSE Division of Policy and Training at OCSE.DPT@acf.hhs.gov. Deaf and hearing impaired individuals may call the Federal Dual Party Relay Service at 1–800–877–8339 between 8 a.m. and 7 p.m. eastern time.

SUPPLEMENTARY INFORMATION:**I. Statutory Authority**

This final rule is published under the authority granted to the Secretary of the Department of Health and Human Services by section 1102 of the Social Security Act (Act), 42 U.S.C. 1302. Section 1102 of the Act authorizes the Secretary to publish regulations, not inconsistent with the Act, which may be necessary for the efficient administration of the functions for which the Secretary is responsible under the Act. Additionally, the Secretary has authority under section 452(a)(1) of the Act to “establish such standards for State programs for locating noncustodial parents, establishing paternity, and obtaining child support . . . as he[she] determines to be necessary to assure that such programs will be effective.” Rules promulgated under section 452(a)(1) must meet two conditions. First, the Secretary's designee must find that the rule meets one of the statutory objectives of “locating noncustodial parents, establishing paternity, and obtaining child support.” Second, the Secretary's designee must determine that the rule is necessary to “assure that such programs will be effective.”

Section 454(13) requires a State plan to “provide that the State will comply with such other requirements and standards as the Secretary determines to be necessary to the establishment of an effective program for locating noncustodial parents, establishing paternity, obtaining support orders, and collecting support payments and provide that information requests by parents who are residents of other States be treated with the same priority as requests by parents who are residents of the State submitting the plan.”

This final rule is published in accordance with the following sections of the Act: Section 451—Appropriation;

section 452—Duties of the Secretary; section 453—Federal parent locator service; section 454—State plan for child and spousal support; section 454A—Automated data processing; section 454B—Collection and disbursement of support payments; section 455—Payments to States; section 456—Support obligations; section 457—Distribution of collected support; section 458—Incentive payments to States; section 459—Consent by the United States to income withholding, garnishment, and similar proceedings for enforcement of child support and alimony obligations; section 459A—International support enforcement; section 460—Civil actions to enforce support obligations; section 464—Collection of past-due support from Federal tax refunds; section 466—Requirement of statutorily prescribed procedures to improve effectiveness of child support enforcement; and section 467—State guidelines for child support awards.

II. Background

The Child Support Enforcement program was established to hold noncustodial parents accountable for providing financial support for their children. Child support payments play an important role in reducing child poverty, lifting approximately one million people out of poverty each year. In 2014, the Child Support Enforcement program collected \$28.2 billion in child support payments for the families in State and Tribal caseloads. During this same period, 85 percent of the cases had child support orders, and nearly 71 percent of cases with support orders had at least some payments during the year. For current support, 64 percent of current collections are collected on time every month.

This final rule makes changes to strengthen the Child Support Enforcement program and update current practices in order to increase regular, on-time payments to all families, increase the number of noncustodial parents working and supporting their children, and reduce the accumulation of unpaid child support arrears. These changes remove regulatory barriers to cost-effective approaches for improving enforcement consistent with the current knowledge and practices in the field, and informed by many successful state-led innovations. In addition, given that almost three-fourths of child support payments are collected by employers through income withholding, this rule standardizes and streamlines payment processing so that employers are not unduly burdened by this otherwise

highly effective support enforcement tool. The rule also removes outdated barriers to electronic communication and document management, updating existing child support regulations, which frequently limit methods of storing or communicating information to a written or paper format. Finally, the rule updates the program to reflect the recent Supreme Court decision in *Turner v. Rogers*, 564 U.S. ___, 131 S Ct. 2507 (2011).

Executive Order 13563 directs agencies to increase retrospective analysis of existing rules to determine whether they should be modified, streamlined, expanded, or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving regulatory objectives.¹ In response to *Executive Order 13563*, OCSE conducted a comprehensive review of existing regulations to identify ways to improve program flexibility, efficiency, and responsiveness; promote technological and programmatic innovation; and update outmoded ways of doing business. Some of these regulations had not been updated in a generation. Regulatory improvements include: (1) Procedures to promote program flexibility, efficiency, and modernization; (2) updates to account for advances in technology; and (3) technical corrections.

This final rule recognizes and incorporates policies and practices that reflect the progress and positive results from successful program implementation by States and Tribes.

The section-by-section discussion below provides greater detail on the provisions of the rule. All references to regulations are related to 45 CFR Chapter III, except as specified in sections relating to the CMS regulations (42 CFR part 433). In general, this final rule only affects regulations governing State IV-D programs, and does not impact Tribal IV-D program rules under 45 CFR part 309, except for some minor technical changes.

III. Summary Descriptions of the Regulatory Provisions

The following is a summary of the regulatory provisions included in the final rule and how these provisions differ from what was initially included in the Notice of Proposed Rulemaking (NPRM). The NPRM was published in the **Federal Register** on November 17,

2014 (79 FR 68548 through 68587). The comment period ended January 16, 2015. We received more than 2,000 sets of public comments. Although the NPRM was strongly supported, we received numerous comments on specific provisions. We made a number of adjustments to the final rule in response to those comments.

This final rule includes (1) procedures to promote program flexibility, efficiency, and modernization; (2) updates to account for advances in technology; and (3) technical corrections. The following is a discussion of all the regulatory provisions included in this rule. Please note the provisions are discussed in order by category. We present the revisions in these three categories to assist the reader in understanding the major concepts and rationale for the changes.

Topic 1: Procedures To Promote Program Flexibility, Efficiency, and Modernization (§§ 302.32; 302.33; 302.38; 302.56; 302.70; 303.3; 303.4; 303.6; 303.8; 303.11 (Including revisions to 42 CFR 433.152); 303.31; 303.72; 303.100; 304.20; 304.23; and 307.11)

Section 302.32—Collection and Disbursement of Support Payments by the IV-D Agency

Section 302.32 mirrors Federal law which requires State Disbursement Units (SDUs) to collect and disburse child support payments in accordance with support orders in IV-D cases. Additionally, SDUs must collect and disburse child support payments in non-IV-D cases in which the support order was initially issued on or after January 1, 1994, and the income of the noncustodial parent is subject to withholding in accordance with section 466(a)(8)(B) of the Act. The provision also specifies timeframes for the disbursement of support payments.

Paragraph (a) describes the basic IV-D State plan requirement that each State must establish and operate an SDU for the collection and disbursement of child support payments.

Paragraphs (a)(1) and (2) identify the types of child support cases for which support payments must be collected and disbursed through the SDU. Paragraph (a)(1) specifies that support payments under support orders in all cases under the State IV-D plan must be collected and disbursed through the SDU.

Paragraph (a)(2) requires that support payments under support orders in all cases not being enforced under the State IV-D plan (non-IV-D cases) in which the support order is initially issued in the State on or after January 1, 1994, and

¹ Available at: <http://www.whitehouse.gov/the-press-office/2011/01/18/improving-regulation-and-regulatory-review-executive-order>. Also, the OMB Memorandum related to Executive Order 13563 is available at: <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-10.pdf>.

in which the income of the noncustodial parent is subject to withholding in accordance with section 466(a)(8)(B) of the Act must be collected and disbursed through the SDU.

Paragraph (b) is introductory language preceding timeframes for disbursement of various types of child support collections. Paragraph (b)(1) requires that in intergovernmental IV–D cases, child support collected on behalf of the initiating agency must be forwarded to the initiating agency within 2 business days of the date of receipt by the SDU in the responding State. The provision also includes an updated reference to the intergovernmental child support regulations at § 303.7(d)(6)(v) of this chapter. In response to comments regarding paragraph (b)(1), in the final rule we changed the term interstate to intergovernmental. We also used the term initiating agency instead of initiating State, recognizing that intergovernmental IV–D cases may be initiated by Tribal or foreign child support programs and not only States.

Section 302.33—Services to Individuals Not Receiving Title IV–A Assistance

Section 302.33(a)(4) requires that whenever a family is no longer eligible for State’s Title IV–A and Medicaid assistance, the IV–D agency must notify the family, within 5 working days of the notification of ineligibility, that IV–D services will be continued unless the family notifies the IV–D agency that it no longer wants services but instead wants to close the case. This notice must inform the family of the benefits and consequences of continuing to receive IV–D services, including the available services and the State’s fees, cost recovery, and distribution policies. This notification requirement also applies when a child is no longer eligible for IV–E foster care, but only in those cases that the IV–D agency determines that such services and notice would be appropriate.

Under § 302.33(a)(6), the State has the option of providing limited services for paternity-only services in intrastate cases to any applicant who requests such services. In response to comments, we narrowed the scope of limited services to paternity-only intrastate cases, instead of allowing a wide range of limited services. Although several commenters expressed support for increasing the flexibility of services offered to applicants, the revisions are based on other comments expressing concerns about the difficulty and cost for States to implement a menu of limited services in the context of intergovernmental enforcement. Some commenters also expressed concerns

about how limited enforcement services options might impact Federal reporting and the performance measures used for incentive payments.

In the preamble to the NPRM, OCSE specifically requested feedback from commenters regarding whether there are additional domestic violence safeguards that should be put in place with respect to limited services. Some commenters emphasized the need for domestic violence safeguards in this area. In response to these commenters, we added language to the final rule requiring States to include domestic violence safeguards when establishing and using paternity-only limited services procedures.

Section 302.38—Payments to the Family

Section 302.38 reinforces the requirements found in section 454(11)(B) of the Act. The provision in the rule requires that a State’s IV–D plan “shall provide that any payment required to be made under §§ 302.32 and 302.51 to a family will be made directly to the resident parent, legal guardian, caretaker relative having custody of or responsibility for the child or children, conservator representing the custodial parent and child directly with a legal and fiduciary duty, or alternate caretaker designated in a record by the custodial parent. An alternate caretaker is a nonrelative caretaker who is designated in a record by the custodial parent to take care of the children for a temporary time period. Based on comments received, we added “judicially-appointed conservator with a legal and fiduciary duty to the custodial parent and the child” and “alternate caretaker designated in a record by the custodial parent” to the list of individuals to whom payments can be made. We also clarified what is meant by an alternate caretaker.

Section 302.56—Guidelines for Setting Child Support Orders

Section 302.56(a) requires each State to establish one set of guidelines by law or by judicial or administrative action for setting and modifying child support order amounts within 1 year after completion of the State’s next quadrennial review of its child support guidelines, that commences more than 1 year after publication of the final rule, in accordance with § 302.56(e), as a condition of approval of its State plan. Considering public comments requesting additional time to implement revised guidelines, we added “that commences more than 1 year after publication of the final rule” to provide more time to do research and prepare

for those States that have a quadrennial review that would initiate shortly after the issuance of this final rule.

Section 302.56(b) requires the State to have procedures for making guidelines available to all persons in the State. Based on comments, we removed the phrase “whose duty it is to set child support award amounts” at the end of the sentence.

The introductory paragraph for section 302.56(c) indicates the minimum requirements for child support guidelines. Paragraph (c)(1) indicates that child support guidelines must provide the child support order is based on the noncustodial parent’s earnings, income, and other evidence of ability to pay that: (i) Takes into consideration all earnings and income of the noncustodial parent (and at the State’s discretion, the custodial parent); (ii) takes into consideration the basic subsistence needs of the noncustodial parent (and at the State’s discretion, the custodial parent and children) who has a limited ability to pay by incorporating a low-income adjustment, such as a self-support reserve or some other method determined by the State; and (iii) if imputation of income is authorized, takes into consideration the specific circumstances of the noncustodial parent (and at the State’s discretion, the custodial parent) to the extent known, including such factors as the noncustodial parent’s assets, residence, employment and earnings history, job skills, educational attainment, literacy, age, health, criminal record and other employment barriers, and record of seeking work, as well as the local job market, the availability of employers willing to hire the noncustodial parent, prevailing earnings level in the local community, and other relevant background factors in the case.

Responding to comments, we made major revisions in paragraph (c)(1). We moved the phrase “and other evidence of ability to pay” from paragraph (c)(4) to paragraph (c)(1) based on comments to require child support guidelines to provide that the child support order is based on the noncustodial parent’s earnings, income, and other evidence of ability to pay. This provision codifies the basic guidelines standard for setting order amounts, reflecting OCSE’s longstanding interpretation of statutory guidelines requirements (See AT–93–04 and PIQ–00–03).²

² AT–93–04, available at <http://www.acf.hhs.gov/programs/css/resource/presumptive-guidelines-establishment-support-unreimbursed-assistance> and PIQ–00–03, available at: <http://www.acf.hhs.gov/programs/css/resource/state-iv-d-program-flexibility-low-income-obligors>.

In paragraph (c)(1)(i), based on comments, we retained “all income and earnings” and did not change “all” to “actual” income and earnings as we had proposed in the NPRM. Based on comments, we also added “(and at the State’s discretion, the custodial parent).”

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

We redesignated proposed paragraph (c)(3) as (c)(2). This provision requires that State child support guidelines address how the parents will provide for the child’s health care needs through private or public health care coverage and/or through cash medical support. To conform to other medical support revisions in this final rule, we replaced “health insurance coverage” in the NPRM with “private or public health care coverage.” Based on comments, we also removed “in accordance with § 303.31 of this chapter” that was in the NPRM because § 303.31 only pertains to IV–D cases and this provision of the rule applies to both IV–D and non-IV–D cases.

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

of an order upward or downward upon a showing of a substantial change in circumstances.

This rule redesignated proposed paragraph (c)(2) as (c)(4), which requires that the guidelines be based on specific descriptive and numeric criteria and result in a computation of the support obligation. Paragraph (d) requires States to include a copy of the guidelines in the State plan. Paragraph (e) requires that each State review, and revise its guidelines, if appropriate, at least once every 4 years to ensure that their application results in the determination of appropriate child support order amounts. Responding to comments, we added a sentence that requires each State to publish on the Internet and make accessible to the public all reports of the child support guidelines reviewing body, the membership of the reviewing body, the effective date of the guidelines, and the date of the next quadrennial review.

Paragraph (f) requires States to provide for a rebuttable presumption, in any judicial or administrative proceeding for the establishment and modification of a child support order, that the amount of the order which would result from the application of the child support guidelines established under paragraph (a) is the correct amount of child support to be ordered. We made a minor technical revision to both paragraphs (f) and (g) to specify that these paragraphs apply to the establishment and modification of a child support order.

Under paragraph (g) in this rule, a written or specific finding on the record of a judicial or administrative proceeding for the establishment or modification of a child support order that the application of the child support guidelines established under paragraph (a) of this section would be unjust or inappropriate in a particular case will be sufficient to rebut the presumption in that case, as determined under criteria established by the State. Such criteria must take into consideration the best interests of the child. Findings that rebut the child support guidelines shall state the amount of support that would have been required under the guidelines and include a justification of why the child support order varies from the guidelines.

In response to comments, we deleted proposed paragraph (h), which would have allowed States to recognize parenting time provisions in child support orders pursuant to State guidelines or when both parents have agreed to the parenting time provisions.

In the final rule, we redesignated proposed paragraph (i) as paragraph (h)

and subdivided this paragraph into paragraphs (h)(1) through (h)(3) to make it easier to read. Paragraph (h)(1) requires, as part of the review of a State’s child support guidelines required under paragraph (e) of this section, that a State must consider economic data on the cost of raising children, labor market data (such as unemployment rates, employment rates, hours worked, and earnings) by occupation and skill-level for the State and local job markets, the impact of guideline policies and amounts on custodial and noncustodial parents who have family incomes below 200 percent of the Federal poverty level, and factors that influence employment rates among noncustodial parents and compliance with current support orders. Based on comments, we added all of the factors to the existing requirement to consider the economic data on the cost of raising children.

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

Considering public comments, we added the provisions in paragraph (h)(3) that the State’s review of the child support guidelines must provide a meaningful opportunity for public input, including input from low-income custodial and noncustodial parents and their representatives. The State must also obtain the views and advice of the State child support agency funded under title IV–D.

Finally, OCSE made a technical change in the title and throughout this

section to replace “award” with “order.”

Section 302.70—Required State Laws

Section 302.70(d)(2) provides the basis for granting an exemption from any of the State law requirements discussed in paragraph (a) of this section and extends the exemption period from 3 to 5 years.

In this section, OCSE maintains the authority to review and to revoke a State’s exemption at any time [paragraphs (d)(2) and (3)]. States may also request an extension of an exemption 90 days prior to the end of the exemption period [paragraph (d)(4)].

Section 302.76—Job Services

This proposed provision received overwhelming support from states, Members of Congress, and the public, but it also was opposed by some Members of Congress who did not think the provision should be included in the final rule. While we appreciate the support the commenters expressed, we think allowing for federal IV–D reimbursement for job services needs further study and would be ripe for implementation at a later time. Therefore, we are not proceeding with finalizing the proposed provisions at §§ 302.76, 303.6(c)(5), and 304.20(b)(viii).

Section 303.3—Location of Noncustodial Parents in IV–D Cases

Section 303.3 requires IV–D agencies to attempt to locate all noncustodial parents or sources of income and/or assets where that information is necessary. Paragraph (b)(1) requires States to use appropriate location sources such as the Federal PLS; interstate location networks; local officials and employees administering public assistance, general assistance, medical assistance, Supplemental Nutrition Assistance Program (SNAP), and social services (whether such individuals are employed by the State or a political subdivision); relatives and friends of the noncustodial parent; current or past employers; electronic communications and Internet service providers; utility companies; the U.S. Postal Service; financial institutions; unions; corrections institutions; fraternal organizations; police, parole, and probation records if appropriate; and State agencies and departments, as authorized by State law, including those departments which maintain records of public assistance, wages and employment, unemployment insurance, income taxation, driver’s licenses, vehicle registration, and criminal records and other sources.

In response to comments, we made the following technical revisions to the list of locate sources in paragraph (b)(1): Changing “food stamps” to Supplemental Nutrition Assistance Program (SNAP); adding “utility companies;” changing “the local telephone company” to “electronic communications and Internet service providers;” and changing “financial references” to “financial institutions.”

Section 303.4—Establishment of Support Obligations

The NPRM did not include any revisions to § 303.4; however, because we had numerous comments related to the general applicability of State guidelines, we moved the requirements specifically related to State IV–D agencies to § 303.4. We also had many comments related to the IV–D agency responsibilities in determining the noncustodial parent’s income and imputation of income when establishing child support orders. Following this line of comments, we made revisions to § 303.4 that require State IV–D agencies to implement and use procedures in IV–D cases related to applying the guidelines regulation. To address several comments received in response to proposed changes to § 302.56 regarding establishment of support orders and imputation of income, we revised this section to address requirements for the State IV–D agencies when establishing support orders in IV–D cases that would not be applicable to non-IV–D cases.

In § 303.4(b), States are required to use appropriate State statutes, procedures, and legal processes in establishing and modifying support obligation in accordance with § 302.56 of this chapter. We added “procedures,” as well as “and modifying,” to the former paragraph. We also replaced “pursuant to” with “in accordance with” in this same paragraph.

We also added paragraphs (b)(1) through (b)(4) to provide additional requirements that State IV–D agencies must meet in establishing and modifying support obligations. Paragraph (b)(1) requires States to take reasonable steps to develop a sufficient factual basis for the support obligation, through such means as investigations, case conferencing, interviews with both parties, appear and disclose procedures, parent questionnaires, testimony, and electronic data sources. Paragraph (b)(2) requires States to gather information regarding the earnings and income of the noncustodial parent and, when earning and income information is unavailable in a case, gather available information about the specific

circumstances of the noncustodial parent, including such factors as listed under § 302.56(c)(iii).

Additionally, paragraph (b)(3) requires basing the support obligation or recommended support obligation amount on the earnings and income of the noncustodial parent whenever available. If evidence of earnings and income is not available or insufficient to use as the measure of the noncustodial parent’s ability to pay, then the support obligation or recommended support obligation amount should be based on available information about the specific circumstances of the noncustodial parent, including such factors as those listed under § 302.56(c)(iii).

Finally, paragraph (b)(4) requires documenting the factual basis for the support obligation or the recommended support obligation in the case record.

§ 303.6—Enforcement of Support Obligations

In the final rule, we amended § 303.6(c)(4) to require States to establish guidelines for the use of civil contempt citations in IV–D cases. The guidelines must include requirements that the IV–D agency must screen the case for information regarding the noncustodial parent’s ability to pay or otherwise comply with the order. The IV–D agency must also provide the court with such information regarding the noncustodial parent’s ability to pay, which may assist the court in making a factual determination regarding the noncustodial parent’s ability to pay the purge amount or comply with the purge conditions. Finally, the IV–D agency must provide clear notice to the noncustodial parent that ability to pay constitutes the critical question in the civil contempt action.

We amended § 303.6 to remove “and” at the end of paragraph (c)(3) and redesignated paragraph (c)(4) as paragraph (c)(5). We made significant revisions to the NPRM for the final rule based on comments. As a result of comments, we revised the proposed new paragraph (c)(4) to require that State IV–D agencies must establish guidelines for the use of civil contempt citations in IV–D cases.

Based on these comments, we deleted the entire proposed paragraph (c)(4) that would have required procedures that would ensure that enforcement activity in civil contempt proceedings takes into consideration the subsistence needs of the noncustodial parent, and ensure 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. We also

deleted that 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.

Instead we added that IV–D agency must provide the court with such information regarding the noncustodial parent's ability to pay, which may assist the court in making a factual determination regarding the noncustodial parent's ability to pay the purge amount or comply with the purge conditions. Finally, the IV–D agency must provide clear notice to the noncustodial parent that ability to pay constitutes the critical question in the civil contempt action. The Response to Comments section for *Civil Contempt Proceedings* [§ 303.6(c)(4)] provides further details on the reasons for these revisions.

Section 303.8—Review and Adjustment of Child Support Orders

We redesignated former § 303.8(b)(2) through (5) as (b)(3) through (6). A new paragraph (b)(2) allows the IV–D agency to elect in its State plan the option to initiate the review of a child support order, after learning that a noncustodial parent will be incarcerated for more than 180 calendar days, without the need for a specific request, and upon notice to both parents, review and, if appropriate, adjust the order, in accordance with paragraph (b)(1)(i) of this section. Based on comments, we revised the proposed regulatory language “after being notified” to “after learning” and increased the number of days from 90 to 180 days. We also added the word “calendar” after “180” to distinguish between calendar and business days.

In addition, we redesignated former paragraph (b)(6) which requires notice “not less than once every three years,” to paragraphs (b)(7) and (b)(7)(i). We added a new paragraph (b)(7)(ii) that indicates if a State has not elected to initiate review without the need for a specific request under paragraph (b)(2) of this section, within 15 business days of when the IV–D agency learns that the noncustodial parent will be incarcerated for more than 180 calendar days, the IV–D agency must send a notice to both parents informing them of the right to request a review and, if appropriate, adjust the order. The notice must specify, at minimum, the place and manner in which the parents must make the request for review.

Based on comments, we revised the proposed language in paragraph (b)(2) to: Add that the IV–D agency must send the notice within 15 business days of learning that the noncustodial parent

will be incarcerated, add an incarceration timeframe of more than 180 calendar days to be consistent with paragraph (b)(2); and replace the phrase “upon request” with “if appropriate.” We also revised the proposed provision to use the phrase “both parents” instead of “incarcerated noncustodial parent and the custodial parent” for consistency with paragraphs (b)(7)(i) and (ii). In response to comments, we added a sentence at the end of paragraph (b)(7)(ii), based on comments, that recognizes existing comparable State law or rule that modifies child support obligations upon incarceration of the noncustodial parent.

Based on comments, we added a sentence to paragraph (c) to address incarceration as a significant change in circumstance when determining the standard for adequate grounds for petitioning review and adjustment of a child support order.

Finally, OCSE amends § 303.8(d) to make conforming changes with our revisions in § 303.31 to remove a previous requirement that, for purposes of review or adjustment of a child support order, a child's eligibility for Medicaid could not be considered sufficient to meet the child's health care needs. The final rule indicates that the need to provide for the child's health care needs in an order, through health insurance or other means, must be an adequate basis under State law to initiate an adjustment of an order, regardless of whether an adjustment in the amount of child support is necessary.

Section 303.11—Case Closure Criteria

Section 303.11(b) adds language to clarify that a IV–D agency is not required to close a case that is otherwise eligible to be closed under that section. Case closure regulations in paragraph (b) are designed to give a State the option to close cases, if certain conditions are met, and to provide a State flexibility to manage its caseload. If a State elects to close a case under one of these criteria, the State must maintain supporting documentation for its decision in the case record.

Paragraph (b)(1) indicates that a case may be closed when there is no longer a current support order and arrearages are under \$500 or unenforceable under State law. New paragraph (b)(2) adds a case closure criterion to permit a State to close a case where there is no current support order and all arrearages are owed to the State.

Paragraph (b)(3) adds a criterion to allow the IV–D agency to close an arrearages-only case against a noncustodial parent who is entering or

has entered long-term care placement, and whose children have reached the age of majority if the noncustodial parent has no income or assets available above the subsistence level that could be levied or attached for support.

Paragraph (b)(4) permits closure of a case when the noncustodial parent or alleged father is deceased and no further action, including a levy against the estate, can be taken. Paragraph (b)(5) adds a criterion to allow a State to close a case when the noncustodial parent is either living with the minor children as the primary caregiver or is a part of an intact two-parent household, and the IV–D agency has determined that services either are not appropriate or are no longer appropriate. We added “or no longer appropriate” to the proposed language as a technical revision.

Paragraph (b)(6) indicates that a case may be closed when paternity cannot be established because: (i) The child is at least 18 years old and an action to establish paternity is barred by a statute of limitations that meets the requirements of § 302.70(a)(5) of this chapter; (ii) a genetic test or a court or an administrative process has excluded the alleged father and no other alleged father can be identified; (iii) in accordance with § 303.5(b), the IV–D agency has determined that it would not be in the best interests of the child to establish paternity in a case involving incest or rape, or in any case where legal proceedings for adoption are pending; or (iv) the identity of the biological father is unknown and cannot be identified after diligent efforts, including at least one interview by the IV–D agency with the recipient of services. Minor technical changes were made to this paragraph.

Paragraph (b)(7) allows case closure when the noncustodial parent's location is unknown, and the State has made diligent efforts using multiple sources, in accordance with § 303.3, all of which have been unsuccessful, to locate the noncustodial parent: Over a 2-year period when there is sufficient information to initiate an automated locate effort; over a 6-month period when there is not sufficient information to initiate an automated locate effort; or after a 1-year period when there is sufficient information to initiate an automated locate effort, but locate interfaces are unable to verify a Social Security Number.

Paragraph (b)(8) states that case closure is permitted when a IV–D agency has determined that throughout the duration of the child's minority (or after the child has reached the age of majority), the noncustodial parent cannot pay support and shows no

evidence of support potential because the parent has been institutionalized in a psychiatric facility, is incarcerated, or has a medically-verified total and permanent disability. The State must also determine that the noncustodial parent has no income or assets available above the subsistence level that could be levied or attached for support. Based on comments, we deleted from the NPRM “or has had multiple referrals for services by the State over a 5-year period which have been unsuccessful.”

Section 303.11(b)(9) adds a new case closure criterion to permit a State to close a case when a noncustodial parent’s sole income is (i) from Supplemental Security Income (SSI) payments, or (ii) from both SSI payments and Social Security Disability Insurance (SSDI) benefits under title II of the Act. In paragraph (b)(9)(ii), we added “payments” after “SSI” and, in response to comments, clarified that SSDI is the Title II benefit. Also, in paragraph (b)(9)(iii), we deleted the phrase “or other needs-based benefits” because these benefits may have limited duration and do not reflect a determination of an inability to work. In the absence of a disability that impairs the ability to work, the ability of the noncustodial parent to work and earn income may also fluctuate with time. Thus, it is important for the child support agencies to take efforts on these cases to remove the barriers to nonpayment and build the capacity of the noncustodial parents to pay by using tools such as referring noncustodial parents for employment services provided by another State program or community-based organization.

Paragraph (b)(10) allows case closure when the noncustodial parent is a citizen of, and lives in, a foreign country, does not work for the Federal government or a company with headquarters or offices in the United States, and has no reachable domestic income or assets; and there is no Federal or State reciprocity with the country. The final rule makes a technical change in this paragraph to clarify that reciprocity with a country could be through either a Federal or State treaty or reciprocal agreement. We added “treaty or” to the proposed language as a technical change.

Paragraph (b)(11) permits case closure if the IV–D agency has provided location-only services as requested under § 302.35(c)(3) of this chapter.

Paragraph (b)(12) indicates that a case may be closed where the non-IV–A recipient of services requests closure and there is no assignment to the State of medical support under 42 CFR 433.146 or of arrearages which accrued

under a support order. Paragraph (b)(13) adds a criterion to allow the State to close a non-IV–A case after completion of a paternity-only limited service under § 302.33(a)(6) without providing the notice in accordance with § 303.11(d)(4).

Paragraph (b)(14) states that case closure is allowed if there has been a finding by the IV–D agency, or at the option of the State, by the responsible State agency of good cause or other exceptions to cooperation with the IV–D agency and the State or local assistance program, such as IV–A, IV–E, SNAP, and Medicaid, which has determined that support enforcement may not proceed without risk of harm to the child or caretaker relative. We added “IV–D agency, or at the option of the State, by the” as a technical change because this tracks the language of the statute. In response to comments, we also added SNAP to the list of assistance programs referenced in this paragraph.

Paragraph (b)(15) allows case closure in a non-IV–A case receiving services under § 302.33(a)(1)(i) or (iii) of this chapter, or under § 302.33(a)(1)(ii) when cooperation with the IV–D agency is not required of the recipient of services, when the IV–D agency is unable to contact the recipient of services despite a good faith effort to contact the recipient through at least two different methods.

Paragraph (b)(16) also permits closure when the IV–D agency documents the circumstances of the recipient’s noncooperation and an action by the recipient is essential for the next step in providing IV–D services in a non-IV–A case receiving services under § 302.33(a)(1)(i) or (iii) of this chapter, or under § 302.33(a)(1)(ii) when cooperation with the IV–D agency is not required of the recipient of services.

Paragraphs (b)(17) through (b)(19) identify the case closure criteria when the responding State IV–D agency may close a case. Paragraph (b)(17) allows the responding agency to close a case when it documents failure by the initiating agency to take an action that is essential for the next step in providing services. We revised “IV–D” agency from the NPRM to “responding” agency to make the language more consistent with paragraphs (b)(18) and (b)(19). We also made a small editorial change for plain English to this paragraph.

Paragraph (b)(18) also allows the responding IV–D agency to close a case when the initiating agency has notified the responding State that the initiating State has closed its case under § 303.7(c)(11).

Paragraph (b)(19) indicates that the responding State may close a case if the initiating agency has notified the responding State that its intergovernmental services are no longer needed.

Paragraph (b)(20) adds a new criterion to provide a State with flexibility to close a case referred inappropriately by the IV–A, IV–E, SNAP, and Medicaid programs. In response to comments, SNAP is added to the list of referring agencies.

Paragraph (b)(21) adds a criterion to permit a State flexibility to close a case if the State has transferred it to a Tribal IV–D agency, regardless of whether there is a State assignment of arrears, based on the following procedures. First, before transferring the case to a Tribal IV–D agency and closing the State’s case, either the recipient of services requested the State to transfer its case and close the State’s case or the IV–D agency notified the recipient of its intent to transfer the case to the Tribal IV–D agency and the recipient did not respond to the notice within 60 calendar days of the date of the notice. Next, the State IV–D agency completely and fully transferred and closed the case. Third, the State IV–D agency notified the recipient that the case has been transferred to the Tribal IV–D agency and closed. Finally, paragraph (b)(21)(iv) indicates that if the Tribal IV–D agency has a State-Tribal agreement approved by OCSE to transfer and close case, this agreement must include a provision for obtaining the consent from the recipient of services to transfer and close the case.

Responding to comments, we added “including a case with arrears assigned to the State” to the introductory sentence of paragraph (b)(21). We also clarified that the case transfer process includes transfer and closure. As a technical change, we added “State” before IV–D agency throughout this paragraph to clarify which IV–D agency had the responsibility. In response to comments, the rule added paragraph (b)(21)(iv) related to allowing a permissible case transfer in accordance with an OCSE-approved State-Tribal agreement that includes consent from the recipient of services.

Paragraph (c) adds a criterion to require a State IV–D agency to close a Medicaid reimbursement referral based solely upon health care services provided through an Indian Health Service Program, including through the Purchased/Referred Care program. Unlike the case closure criteria under paragraph (b), which are permissive, the case closure criterion under paragraph (c) is mandatory. In the final rule, we

replaced “contract health services” with “the Purchased/Referred Care program” because the Indian Health Service (IHS) program was formally renamed.

In this joint rule, we also amend 42 CFR 433.152(b)(1), consistent with IHS policy, to require that State Medicaid agencies not refer cases for medical support enforcement services when the Medicaid referral is based solely upon health care services, including the Purchased/Referred Care program, provided through an Indian Health Program (as defined at 25 U.S.C. 1603(12)) to a child who is eligible for health care services from the IHS. This policy remedies the current inequity of holding noncustodial parents personally liable for services provided through the Indian Health Programs to IHS-eligible families that qualify for Medicaid. The revision to 42 CFR 433.152(b)(1) also eliminates reference to 45 CFR part 306, which was repealed in 1996.

In the final rule, paragraphs (d)(1) through (3) had minor stylistic edits from the NPRM. Paragraph (d)(1) requires that a State must notify the recipient of services in writing 60 calendar days prior to closing a case of the State’s intent to close the case meeting the criteria in paragraphs (b)(1) through (10) and (b)(15) through (16) of this section. Paragraph (d)(2) adds provisions that in an intergovernmental case meeting the criteria for closure under paragraph (b)(17), the responding State must notify the initiating agency 60 calendar days prior to closing the case of the State’s intent to close the case.

Paragraph (d)(3) states that the case must be kept open if the recipient of services or the initiating agency supplies information, in response to the notice provided under paragraph (d)(1) or (2), which could lead to paternity or support being established or an order being enforced, or, in the instance of paragraph (b)(15) of this section, if contact is reestablished with the recipient of services.

Based on comments, we removed proposed paragraphs (d)(4) and (5) regarding the notice requirements for inappropriate referrals under paragraphs (b)(20) and (c).

Section 303.11(d)(4), which was proposed as (d)(6) in the NPRM, requires that for a case to be closed in accordance with paragraph (b)(13), the State must notify the recipient of services, in writing, 60 calendar days prior to closure of the case of the State’s intent to close the case. This paragraph also specifies the notice content and lists steps the recipient must take if the recipient reapplies for child support services. Responding to comments, we

revised the proposed language to require the notice prior to closure rather than after the limited services case has been closed. We also removed references to proposed paragraph (d)(5) and changed the number of days to 60 calendar days from 30 calendar days.

Section 303.11(d)(5) permits a former recipient of services to re-open a closed IV–D case by reapplying for IV–D services.

Finally, paragraph (e) requires a IV–D agency to retain all records for cases closed for a minimum of 3 years.

Section 303.31—Securing and Enforcing Medical Support Obligations

In this final rule OCSE amends § 303.31 to provide a State with flexibility to permit parents to meet their medical support obligations by providing health care coverage or payments for medical expenses that are reasonable in cost and best meet the health care needs of the child. In paragraph (a)(2), we clarify that health care coverage includes public and private insurance.

In paragraph (a)(3), we delete the requirement that the cost of health insurance be measured based on the marginal cost of adding the child to the policy. Therefore, this change gives a State additional flexibility to define reasonable medical support obligations.

Next, § 303.31(b) requires the State IV–D agency to petition the court or administrative authority to include health care coverage that is accessible to the parent and can be obtained for the child at a reasonable cost. OCSE removes the limitation in paragraphs (b)(1) and (2), (3)(i), and (4) restricting this to private health insurance to allow a State to take advantage of both private and public health care coverage options to meet children’s health care needs, and emphasize the role of State child support guidelines in setting child support orders that address how parents will share the costs associated with covering their child. We also made an editorial change in paragraph (b)(1)(ii).

Section 303.72—Requests for Collection of Past-Due Support by Federal Tax Refund Offset

To be consistent with Department of Treasury regulations at 31 CFR 285.3(c)(6), the rule amends § 303.72(d)(1) to require the initiating State to notify other States only if it receives an offset amount. This change amends the former § 303.72(d)(1) by eliminating the phrase, “when it submits an interstate case for offset.”

Section 303.100—Procedures for Income Withholding

We are adding a new paragraph (h) in section 303.100(e) to require use of the Office of Management and Budget (OMB) approved form to implement withholding for all child support orders regardless of whether the case is IV–D or non-IV–D. Section 303.100(e) clarifies that “the required OMB-approved Income Withholding for Support form” must be used when sending notice to employers to initiate income withholding for child support. Finally, the rule adds a new paragraph (i), which explicitly states that income withholding payments on non-IV–D cases must be directed through the State Disbursement Unit.

Section 304.20—Availability and Rate of Federal Financial Participation

In the final rule, we are amending § 304.20 to increase the flexibility of State IV–D agencies to receive Federal reimbursement for cost-effective practices that increase the effectiveness of standard enforcement activities. We amend § 304.20(a)(1) to clarify that Federal financial participation (FFP) is available for expenditures for child support services and activities that are necessary and reasonable to carry out the State title IV–D plan. This change reflects 45 CFR part 75, “Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards,” subpart E—Cost Principles, which all State child support agencies must use in determining the allowable costs of work performed under Federal grants.

In paragraph (b), we added the phrase “including but not limited to” to make clear that FFP is available for, but not limited to, the activities listed in the regulation, consistent with OMB cost principles that allow for expenditures that are necessary and reasonable and can be attributed to the child support enforcement program.

Paragraphs (b)(1)(viii) and (ix) address the establishment of agreements with other agencies administering the titles IV–D, IV–E, XIX (Medicaid), and XXI (Children’s Health Insurance Program (CHIP)) programs, to recognize activities related to cross-program coordination, client referrals, and data sharing when authorized by law. The provisions also include minor technical changes and specify the criteria States may include in these agreements. In paragraphs (b)(1)(viii)(A) and (b)(1)(ix)(A), we are adding “and from” before IV–D agency to provide States more flexibility to refer a case to and from the IV–D agency

when working with these Federal programs.

For agreements with IV–A and IV–E agencies under paragraph (b)(1)(viii), we added paragraphs (b)(1)(viii)(D) and (E) to the list of criteria to include procedures to coordinate services and agreements to exchange data as authorized by law, respectively. The rule also adds these two new criteria under paragraph (b)(1)(ix) for agreements with State agencies administering Medicaid or CHIP programs as paragraphs (b)(1)(ix)(B) and (C).

In response to comments, under paragraph (b)(1)(ix), we added “appropriate” before criteria to provide States greater flexibility in which criteria or activities to include in their agreements with Medicaid or CHIP agencies. Also based on comments, we retained the provision regarding the transfer of assigned medical support collections to the Medicaid agency now at paragraph (b)(1)(ix)(D), and formerly at paragraph (b)(1)(ix)(C).

Section 304.20(b)(2) clarifies that FFP is available for services and activities for the establishment of paternity including, but not limited to the specific activities listed in paragraph (b)(2). The rule adds educational and outreach activities to § 304.20(b)(2)(vii) to explain that FFP is available for IV–D agencies to educate the public and to develop and disseminate information on voluntary paternity establishment.

In accordance with the requirement in section 454(23) of the Act to regularly and frequently publicize the availability of child support enforcement services, including voluntary paternity services, paragraph (b)(3) clarifies that FFP is available for services and activities for the establishment and enforcement of support obligations including, but not limited to the specific activities listed in paragraph (b)(3). The rule adds allowable services and activities under paragraph (b)(3) related to the establishment and enforcement of support obligations. A new paragraph (b)(3)(v) allows FFP for bus fare or other minor transportation expenses to allow participation by parents in child support proceedings and related activities such as genetic testing appointments. We redesignated the former § 304.20(b)(3)(v) as § 304.20(b)(3)(vii).

In addition, new paragraph (b)(3)(vi) recognizes that FFP is available to increase *pro se* access to adjudicative and alternative dispute resolution processes in IV–D cases related to the provision of child support services. We added a clarification in the final rule that this paragraph only applies when

the expenses are related to the provision of child support services.

In response to comments, we deleted the proposed paragraph (b)(3)(vii), which would have specifically allowed States to claim FFP for “*de minimis*” costs for including parenting time provisions in child support orders. (For further details, see Comment/Response 9 in § 304.20.)

We also made minor editorial changes in paragraph (b)(5)(v) by deleting “;” and adding “.” at the end of the paragraph, and in paragraphs (b)(9) and proposed (b)(11) by deleting “; and” and adding “.” at the end of the sentence.

Finally, we added a new paragraph (b)(12) to allow FFP for the educational and outreach activities intended to inform the public, parents and family members, and young people who are not yet parents about the Child Support Enforcement program, responsible parenting and co-parenting, family budgeting, and other financial consequences of raising children when the parents are not married to each other.

Section 304.23—Expenditures for Which Federal Financial Participation Is Not Available

Section 304.23(a) through (c) of the rule indicates that Federal financial participation at the applicable matching rate is not available for: (a) Activities related to administering titles I, IV–A, IV–B, IV–E, X, XIV, XVI, XIX, XX, or XXI of the Act or 7 U.S.C. Chapter 51; (b) purchased support enforcement services which are not secured in accordance with § 304.22; and (c) construction and major renovations.

For § 304.23(d), we added “State and county employees and court personnel” as a technical clarification that Federal financial participation is not available for the education and training of personnel except direct costs of short-term training provided to IV–D agency staff in accordance with § 304.20(b)(2)(vii) and § 304.21. This provision does not apply to other types of education and training activities (such as those provided to parents that are addressed in other rules) in this part. We also made a minor editorial change from the proposed language.

The final rule also clarifies that FFP is not available for any expenditures which have been reimbursed by fees collected as required by this chapter (§ 304.23(e)); any costs of those caseworkers described in § 303.20(e) of this chapter (§ 304.23(f)); any expenditures made to carry out an agreement under § 303.15 of this chapter (§ 304.23(g)); and the costs of counsel

for indigent defendants in IV–D actions (§ 304.23(h)).

Paragraph (i) indicates that FFP is prohibited for any expenditures for the jailing of parents in child support enforcement cases. In the NPRM, OCSE inadvertently removed this restriction; however, we are correcting this error in the final rule. As a result, proposed paragraph (i), which addresses that costs of *guardians ad litem* are prohibited in IV–D actions, was redesignated as paragraph (j).

Section 307.11—Functional Requirements for Computerized Support Enforcement Systems in Operation by October 1, 2000

In the final rule, we amend § 307.11(c)(3)(i) to include provisions requiring States to build automatic processes designed to preclude garnishing financial accounts of noncustodial parents who are recipients of Supplemental Security Income (SSI) payments or individuals concurrently receiving both SSI and Social Security Disability Insurance (SSDI) benefits under title II of the Act. We also amended § 307.11(c)(3)(ii) to provide that funds must be returned to a noncustodial parent’s financial account, within 5 business days after the agency determines that SSI payments or concurrent SSI payments and SSDI benefits under title II of the Act, have been inappropriately garnished. Responding to comments, we increased the timeframe from 2 days in the NPRM to 5 business days.

Topic 2: Updates To Account for Advances in Technology (§§ 301.1, 301.13, 302.33, 302.34, 302.50, 302.65, 302.70, 302.85, 303.2, 303.5, 303.11, 303.31, 304.21, 304.40, 305.64, 305.66, and 307.5)

In this final rule, the revisions remove barriers to using electronic communication and document management. Throughout the regulation, where appropriate, we removed the words “written” and “in writing” and insert “record” or “in a record.” These simple changes will allow OCSE, States, and others the flexibility to use cost-saving and efficient technologies, such as email or electronic document storage, wherever possible. The revisions to the regulation do not require a State to use electronic records for the specified purpose, but instead provide a State with the option to use electronic records, in accordance with State laws and procedures.

The definition of “record” used in this final regulation is taken from the Uniform Interstate Family Support Act (UIFSA) 2008, section 102(20). The

UIFSA drafters adopted the definition from another uniform law, the Uniform Electronic Transactions Act (1999). “Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.” The Uniform Electronic Transactions Act describes this definition further:

This is a standard definition designed to embrace all means of communicating or storing information except human memory. It includes any method for storing or communicating information, including “writings.” A record need not be indestructible or permanent, but the term does not include oral or other communications which are not stored or preserved by some means. Information that has not been retained other than through human memory does not qualify as a record. As in the case of the terms “writing” or “written,” the term “record” does not establish the purposes, permitted uses or legal effect which a record may have under any particular provision of substantive law.³

Substituting the phrase “in a record” for “in writing” allows more flexibility for electronic options by preventing a record from being automatically denied legal effect or enforceability just because it is in an electronic format. In addition, the use of the word “record” is designed to be technologically neutral; the word equates an electronic signature with a hand signature and an electronic document (whether scanned or created electronically) with a paper document. It neither means that electronic documents or electronic signatures will be required, nor will it affect any Federal requirements for what documents must contain to be valid or enforceable, such as a signature.

We are aware that not everyone has access to the latest technology. For that reason, wherever individual members of the public are involved, we generally are not removing requirements that the information is provided in a written, paper format [*i.e.*, pre-offset notices to obligors for Federal tax refund offset (§ 303.72(e)(1)). In addition, we are not changing regulatory language where written formats are required by statute.

Section 301.1—General Definitions

This final rule amends the definition of “Procedures” in § 301.1 by changing the phrase “written set of instructions” to “instructions in a record.” This will allow instructions set forth under the State’s child support plan to be made in

an electronic form that is retrievable and perceivable within the meaning of the Uniform Electronic Transactions Act, and is not limited to a written format.

In addition, we are inserting the definition for the term “record” in this section. The use of the term “record” is broader than the term “written” and encompasses different ways of storing information, including, for example, in a written or an electronic document.

Section 301.13—Approval of State Plans and Amendments

In the first sentence of the introductory paragraph of § 301.13, we replace the words “written documents” with the word “records.” The intent of this change is to allow for electronic submission, transmission, and storage of the State child support plan. When a State submits a new State child support plan or plan amendment(s) electronically, it must ensure electronic signature(s) accompany the document(s).

In paragraphs (e) and (f) of this section, “Prompt approval of the State plan” and “Prompt approval of plan amendments,” respectively, we change the words “a written agreement” in both provisions to “an agreement, which is reflected in a record.” These changes will enable OCSE regional program offices to secure from IV–D agencies agreements to extend an approval deadline for either a State plan or State plan amendment(s) in an electronic record format. In addition, we are making a technical change to paragraph (f) to change “Regional Commissioner” to “Regional Office” for consistency with other references to the “Regional Office” in this section.

Section 302.33—Services to Individuals Not Receiving Title IV–A Assistance

In § 302.33(d)(2), we change the phrase “written methodology” to “methodology, which is reflected in a record.” This change will afford a State record-keeping flexibility in maintaining the methodology developed for recovering standardized costs.

Section 302.34—Cooperative Arrangements

The first sentence under § 302.34 requires a State to enter into written agreements for cooperative arrangements under § 303.107 with appropriate courts, law enforcement officials, Indian tribes, or tribal organizations. The rule edits the phrase “written agreements” to read “agreements, which are reflected in a record.” This will ensure that any cooperative arrangements entered into by the IV–D agency can be maintained

in a manner that is not limited to a written format. This amendment does not change any of the requirements for the document to be legally effective or enforceable, such as a signature.

Section 302.50—Assignment of Rights to Support

In this final rule, we replace the word “writing” with the term “a record” in § 302.50(b)(2) so the State has greater flexibility in determining the format of the obligation amount, when there is no court or administrative order, and such amount is based on other legal process established under State law in accordance with State guidelines procedures.

Section 302.65—Withholding of Unemployment Compensation

This rule amends § 302.65(b) by changing the phrase “a written agreement” to “an agreement, which is reflected in a record.” Additionally, in paragraph (c)(3), we replaced the words “written criteria” with “criteria, which are reflected in a record.” These changes will establish that the agreements States develop with State workforce agencies (SWAs) and the criteria for selecting cases in which to pursue withholding of unemployment compensation are not limited to written agreements or written criteria. Again, these amendments do not impact any of the requirements for the documents to be legally effective or enforceable, such as a signature.

Section 302.70—Required State Laws

Section 302.70(a)(5) describes the procedures for paternity establishment. In the final rule, paragraph (a)(5)(v) discusses requirements for objecting to genetic testing results and states that if no objection is made, a report of the test results, which is reflected in a record, is admissible as evidence of paternity without the need for foundation testimony or other proof of authenticity or accuracy. We are changing the phrase “a written report of the test results” to “a report of the test results, which is reflected in a record” to provide greater flexibility and efficiency in admitting evidence of paternity. Please note that in this same paragraph, we are not eliminating the phrase “in writing” in the requirement regarding the notice to parents about the consequences of acknowledging paternity, paragraph (a)(5)(iii), and the requirement that any objection to genetic testing results must be made in writing within a specified number of days before any hearing at which such results may be introduced into evidence, paragraph (a)(5)(v). In these instances, the phrase “in writing” is statutorily prescribed, according to

³ See comments to the Uniform Electronic Transactions Act (1999), section 2, Definitions, available at: <http://www.uniformlaws.org/Act.aspx?title=Electronic%20Transactions%20Act> (quoting ABA Report on Use of the Term “Record,” October 1, 1996).

sections 466(a)(5)(C)(i) and 466(a)(5)(F)(ii) of the Act, respectively.

Section 302.85—Mandatory Computerized Support Enforcement System

This section describes the basis for OCSE to grant State waivers in regard to the mandatory computerized support enforcement system. Section 302.85(b)(2)(ii) requires the State to provide assurances, which are reflected in a record, that steps will be taken to otherwise improve the State's IV-D program. This change provides a State the option of communicating with OCSE electronically, rather than only in writing, when providing the required assurances under this provision.

Section 303.2—Establishment of Cases and Maintenance of Case Records

In this rule, § 303.2(a)(2), requires the State IV-D agency to send an application to an individual within no more than 5 working days of a request received by telephone or in a record. We are replacing the phrase “a written or telephone request” with “a request received by telephone or in a record,” in order to allow for any requests for applications that are received by telephone or transmitted electronically, for example, by email or text message. In response to comments, we also changed the word “made” to “received” to clarify when the 5 working day timeframe begins.

Under paragraph (a)(3), the rule changes the requirements for applications for IV-D services, to define an application as a record provided by the State which is signed, electronically or otherwise, by the individual applying for IV-D services. We are lifting the restriction that applications only be in a written or paper format, as well as allowing for electronic signature, by inserting the phrase “electronically or otherwise” after the word “signature.” The acceptance of electronic signature is in accordance with PIQ 09-02,⁴ which allows States to use electronic signatures on applications, as long as it is allowable under State law. As noted in PIQ 09-02, the appropriateness of the use of electronic signatures must be carefully determined by States. In making this determination, States should consider the reliability of electronic signature technology and the risk of fraud and abuse, among other factors.

⁴ PIQ-09-02 is available at: <http://www.acf.hhs.gov/programs/css/resource/use-of-electronic-signatures-on-applications-for-iv-d-services>.

Section 303.5—Establishment of Paternity

Section 303.5(g)(6) requires the State to provide training, guidance, and instructions, which are reflected in a record, regarding voluntary acknowledgment of paternity to hospitals, birth record agencies, and other entities that participate in the State's voluntary acknowledgment program. The rule changes the phrase “written instructions” to “instructions, which are reflected in a record” to allow a State the flexibility to provide program instructions in electronic formats, in addition to, or in place of, written instructions.

Section 303.11—Case Closure Criteria

Paragraph (d) describes the requirements for case closure notification and case reopening. Paragraph (d)(1) indicates that for cases meeting the case closure requirements in paragraphs (b)(1) through (10) and (b)(15) and (16) of this section, the State must notify service recipients in writing 60 calendar days prior to closure of the cases of the State's intent to close a case.

In order to allow for greater efficiency and flexibility, paragraph (d)(2) allows electronic notification in the instance of intergovernmental IV-D case closure when the responding agency is communicating with the initiating agency.

Paragraph (b)(4) states that for cases to be closed in accordance with paragraph (b)(13), the State must notify the recipient of services, in writing, 60 calendar days prior to closure of the case of the State's intent to close the case. In response to comments, we added the phrase “in writing” to clarify how the notices should be sent to the recipient.

We are not changing the State's “written” notification requirements to the recipients of services because of our general approach not to remove requirements to provide formal notices for all applicants and recipients of services in writing. However, as discussed in response to comments under § 303.11, *Case Closure Criteria* section in Topic I of this rule, we added paragraph (d)(6) for notices required under paragraphs (d)(1) and (4), if the recipient of services specifically authorizes consent for electronic notifications, the IV-D agency may elect to notify the recipient of services electronically of the State's intent to close the case. The IV-D agency is required to maintain documentation of the recipient's consent in the case record.

Section 303.31—Securing and Enforcing Medical Support Obligations

We amend the introductory language in § 303.31(b)(3) by changing the phrase “written criteria” to “criteria, which are reflected in a record,” so that criteria established to identify cases where there is a high potential for obtaining medical support can be either in an electronic or written format.

Section 304.21—Federal Financial Participation in the Costs of Cooperative Arrangements With Courts and Law Enforcement Officials

This rule amends paragraph (a) of § 304.21 by changing the words “written agreement” to “agreement, which is reflected in a record,” to provide flexibility in the format of the agreements between a State and courts or law enforcement officials.

Section 304.40—Repayment of Federal Funds by Installments

Section 304.40(a)(2) requires a State to notify the OCSE Regional Office in a record of its intent to make installment repayments. We are changing the phrase “in writing” to “in a record” to give a State the option of notifying the Regional Office electronically of its intent to repay Federal funds in installments.

Section 305.64—Audit Procedures and State Comments

In § 305.64(c), we removed the phrase “by certified mail” from the second sentence of this paragraph since OCSE currently sends these reports electronically and by overnight mail. In this same paragraph, we change “written comments” to “comments, which are reflected in a record,” allowing IV-D agencies to submit comments on an interim audit report in an electronic format, if appropriate.

Section 305.66—Notice, Corrective Action Year, and Imposition of Penalty

Paragraph § 305.66(a) replaces “in writing” with “in a record” so that OCSE can notify the State that it is subject to a penalty in an electronic format, not just in a written format.

Section 307.5—Mandatory Computerized Support Enforcement Systems

The rule amends paragraph (c)(3) of § 307.5 by changing “written assurance” to “assurance, which is reflected in a record,” so that a State can provide assurance in an electronic format, if it so chooses.

Topic 3: Technical Corrections

(§§ 301.15; 302.14; 302.15; 302.32; 302.34; 302.65; 302.70; 302.85; 303.3; 303.7; 303.11; 304.10; 304.12; 304.20; 304.21; 304.23; 304.25; 304.26; 305.35; 305.36; 305.63; 308.2; 309.85; 309.115; 309.130; 309.145; and 309.160)

We made a number of technical corrections that update, clarify, revise, or delete former regulations to ensure that the child support enforcement regulations are accurate, aligned, and up-to-date. In the NPRM, we proposed to update or replace obsolete references to administrative regulations by replacing 45 CFR part 74 with 45 CFR part 92 throughout the child support regulations. However, an Interim Final Rule effective December 26, 2014 (79 FR 75871),⁵ issued jointly by OMB, HHS, and a number of Federal agencies, implements for all Federal award-making agencies the final guidance “Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards” (Uniform Guidance) published by the Office of Management and Budget (OMB) on December 26, 2013. The Interim Final Rule is necessary in order to incorporate the Uniform Guidance into regulation at 45 CFR 75 and thus bring into effect the Uniform Guidance as required by OMB. The Uniform Guidance in part 75 supersedes and streamlines requirements from several OMB circulars, including OMB Circulars A–87 and A–133 and applies to all HHS grantees, including State and Tribal child support programs funded under title IV–D of the Act.

Additionally, HHS issued an Interim Final Rule, effective January 20, 2016 (81 FR 3004),⁶ that contains technical amendments to HHS regulations regarding the Uniform Guidance. The regulatory content updates cross-references within HHS regulations to replace part 74 with part 75.

Therefore, it is no longer necessary to make the proposed revisions and we will delete these proposed revisions in the final rule, except as otherwise noted.

Section 301.15—Grants

This rule renames paragraph (a) as *Financial reporting forms* and deletes paragraph (a)(3). We are replacing paragraph (a)(1) *Time and place* and paragraph (a)(2) *Description of forms* with the title and description of Form OCSE–396 and Form OCSE–34,

respectively. In response to comments, we eliminated the “A” from the forms OCSE–396A and Form OCSE–34A to reflect the current title of these forms.

We are also renaming paragraph (b) *Review as Submission, review, and approval* and adding under paragraph (b) the following paragraphs: (b)(1) *Manner of submission*; (b)(2) *Schedule of submission*; and (b)(3) *Review and approval*. To provide a State more time to submit its financial reports, we are modifying the *Schedule of submission* paragraph to require the financial forms be submitted no later than 45 days following the end of each fiscal quarter. Further revisions in this paragraph reflect the current operating procedures and processes that are currently in place.

Additionally, we are revising paragraph (c) *Grant award* by deleting its former language and replacing it with three paragraphs (c)(1) *Award documents*; (c)(2) *Award calculation*; and (c)(3) *Access to funds*.

Finally, we are also deleting paragraphs (d) *Letter of credit payment system* and redesignating paragraph (e) *General administrative requirements* as paragraph (d) and revising this paragraph to add a reference to part 95 of this title, establishing general administrative requirements for grant programs, moving “with the following exceptions” to the end of the paragraph, and adding paragraph levels: (1) 45 CFR 75.306, *Cost sharing or matching*; and (2) 45 CFR 75.341, *Financial reporting*.

In the NPRM, we had incorrectly added reference to parts 74 and 95 as exceptions. In this rule, we are correcting this paragraph by adding the reference to part 95 in paragraph (d) and indicating that this part establishes general administrative requirements for grants. We also moved the phrase “with the following exceptions” to the end of the paragraph to make it easier to understand.

In paragraph (d), as discussed in the introductory paragraph of Topic 3 in this section, the rule deletes the proposed revision in the NPRM to reference part 92. However, we are updating the Interim Final Rule technical corrections discussed in the introductory paragraph of Topic 3 to add paragraph levels for the regulatory cites that are excluded. Specifically, we added “(1)” before 45 CFR 75.306, and added “,” before the title, *Cost sharing or matching* and added “(2)” before 45 CFR 75.341 and added “,” before the title, *Financial reporting*.

Section 302.14—Fiscal Policies and Accountability

As discussed in the introductory paragraph of Topic 3 in this section, we are deleting our proposed revision in the NPRM related to updating the reference to part 74 since this has been corrected. However, we are updating the reference in § 302.14 from 45 CFR 75 to 45 CFR 75.361 through 75.370 to specifically address the retention and custodial requirements for the fiscal records.

Section 302.15—Reports and Maintenance of Records

For clarity, we are redesignating the undesignated concluding paragraph of this section as § 302.15(a)(8). In paragraph (a)(8), as discussed in the introductory paragraph of Topic 3 in this section, we are deleting our proposed revision in the NPRM related to updating the reference to part 74 since this has been corrected. However, we are updating the reference in paragraph (8) from 45 CFR 75 to 45 CFR 75.361 through 45 CFR 75.370 to specifically address the retention and custodial requirements of the records.

Section 302.32—Collection and Disbursement of Support Payments by the IV–D Agency

In this final rule, we remove the outdated timeframes in the introductory paragraph. We also revise paragraph (b) to replace “State Disbursement Unit (SDU)” with “SDU” because the term was defined in paragraph (a). In response to comments, we replaced “interstate” with “intergovernmental” and “initiating State” with “initiating agency.” Finally, we replace an incorrect cross-reference in paragraph (b)(1) from § 303.7(c)(7)(iv) to § 303.7(d)(6)(v).

Section 302.34—Cooperative Arrangements

In the final rule we are clarifying that the term law enforcement officials includes “district attorneys, attorneys general, and similar public attorneys and prosecutors,” and adding “corrections officials” to the list of entities with which a State may enter into agreements for cooperative arrangements.

Section 302.65—Withholding of Unemployment Compensation

We replace the term “State employment security agency” with “State workforce agency,” and the term “SESA” with “SWA” throughout this regulation for consistency with the terminology used by the Department of Labor.

⁵ The Uniform Guidance interim final rule is available at: <http://www.gpo.gov/fdsys/pkg/FR-2014-12-19/pdf/2014-28697.pdf>.

⁶ The Uniform Guidance HHS technical corrections are available at: <https://www.gpo.gov/fdsys/pkg/FR-2016-01-20/pdf/2015-32101.pdf>.

Section 302.70—Required State Laws

We are making a technical correction in paragraph (a)(8) by revising the cross-reference to § 303.100(g).

Section 302.85—Mandatory Computerized Support Enforcement System

We are making a technical correction in paragraph (a)(1) by removing an out-of-date address. To be more user-friendly, we are indicating that the guide is available on the OCSE Web site.

Section 303.3—Location of Noncustodial Parents in IV–D Cases

In paragraph (b)(5), we are replacing the term “State employment security” with “State workforce” for consistency with revisions made elsewhere in the final rule.

Section 303.7—Provision of Services in Intergovernmental IV–D Cases

Under this rule, as discussed under Topic 1, we renumber paragraphs in § 303.11 and update the cross references in paragraph (d)(10).

Additionally, we add paragraph (f), “Imposition and reporting of annual \$25 fee in interstate cases,” to provide that the title IV–D agency in the initiating State must impose and report the annual \$25 fee in accordance with § 302.33(e). This provision was added in the final rule related to the Deficit Reduction Act of 2005 (73 FR 74898, dated December 9, 2008), but it had been inadvertently omitted in the final intergovernmental child support regulation, published in the **Federal Register** on July 2, 2010 and effective on January 3, 2011.

Finally, we are making a conforming technical change to add § 302.38 to the list of regulatory sections cited related to the initiating State IV–D responsibilities to distribute and disburse any support collections received. This technical change was not proposed in the NPRM, but was recommended by a commenter.

Section 303.11—Case Closure

We are making several technical changes to § 303.11, in addition to the numerous changes discussed under topics 1 and 2 of the final rule. In redesignated paragraphs (b)(4) and (b)(6)(ii), formerly paragraphs (b)(2) and (b)(3)(ii), respectively, we replace the outdated term “putative father” with the term “alleged father.” We also remove the word “or” at the end of the sentence in paragraph (b)(6)(ii) and add the word “or” to the end of the new paragraph (b)(6)(iii). Finally, in paragraph (e) we are updating our reference to 45 CFR 75.361.

As discussed earlier in the introductory paragraph of Topic 3 in this section, we are deleting our proposed revision in the NPRM related to updating the reference to part 74 since this has been corrected. However, we are updating the reference in paragraph (e) from 45 CFR 75 to 45 CFR 75.361 to specifically address the 3-year retention requirements for records.

Section 304.10—General Administrative Requirements

We are adding after 45 CFR 75.306 “, Cost sharing or matching” and after 45 CFR 75.341 “, Financial reporting”.

As discussed earlier in the introductory paragraph of Topic 3 in this section, we are deleting our proposed revision in the NPRM related to updating the reference to part 74 since this has been corrected. However, we are adding the titles for clarity for 45 CFR 75.306 through 75.341.

Section 304.12—Incentive Payments

In the final rule, we delete outdated paragraphs 304.12(c)(4) and (5) as they applied to fiscal years 1985, 1986, and 1987.

Section 304.20—Availability and Rate of Federal Financial Participation

In § 304.20(b)(1)(iii), we revised the language to allow FFP for the establishment of all necessary agreements with other Federal, State, and local agencies or private providers to carry out Child Support Enforcement program activities in accordance with Procurement Standards. Additionally, we deleted paragraphs (c) and (d), which apply to fiscal years 1997 and 1998.

As discussed in the introductory paragraph of Topic 3 in this section, we are deleting our proposed revision in the NPRM related to updating the reference to part 74 since this has been corrected.

Section 304.21—Federal Financial Participation in the Costs of Cooperative Arrangements With Courts and Law Enforcement Officials

We are clarifying in paragraph (a) that the term law enforcement officials includes “corrections officials” to be consistent with § 302.34.

Section 304.21(a)(1) lists activities for which FFP at the applicable matching rate is available in the costs of cooperative agreements with appropriate courts and law enforcement officials. We modified this section to include a reference to § 304.20(b)(11), regarding medical support activities.

In response to comments, we further revised § 304.21(a)(1) to cross reference

§ 304.20(b)(12) which allows FFP for education and outreach activities provided by the courts and law enforcement officials through cooperative agreements.

Section 304.23—Expenditures for Which Federal Financial Participation Is Not Available

Section 304.23(a) lists various programs for which FFP is not available for administering these programs. We add the following Social Security Act programs to the list: Title IV–B, the Child Welfare Program; Title IV–E, the Foster Care Program; and Title XXI, the Children’s Health Insurance Program (CHIP). We also add SNAP, which is administered under 7 U.S.C. Chapter 51.

In addition, we delete § 304.23(g) of the former rule because it is outdated. Paragraph (h) is redesignated as (g).

Section 304.25—Treatment of Expenditures; Due Date

In § 304.25(b), we lengthen the timeframe from 30 to 45 days after the end of the quarter for States to submit quarterly statements of expenditures under § 301.15.

As discussed in the introductory paragraph of Topic 3 in this section, we are deleting our proposed revision in the NPRM related to updating the reference to part 74 since this has been corrected.

Section 304.26—Determination of Federal Share of Collections

In this rule, § 304.26(a)(1) clarifies that the Federal medical assistance percentage rate is 75 percent for the distribution of retained IV–A collection. This paragraph also adds that the Federal medical assistance percentage rate is 55 percent for the distribution of retained IV–E Foster Care Program collections for Puerto Rico, the Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa and 70 percent of retained IV–E collections for the District of Columbia. We also delete paragraphs (b) and (c) of the former rule related to incentive and hold harmless payments to be made from the Federal share of collections because this requirement is outdated.

Section 305.35—Reinvestment

Section 305.35 requires State IV–D agencies to reinvest the amount of Federal incentive payments received into their child support programs. We are making several technical changes to this section.

To clarify the potential consequences of a State not maintaining the baseline expenditure level, we are amending paragraph (d) by adding a sentence to

the end of the paragraph to read: “Non-compliance will result in disallowances of incentive amounts equal to the amount of funds supplanted.”

We redesignated paragraph (e) as paragraph (f) and added a new paragraph (e) to clarify how the State Current Spending Level should be calculated. Using the Form OCSE–396, “Child Support Enforcement Program Financial Report,” the State Current Spending Level will be calculated by determining the State Share of Total Expenditures Claimed for all four quarters of the fiscal year minus State Share of IV–D Administrative Expenditures Made Using Funds Received as Incentive Payments for all four quarters of the fiscal year, plus the Federal Parent Locator Service (FPLS) fees for all four quarters of the fiscal year.

The equation for calculating the State Share of Total Expenditures Claimed is: Total Expenditures Claimed for the Current Quarter and the Prior Quarter Adjustments minus the Federal Share of Total Expenditures Claimed for the Current Quarter and Prior Quarter Adjustments. Using the Form OCSE–396, this equation can also be translated as: State Share of Expenditure = Line 7 (Columns A + C) – Line 7 (Columns B + D) for all four quarters of the fiscal year.

The equation for calculating the State Share of IV–D Administrative Expenditures Made Using Funds Received as Incentive Payments is: IV–D Administrative Expenditures Made Using Funds Received as Incentive Payments for the Current Quarter and the Prior Quarter Adjustments minus the Federal Share of IV–D Administrative Expenditures Made Using Funds Received as Incentive Payments for the Current Quarter and Prior Quarter Adjustments. Using the Form OCSE–396, this equation can also be translated as: State Share of IV–D Administrative Expenditures Made Using Funds Received as Incentive Payments = Line 1a (Columns A + C) – Line 1a (Columns B + D) for all four quarters of the fiscal year.

The Fees for the Use of the FPLS can be computed by adding the FPLS fees claimed on the Form OCSE–396 for all four quarters of the fiscal year. Using the Form OCSE–396, this equation can also be translated as: Fees for the Use of the FPLS = Line 10 (Columns B) for all four quarters of the fiscal year.

Section 305.36—Incentive Phase-In

While we did not propose changes to this section in the NPRM, in response to comments, we deleted this section in the final rule since it is outdated.

Section 305.63—Standards for Determining Substantial Compliance with IV–D Requirements

Section 305.63(d) erroneously cross references paragraph (b). We replace that cross reference with a reference to paragraph (c).

Section 308.2—Required Program Compliance Criteria

The term “State employment security agency” is removed wherever it appeared and is replaced by “State workforce agency.” In addition, in subparagraph (c)(3)(i), we capitalize Department of Motor Vehicles and use the section symbol for consistency.

Section 309.85—What records must a Tribe or Tribal organization agree to maintain in a Tribal IV–D Plan?

As discussed in the introductory paragraph of Topic 3 in this section, we are deleting our proposed revision in the NPRM related to updating the reference to part 74 since this has been corrected.

Section 309.115—What procedures governing the distribution of child support must a Tribe or Tribal organization include in a Tribal IV–D Plan?

We are making two technical changes, not originally proposed in the NPRM, by fixing the reference in paragraph (b)(2) from “§ 9.120” to “§ 309.120” and in paragraph (c)(2) from “303.52” to “302.52.”

Section 309.130—How will Tribal IV–D programs be funded and what forms are required?

We update § 309.130(b)(3) to reference Standard Form (SF) 425, “Federal Financial Report,” which is the new OMB approved form. In response to comments, in paragraph (b)(4), we eliminated the “A” from Form OCSE–34A to reflect the current title of the form. Additionally, in paragraph (b)(4), to be consistent with revision to § 301.15(b)(2), we revise the submission requirements for the OCSE–34, “Quarterly Report of Collections,” including extending the due date from 30 to 45 days from the end of the fiscal quarter.

In paragraphs (d)(3) and (h), as discussed in the introductory paragraph of Topic 3 in this section, we are deleting our proposed revision in the NPRM related to updating the reference to part 74 since this has been corrected.

Section 309.145—What costs are allowable for Tribal IV–D programs carried out under 309.65(a) of this part?

As discussed in the introductory paragraph of Topic 3 in this section, we are deleting our proposed revision in the NPRM related to updating the reference to part 74 since this has been corrected. However, because this paragraph addresses the Procurement Standards, for clarity we are updating our reference from 45 CFR 75 to specify 45 CFR 75.326 through 75.340.

Section 309.160—How will OCSE determine if Tribal IV–D program funds are appropriately expended?

As discussed in the introductory paragraph of Topic 3 in this section, we are deleting our proposed revision in the NPRM related to updating the reference to part 74 since this has been corrected. However, we are updating the reference to the audit requirements by adding “, *Subpart F—Audit Requirements* under” after 45 CFR part 75.

IV. Response to Comments

We received 2,077 sets of comments from States, Tribes, and other interested individuals. We posted 2,017 sets of comments on www.regulations.gov; 60 sets of comments were not posted because they were either not related to the NPRM or contained personally identifiable information.

Using a text analytic software technology, we were able to detect duplicate and near duplicate documents. Of the 2,077 set of comments, we identified 1,679 sets of comments that were received from either mass-mail campaigns (when commenters provided the same or similar responses from the members of the same organization) or were duplicate responses (when the same commenter submitted the same response more than once).

The comments we received were from the following groups:

- 34 State child support agencies;
- 10 Tribes or Tribal organizations
- 9 National or State child support organizations;
- 6 judicial district offices;
- 5 counties/local child support offices;
- 2 judicial organizations;
- 2 prosecuting attorney office or organization;
- 50 organizations such as community-based, fatherhood, research, domestic violence, access to justice, parent, re-entry, court reform, and employment services organizations; and
- Remaining comments from private citizens representing custodial and

noncustodial parents, former child support workers, attorneys, a retired judge, etc.

Although we had a range of comments on specific provisions, the NPRM was strongly supported by State agencies, court associations, advocacy groups, parent groups, and researchers, and reflected broad consensus in the field. In drafting the final rule, we closely reviewed the comments and made a number of adjustments to the final rule in response to comments.

DATES:

1. Comment: While many commenters appreciated OCSE's suggestion that the proposed effective date for *Guidelines for setting child support awards* (§ 302.56) coincides with the next quadrennial review, States whose quadrennial review will commence shortly after the rule is finalized will need time to conduct further analysis and research on implementation issues and potential system changes. They recommended an additional extension of one year. In other words, the guideline changes 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.

Response: We agree with this suggestion and have made this change in the compliance date for § 302.56.

2. Comment: Some commenters expressed concerns regarding the length of time needed to implement the revisions in the final rule. A few commenters thought that one year would be adequate, while others believed that a 2-year effective date would be more reasonable period because of the significant changes in State law and policy, as well as numerous system changes will be needed. A few commenters believed that more than 2 years would be necessary to implement some of the revisions.

Response: While we understand the complexity of implementing several of the revisions in the final rule, there are some revisions that can be implemented immediately upon issuance of this final rule. Also, many of the revisions are optional requirements, so the compliance dates can vary State by State as the child support agencies elects to implement the optional rules, or allow Federal financial participation (FFP) for additional allowable expenditures. As a result, we are varying the compliance dates for the various Federal requirements. Generally, the compliance date for the final rule will be within 60 days after publication. However, if State

law revisions are needed, the compliance date will be the first day of the second calendar quarter beginning after the close of the first regular session of the State legislature that begins after the effective date of the final rule.

In response to comments, the final rule also revises the effective date for *Establishment of support obligations* (§ 303.4) and *Review and adjustment of support order* (§ 303.8) to allow States adequate time to incorporate the new rule requirements into the State's guidelines and order enforcement and modification procedures. For implementing the revisions under § 302.56(a) through (g), § 303.4, and § 303.8, the compliance date will be 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.

3. Comment: A few commenters thought they would need more than one year to implement the *Case Closure* (§ 303.11) because they need time to make legislative changes, substantial programming enhancements, and policy changes.

Response: Because many of the changes for Case Closure are optional requirements, we have made the compliance date 60 days after enactment of the final rule. For the mandatory changes required under § 303.11(c) and (d), we have extended the compliance date for these provisions to be one year from date of issuance of the final rule. However, if State law changes are needed, then the compliance date will be the first day of the second calendar quarter beginning after the close of the first regular session of the State legislature that begins after the effective date of the final rule.

4. Comment: Several commenters requested that if States will no longer be held harmless from complying with the 2008 medical support final rules upon issuance of the final rule, the effective date for § 303.31 should take this into consideration.

Response: For the medical support provisions under § 303.31, the compliance date for the new § 303.31 provisions will be 60 days from the date of the final rule unless statutory changes are required. If State law revisions are needed, the compliance date is the first day of the second calendar quarter beginning after the close of the first regular session of the State legislature that begins after the effective date of the regulation. We believe that this is sufficient time for the States to implement the new revisions in § 303.31. Upon issuance of this rule, OCSE will work with States in

developing guidance related to the new rule requirements and AT-10-02.

Topic 1: Procedures To Promote Program Flexibility, Efficiency, and Modernization (§§ 302.32; 302.33; 302.38; 302.56; 302.70; 303.3; 303.4; 303.6; 303.8; 303.11 (Including Revisions to 42 CFR 433.152); 303.31; 303.72; 303.100; 304.20; 304.23; and 307.11)

Section 302.32—Collection and Disbursement of Support Payments by the IV-D Agency

1. Comment: A few commenters suggested that the ongoing issues and concerns raised by employers should be addressed through guidance and outreach to specific States rather than a proposed regulation, given that only a few States are noncompliant. Another commenter suggested that States and OCSE make additional efforts to educate parents, family law lawyers, and judges about the State Disbursement Unit (SDU) law.

Response: Although this requirement has been a Federal law for almost two decades, issues persist. OCSE's Employer Services team has provided extensive technical assistance related to persistent noncompliance issues. Additionally, OCSE regularly holds employer symposia to bring together child support professionals and employers to identify issues of mutual concerns and work on ways to resolve these issues. In addition to providing continued outreach, technical assistance, and policy guidance to all stakeholders, we find it is necessary to regulate this requirement.

2. Comment: One commenter suggested that SDUs be required to continue processing spousal support payments after their associated child support payments are released. The commenter indicated that under current practice, spousal payments are paid through the SDU when they are included with child support payments. Once the child support payment ends, the SDU ceases processing the spousal support payments. Having the SDU continue to process such spousal payments will ensure that there is no disruption in payments to the custodial parent. Another commenter requested that the final rule clarify that an Income Withholding Order (IWO) and/or payment through the SDU for maintenance-only cases is not allowed.

Response: In accordance with PIQ-11-01,⁷ if the child support portion of a support order that includes spousal

⁷ PIQ-11-01 is available at: <http://www.acf.hhs.gov/programs/css/resource/spousal-support-only-cases>.

support ends, the IV–D case may continue to qualify for collection services at State option. If a State chooses to continue IV–D collection services for the spousal support portion of the support order, it may continue to collect spousal support through the income withholding process with receipt and disbursement of support collections through the SDU. However, we want to clarify that FFP for enforcement of spousal support-only cases beyond collection and disbursement of payments is not eligible for FFP under title IV–D.

Additionally, in accordance with § 303.72(a)(3)(i), past-due spousal support is only eligible for Federal tax refund offset in cases where the parent is living with the child and the spousal support and child support obligations are included in the same support order. OCSE Action Transmittal (AT) 10–04⁸ also indicates that past-due spousal support-only cases certified for any of the Federal collection and enforcement programs (*i.e.*, Federal tax refund and administrative offset, passport denial, multistate financial institution data match, and insurance match) are only eligible when the parent is living with the child.

For reporting purposes on the OCSE–157, *Child Support Enforcement Annual Data Report*, once the child is emancipated or otherwise no longer involved, the State has the option of whether or not to continue to collect spousal support through the income withholding process with receipt and disbursement of support collections for these spousal support only cases. States that opt to continue to collect spousal support through income withholding must report the income withholding collections received and disbursed on these spousal support-only cases for all lines that apply.

3. *Comment:* One commenter suggested that OCSE mandate that non-IV–D families that seek to have child support payments processed through the SDU must sign up for limited payment processing-only services. This would enable States to assist these families and provide authorization for States to work the cases. In addition, this would strengthen the IV–D program overall by offering a broader service, collecting more support, and assisting more families in the way they request.

Response: The final rule only allows the States the option to provide paternity-only limited services, and we

decided not to include an option in this rule for families to sign up for limited payment processing-only services at this time due to complex administrative issues related to interstate cases.

4. *Comment:* One commenter indicated that while IV–D programs, SDUs, and employers should not pass off their responsibilities for having order and location information by relying on parents for the information, they should be able to ask parents for information as a last resort.

Response: There is no prohibition against a IV–D program asking parents for information to ensure the prompt disbursement of support payments.

5. *Comment:* One commenter requested that OCSE revisit OCSE–PIQ–10–01⁹ to allow Federal financial participation (FFP) for non-employer-processed payments on non-IV–D orders. The commenter believed that expanding the IV–D program to process other non-IV–D payments, not just income withholding cases, would be more efficient because the IV–D program would not have to obtain payment records from counties when a case moves from non-IV–D to IV–D status. In addition, directing the obligor to make payments to one location would likely lead to greater compliance with the order.

Response: OCSE appreciates this comment; however, under 45 CFR 304.20(b), FFP is limited to services and activities under the approved title IV–D State plan which are determined by the Secretary to be necessary expenditures properly attributable to the IV–D program.

6. *Comment:* One commenter suggested that § 302.32(b)(1) be changed to replace “interstate” with “intergovernmental” and “State” with “agency.”

Response: OCSE agrees, with the first suggested change, and revised § 302.32(b)(1) by replacing the word “interstate” with the word “intergovernmental.” Additionally, we have revised the term initiating State to initiating agency, since intergovernmental IV–D cases may be initiated by Tribal or foreign child support programs. However, we retained the phrase “responding State,” since only States are required to meet the 2 day timeframe for forwarding collections under paragraph (b)(1).

7. *Comment:* One commenter asked about the IV–D procedure when the support payment has insufficient identifying information resulting in an

undistributed and often unidentified collection until the case information is provided. Another commenter’s State does not have a working interface with the court system, and wanted to know how the State can process payments if they do not have a copy of the order. An additional commenter indicated that direct referrals of non-IV–D child support orders to the IV–D agency would result in a large number of orders that cannot be registered until further identifying information is received from the parties or their attorneys.

Response: We acknowledge that States sometimes need to hold support payments until they receive the needed case information. We encourage States to work with courts and attorneys to develop processes that ensure that complete case information is received expeditiously and support payments can be disbursed within statutory timeframes.

In addition, sometimes it may be necessary to perform routine location services if the non-IV–D custodial parent has an invalid address and undistributable payments. As indicated in PIQ–10–01,¹⁰ Question and response 9, FFP is available for location services in non-IV–D cases only if location services are used to locate the custodial parent for disbursement of a collection. FFP is not available for non-IV–D cases if location services are used to establish and/or enforce a support order.

Section 454B(b) of the Act requires that the “State disbursement unit shall use automated procedures, electronic processes, and computer-driven technology . . . for the collection and disbursement of support payments. . . .” This includes the use of automated location services to locate the custodial parent for prompt disbursement of support payments. IV–D agencies are not responsible for providing other services or taking enforcement actions in non-IV–D cases. In some instances, the State may have to go back to the party and request the information the State needs to disburse the support payments.

8. *Comment:* One commenter asked if one-time costs incurred by the courts to permit the electronic exchange of non-IV–D information with the State case registry (*e.g.*, through portal or interface) would be eligible for FFP.

Response: Yes, FFP is available for the courts to provide information to the

⁸ AT–10–04 is available at: <http://www.acf.hhs.gov/programs/css/resource/collection-and-enforcement-of-past-due-child-support-obligations>.

⁹ PIQ–10–01 is available at: <http://www.acf.hhs.gov/programs/css/resource/federal-financial-participation-and-non-iv-d-activities>.

¹⁰ PIQ–10–01 is available at: <http://www.acf.hhs.gov/programs/css/resource/federal-financial-participation-and-non-iv-d-activities>.

SDU. OCSE-Action Transmittal (AT) 97-13¹¹ indicates that:

FFP . . . is available for the cost of establishing an automated interface with the non-IV-D systems to transmit data to the State CSE automated system. . . . The costs associated with establishing and maintaining the State Case Registry and the SDU, including the costs of maintaining non-IV-D support order records in the State case registry and necessary identification and [support] payment information in the State Disbursement Unit, are eligible for reimbursement at the applicable rate of FFP. FFP is available for the cost of converting non-IV-D case information (not payment records) necessary to process collections required to be paid through the SDU.

9. *Comment:* Two commenters asked if this provision will apply to all child support payments.

Response: This provision applies to child support payments in all IV-D cases and in non-IV-D cases in which the support order is initially issued in the State on or after January 1, 1994, and in which the income of the noncustodial parent is subject to withholding in accordance with sections 454B, 454(27), and 466(a)(8)(B) of the Act.

10. *Comment:* One commenter asked who is responsible for obtaining information on non-IV-D cases in a purely private matter.

Response: It is the State's responsibility to secure the information needed to disburse support payments in non-IV-D cases.

11. *Comment:* One commenter requested clarification about the term "maintenance." The commenter suggested that it should be very broad to include all actions and information gathering to ensure compliance.

Response: The NPRM indicates that FFP is generally available for the submission and maintenance of data in the State Case Registry (SCR) with respect to non-IV-D support orders established or modified on or after October 1, 1998. Maintenance in this context refers to updating the support order information in the SCR as needed.

PIQ-10-01 states that FFP is available for the costs of entering into the SCR the data elements listed in the regulations under § 307.11(e)(3) and (f)(1). Specifically, § 307.11(e)(3) specifies the following data elements for each participant in the case: Name, social security number, date of birth, case identification number, other uniform identification number, data elements required under paragraph (f)(1) of this section necessary for the operation of the Federal case registry, issuing State of

an order, and any other information that the Secretary may require. Section 307.11(f)(1) indicates the additional elements required for the Federal Case Registry, which include the following data elements: State Federal Information Processing Standard (FIPS) code and optionally county code; State case identification number; State member identification number; case type (IV-D, non-IV-D); social security number and any necessary alternative social security number; name including first, middle, and last name and any alternative name; sex (optional); date of birth; participant type (custodial party, noncustodial parent, putative father, child); family violence indicator (domestic violence or child abuse); indication of an order; locate request type (optional); locate source (optional); and any other information that the Secretary may require.

FFP is available for the State child support agency to update address changes as reported by the non-IV-D custodial parent and noncustodial parent to ensure prompt disbursement of support payments.

12. *Comment:* One commenter stated that this provision does not address Tribal use of their own income withholding form, as Tribal entities without a IV-D program do not currently use the OMB-approved *Income Withholding for Support* form, and Tribal employers do not consistently honor the Federal form.

Response: While the Uniform Interstate Family Support Act (UIFSA) compels an employer subject to State jurisdiction to honor an income withholding order sent directly from another State or an Indian Tribe, Tribes are not subject to UIFSA. However, the Full Faith and Credit for Child Support Orders Act (FFCCSOA), 28 U.S.C. 1738B, requires Tribes to enforce child support orders made by a court or administrative agency that had appropriate jurisdiction and afforded the parties a reasonable opportunity to be heard. This would include enforcement of orders providing for income withholding.

The regulation at § 309.110(d) of this chapter states that the income withholding must be carried out in compliance with the procedural due process requirements established by the Tribe or Tribal organization. Accordingly, Tribes may conduct preliminary reviews of foreign orders to ensure that the court or administrative authority properly entered the order, but such processing of orders must be done expeditiously to ensure that orders are promptly served on employers within the Tribe's jurisdiction in accordance

with the regulations at § 309.110(n). In accordance with § 309.110(j), the only basis for contesting a withholding order is a mistake of fact, which means an error in the amount of current or overdue support or in the identity of the alleged noncustodial parent.

While the regulations do not require Tribes to have laws and procedures which mandate that employers subject to the Tribe's jurisdiction must honor direct income withholding orders from another State or Tribe, a Tribe may choose to permit direct withholding as a matter of administrative efficiency or comity between the Tribe and other Tribes and States.

As indicated in PIQT-05-04,¹² Tribes that do not receive funding to operate IV-D programs are not required to use or recognize the OMB-approved *Income Withholding for Support* form. However, the Tribal child support regulation at § 309.110(l) requires Tribes that receive Federal funding to operate IV-D programs to use and recognize the OMB-approved form.

13. *Comment:* One commenter was concerned that the proposed provision does not sufficiently incorporate Tribal IV-D programs into the calculus. While a case and its corresponding child support order that was entered in the State courts may be a non-IV-D case for the State, this same case may be a IV-D case in the Tribal IV-D caseload. The Tribal IV-D agency may have served the employer with an income withholding for support order and directed the employer to send payments to the Tribe. The commenter suggested that the rule be broadened to acknowledge the appropriateness of employers sending payments to Tribal IV-D agencies or Tribal SDUs; otherwise State IV-D agencies may resist transferring such cases and/or support orders to Tribal IV-D agencies.

Response: This issue arises when a Tribe is enforcing an underlying State child support order. In those instances, the IWO issued by the Tribe often incorrectly indicates that remittance should be made to the Tribe instead of to the SDU of the order-issuing State, in accordance with § 309.115(d). The instructions for the OMB-approved IWO form, however, may cause confusion by referring generically to the "order." The instructions read: "Payments are forwarded to the SDU in each State, unless the order was issued by a Tribal CSE agency. If the order was issued by a Tribal CSE agency, the employer/income withholder must follow the

¹¹ AT-97-13 is available at: <http://www.acf.hhs.gov/programs/css/resource/collection-and-disbursement-of-support-payments>.

¹² PIQT-05-04 is available at: <http://www.acf.hhs.gov/programs/css/resource/state-iv-d-agencies-use-of-federal-income-withholding-form>.

remittance instructions on the form.” The term “order” in these instructions refers to the underlying State support order and not the tribal IWO. Tribes have interpreted these instructions, however, as meaning that payment is to be remitted to the Tribe.

Because the IWO is an OMB-approved form, OCSE will consider reviewing these issues further and clarifying the form and instructions to the form in future revisions. In addition, we will continue to provide technical assistance to Tribes so that the remittance section of the IWO form is completed correctly and in accordance with existing regulations.

14. Comment: One commenter stated that the proposal to require States to distribute non-IV-D payments the same as IV-D payments fails to address the impact of this policy on the Federal performance measures by which the States derive incentive payments. The commenter noted that this requirement diverts State resources to process and collect non-IV-D payments that do not affect the State’s overall performance, and detracts from work on IV-D cases.

Response: The requirement for SDUs to process non-IV-D income withholding collections is required by title IV-D of the Act as amended by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996. In addition, the performance incentive measures were mandated by the Child Support Performance and Incentive Act of 1998. Since the definition of the performance measures are a statutory requirement, OCSE does not have authority to revise how these measures are calculated.

15. Comment: One commenter noted that in his State, the county clerks are allowed to implement and manage their own case management and e-filing systems. There is neither statewide authority nor any law that creates a centralized authority that could mandate that a particular system or system requirements are put in place for implementing this requirement. Because of this, there is no standard process to digitally and automatically transmit case information on non-IV-D domestic cases to the IV-D agency. Another commenter asserted that, in her State, local child support agencies are not privy to information on the establishment of non-IV-D court orders and such information is not entered into the State’s automated child support enforcement system.

Response: The requirement that support payments made through income withholding on non-IV-D cases be processed through the SDU has been in place for over 20 years. It is important

that States work with courts to set up processes that are efficient and that States follow Federal income withholding and SDU requirements. Over the years OCSE has provided technical assistance to States and will continue to do so upon request.

Section 302.33—Services to Individuals Not Receiving Title IV-A Assistance Former Child Welfare Recipients: § 302.33(a)(4)

1. Comment: One commenter urged OCSE to clarify that, when a State has opted to implement the limited services option authorized in § 302.33(a)(6), the notice to former recipients of State assistance under § 302.33(a)(4) shall include information about the family’s option of seeking limited services rather than the binary option of continuing full services or closing the case.

Response: In the final rule, paternity establishment is the only limited service available to individuals receiving child support services. States may include this option in their notice, but it is not required.

2. Comment: One commenter stated that further language may be needed to determine if this flexibility applies to both Federal and State foster care scenarios. In addition, the commenter noted that closing foster care cases with arrears owed to the State may result in unintended negative consequences if the cases are later reopened with arrears balances and interest still owing (if applicable).

Response: The Federal government does not have authority to regulate the State-funded foster care program (other than to define child support family distribution requirements under section 457 of the Act.) Therefore, this regulation applies to federally-funded foster care cases. However, States have discretion to apply this language to State-funded foster care cases as well. If there is no longer a current support order and arrearages are under \$500 or unenforceable under State law, the State may close the case pursuant to 45 CFR 303.11(b)(1). If there is no longer a current support order and all arrearages in the case are assigned to the State, the case may be closed pursuant to 45 CFR 303.11(b)(2). Additionally, for arrears assigned to the State, the State has the authority to compromise the arrearages. It is the State, and not the Federal government, that has the authority to compromise the arrearages since the State has the financial interest in the money.

3. Comment: One commenter asked if the State is still required to collect assigned child support when a child is no longer eligible for IV-E foster care

services and the IV-D agency determines closure is appropriate. The commenter indicated that it would reduce strain on a newly reunified family if the State could stop collecting the assigned arrears.

Response: In this situation, the case has been referred by the IV-E agency and can be closed in accordance with § 303.11(b)(20) if the IV-D agency determines that it is inappropriate to continue to enforce the order.

4. Comment: According to one commenter, the wording of the provision suggests that if both the custodial parent and the noncustodial parent owe arrears to the State foster care agency pursuant to a valid support order, and then the child is returned to the custodial parent’s home, enforcement would discontinue against the custodial parent, but not the noncustodial parent.

Response: In this scenario, there are two orders, one for the custodial parent, who was referred to the IV-D agency when the child was removed from the home, and one for the noncustodial parent. For the custodial parent that was referred and to whom the child is being returned, the IV-D agency can close the case pursuant to § 303.11(b)(20) of this chapter once the parent resumes custody of the child. For the noncustodial parent, the case should remain open if there is an order for current support and arrearages.

5. Comment: One commenter asked that consideration also be given to allowing States to close cases instead of continuing services to former Medicaid-only cases in which the IV-D agency determines that continued services would be inappropriate.

Response: OCSE appreciates this comment; however, we need to gather additional information before proposing this change.

6. Comment: One commenter recommended that OCSE clarify how States determine whether child support services continue to be appropriate for the family once the child is no longer eligible for foster care. Specifically, the commenter suggested additional language that would permit States to establish in regulation, rule, or procedure a category of cases that, based on criteria chosen by the IV-D agency, would not be appropriate for continued services.

Response: States have discretion to establish criteria for determining when continued services and notice are not appropriate.

Limited Services: § 302.33(a)(6)

1. Comment: We received a substantial amount of feedback

regarding the concept of limited services. Most of the commenters expressed support for offering limited services to applicants. A number of commenters indicated that allowing parents to have more ability to select the services they need would make the child support program more family-friendly and increase program efficiency. In particular, commenters identified the need to offer paternity establishment as a limited service. However, commenters also raised various implementation concerns about limited services, including challenges in the context of intergovernmental cases, the range and types of limited services options offered, the need for domestic violence safeguards, system programming needs, and reporting and performance issues. With regard to offering limited services in interstate cases, commenters raised issues such as difficulty in tracking which limited services are offered by each State and the ability of a responding State to accommodate an intergovernmental limited services request. Some commenters were also confused regarding which types of limited enforcement services would be offered and how competing limited enforcement services requests between parties would be handled.

Response: We are persuaded that the potential intergovernmental challenges involved with implementing a menu of limited enforcement services warrants rolling back the scope of the option proposed in the NPRM. We decided to move forward by only giving States the option to offer paternity establishment as a limited service in an intrastate case. In response to these and other concerns addressed above by commenters, we amended § 302.33(a)(6). This paragraph indicates that the State may elect in its State plan to allow an individual under paragraph (a)(1)(i) of this section who files an application to request paternity-only limited services in an intrastate case. If the State chooses this option, the State must define how this process will be implemented and must establish and use procedures, including domestic violence safeguards, which are reflected in a record, that specify when paternity-only limited services will be available. An application will be considered full-service unless the parent specifically applies for paternity-only limited services in accordance with the State's procedures. If one parent specifically requests paternity-only limited services and the other parent in the State requests full services, the case will automatically receive full services. The State will be required to charge the

application and service fees required under paragraphs (c) and (e) of this section for paternity-only limited services cases, and may recover costs in accordance with paragraph (d) of this section if the State has chosen this option in its State plan. The State must provide the applicant an application form with information on the availability of paternity-only limited services, consequences of selecting this limited service, and an explanation that the case will be closed when the limited service is completed.

2. Comment: Commenters raised concerns regarding what would happen if an applicant in an intrastate case applied for and was receiving limited services and one of the parties later moved out of state and that State did not include the option to provide limited services in its State plan.

Response: As noted above, in response to comments we narrowed the scope of limited services to paternity establishment services only and only in intrastate cases. Therefore, if, during the course of providing paternity-only limited services, one of the parties moves out of state, the State may pursue paternity establishment using long-arm¹³ procedures. If this is not appropriate, then the State should contact the applicant to determine whether to pursue a full-services intergovernmental case.

3. Comment: One commenter noted that the language in paragraph (a)(6) reads as if the option of limited services is available only to nonpublic assistance recipients, *i.e.*, those eligible under paragraph (a)(1)(i). The commenter asked for clarification regarding whether the intent of this language is to disallow the option of limited services to former Medicaid, former TANF, and/or former IV–E foster care recipients.

Response: After reviewing the regulatory text, we think that it is clear that the intent of this provision to allow those individuals under § 302.33(a)(1)(i) who file an application for IV–D services to request and receive paternity-only limited services. Further, paternity-only limited services are restricted to intrastate cases only. An individual who has been receiving IV–D services and is no longer eligible for assistance under title IV–A, IV–E foster care, or Medicaid programs and has not had paternity established while his/her case was open under paragraphs (a)(1)(ii) or (iii), may choose to close his/her existing case once he/she is no

longer receiving public assistance and may submit a new application under paragraph (a)(1)(i) for paternity-only limited services, along with any applicable fees.

4. Comment: A few commenters opposed the inclusion of paternity-only limited services in the provision because applicants may simply request closure of their case with the State child support agency after genetic testing results are provided. Another commenter felt that paternity-only services should not be offered because, if a support order is not obtained, we are neglecting one of the key tenants of our mission statement to obtain meaningful support for the child. This commenter also noted that establishing the support order at the time paternity is determined will likely result in more accurate income information and less default orders, as initial cooperation has already been gained from the noncustodial parent.

Response: We disagree with the comments that paternity-only services should not be offered because of the possibility of case closure. While some State child support agencies may currently have policies that allow applicants to request closure of their case after obtaining genetic testing results, other State child support agencies' policies do not allow the applicants to request closure of their cases until after an order for paternity and support has been legally established or determination made that paternity cannot be established. The addition of this rule provides all States with the authority to allow either the custodial or the noncustodial parent to request paternity-only services without also requiring the establishment of an order for support, thus giving States increased flexibility to be responsive to a family's specific circumstances.

We also disagree with the notion that paternity-only services should not be offered in cases where there is to be no support order established. While we acknowledge that establishing a child support order at the time paternity is determined may result in more accurate income information and less default orders, provided that there is continued cooperation from the noncustodial parent, there are benefits to paternity determination even if a support order is not established. A key component of encouraging responsible parenting is accomplished through the establishment of paternity for a child. Whether or not an unwed biological father is currently living with the biological mother and children in an intact household, he has no legal standing as the children's father unless paternity is legally established.

¹³ Long-arm" refers to State laws that allow the State to exercise personal jurisdiction over an out-of-state defendant in situations when the defendant has had sufficient minimum contacts with the State.

Establishing paternity also serves to clarify the birth record of the child and establishes possible eligibility for dependents' benefits—all without subjecting the intact family unit to an unwanted and unnecessary order for child support.

5. Comment: In regard to the requirement under paragraph (a)(6) that a case will automatically receive full services in the event that one parent specifically requests paternity-only limited services and the other parent requests full services, one commenter asked who, in this instance, would be the applicant and who could close the case or request a change in services. Another commenter asked whether a new case would be opened when a request is made to change from limited services to full services, or if the existing case would instead be modified.

Response: If a State chooses to offer a paternity-only limited services option, the State must define how this process will be implemented. The State must establish and follow policy and procedures regarding appropriate case management protocol when applications from both parties are received with differing requests for services or when a case is moving from paternity-only limited services to a full services case.

6. Comment: Several commenters requested clarification regarding how an application for full services should be handled when received after a case was previously opened for limited services only. Questions were posed such as: Would a new application be required? Would an additional full application fee be required or would it be a reduced fee for the subsequent application? Does this decision change if it is the same parent now requesting full services versus if it is the other parent making the subsequent request?

Response: As we indicated above in the discussion of how States should handle competing applications received from both parties in a case, it is up to each State child support agency to determine specific paternity-only limited services policy and procedures. Although a full new application may not be necessary, States are encouraged to require some type of written documentation (for example, an addendum to the original application) when a subsequent request is made to change a case previously opened for paternity-only limited services to a full-services case.

7. Comment: One commenter voiced concern that the changing of an applicant's limited services selection may cause disruption in the streamlined

delivery of services, causing delays and increased staff time. For example, if paternity-only limited services were requested and the applicant later requests full services before the paternity establishment process has been completed, the State child support agency would be required to amend, re-serve, and refile the summons and complaint to include the establishment of child support. Several commenters expressed concern over potential system programming difficulty and costs associated with offering limited services, stating that system changes may be problematic for State child support agencies with older systems and may require longer than one year to complete. Finally, one commenter noted that, as current statutes and procedures are designed around a full-service approach to establishment and enforcement, it will be necessary for States to review their current laws to determine if a limited services option can be provided within existing judicial framework or whether statutory changes may be required to accommodate a limited services option.

Response: If a State chooses to offer paternity-only limited services as an option, that State has the ability to make provisions in its policies and procedures regarding how to address changes that applicants make in service selections. Additionally, if a State chooses to offer this option, the State has flexibility in how and when to implement the changes. In this rule, OCSE has not mandated if, how, or when States should upgrade the functionality of their automated child support enforcement systems to accommodate a paternity-only limited services option. As indicated in the preamble to the NPRM, as States modernize their statewide automated systems, it will be easier to implement and manage paternity-only limited services in their caseloads, and at the same time will provide States additional flexibility to offer child support services that meet the needs of modern families. Finally, as State child support programs continue to evolve to provide services that are tailored to meet the needs of modern families, OCSE will continue to provide outreach and technical assistance on an individual basis to States needing support with the passage and implementation of necessary statutory changes.

8. Comment: One commenter was concerned that if a father applies for paternity-only limited services and the mother does not want to cooperate, there would be nothing further a State could do to compel her to comply and thus the State could never close the case

since the paternity-only limited service will not have been completed.

Response: We disagree. It is common practice for State child support agencies to file a judicial motion requesting the court's assistance when a custodial parent refuses to cooperate with the paternity establishment process. A court order requiring the custodial parent to cooperate with genetic testing may then be issued, and contempt of court sanctions are possible if the custodial parent continues to be noncompliant. However, prior to taking the above actions, we encourage State child support agencies to work with custodial parents to explain the benefits of having paternity established for their children, unless there is good cause for refusal to cooperate, such as domestic violence, as discussed later in this section (see Comment/Response 12).

9. Comment: One commenter suggested that a pamphlet or some other document accompany child support applications to provide information on the paternity-only limited services option. The commenter felt that providing this information on a separate but accompanying document would be more effective than if it were to appear in the application itself.

Response: States electing to provide paternity-only services are required under § 302.33(a)(6) to provide applicants with information on the availability of paternity-only limited services, the consequences of selecting this limited service, and an explanation that the case will be closed when the limited service is completed. Providing information on the application about paternity-only limited services is necessary to document that the applicant has obtained this information and requested this service. However, a State may supplement the information on the application with a brochure, pamphlet, or any other type of document that the applicant could maintain if the State believes that this is a better way to convey the information.

10. Comment: One State inquired whether Federal financial participation (FFP) will be available for States to make the necessary system changes to support the implementation of limited services.

Response: Yes. As outlined in 45 CFR 307.35, FFP at the applicable matching rate is available for computerized support enforcement system expenditures related to, among other things, system enhancements related to the establishment of paternity. Section 304.20 of this final rule also clarifies that FFP is available for necessary and reasonable expenditures properly

attributed to the Child Support Enforcement program for services and activities to carry out the title IV–D State plan, including obtaining child support, locating noncustodial parents, and establishing paternity.

11. *Comment:* There were a number of comments from States expressing concern over how limited services would affect reporting requirements and performance measures. More specifically, questions were raised regarding how paternity-only cases may impact the order establishment performance measure and whether paternity-only cases will be excluded from the case count for the total number of “Cases Open at the End of the Fiscal Year” denominator for that measure.

Response: We recognize that reporting changes on the OCSE–157 report may be necessary to accommodate the addition of a paternity-only limited services option so that these cases do not negatively impact the support order establishment performance measure. OCSE will work to implement the necessary changes to the form after this rule is published as final.

12. *Comment:* Several commenters expressed the need for sound domestic violence safeguards when offering limited services. One commenter specifically suggested that language be added to the regulation requiring the inclusion of domestic violence safeguards when States establish procedures for paternity-only limited services. One commenter raised the possibility that a parent could be pressured or coerced by the other parent into pursuing paternity-only limited services but no support order so that there would be no responsibility for supporting the child. Another commenter felt that offering paternity-only limited services may be a barrier that keeps a custodial parent and child in an abusive relationship, requiring the custodial parent to take some later affirmative step in requesting and obtaining a support order and thus potentially provoking his or her abuser. Other commenters recommended that OCSE work with domestic violence experts to develop procedures and training resources, and that State child support agencies be required to assess domestic violence status multiple times throughout the life of a case versus the current practice, which typically occurs only at the beginning of a case. A few commenters recommended practices that child support workers could take to mitigate potential domestic violence issues. One commenter asked whether there are good cause procedures that would be applicable in nonpublic assistance cases. For example, if a

noncustodial parent requests paternity-only services but the custodial parent does not wish to comply due to domestic violence concerns, and it is a nonpublic assistance case, would the State child support agency then be responsible for determining if the paternity-only limited service should be denied?

Response: OCSE appreciates commenters’ concern for the safety of domestic violence victims. We encourage States to consider developing domestic violence safeguards throughout every step in case processing. In response to these specific comments, we amended the final regulation at § 302.33(a)(6) to require that States include domestic violence safeguards when establishing and using limited services processes and procedures. As discussed in the preamble to the NPRM, OCSE is acutely aware of the risk of domestic violence in the general operation of the child support program and, in particular, as it relates to this limited services provision. Supporting families who have experienced domestic violence is essential to a successful child support program. All State child support agencies are required, under § 303.21(e), to establish domestic violence safeguards pertaining to the disclosure of information and these procedures must be followed for paternity-only limited services cases, as well. In addition, IM–14–03¹⁴ provides an array of resources and tools child support programs can use to help victims safely and confidentially obtain child support services. It includes training tools for child support professionals, emphasizes the critical role of confidentiality, and describes existing domestic violence resources for parents, child support professionals, and the courts. The IM also outlines the importance of, and opportunities for, collaboration with domestic violence programs and coalitions as a means to improve the safe, efficient delivery of child support services. Child support establishment and enforcement can heighten the risk of domestic violence.¹⁵ OCSE

¹⁴ Available at: <http://www.acf.hhs.gov/programs/css/resource/ocse-domestic-violence-awareness-month>.

¹⁵ Pearson, Jessica and Esther Ann Griswold, “Child Support Policies and Domestic Violence,” *Public Welfare*, (Winter 1997), preview available at: <https://www.questia.com/magazine/1G1-19354300/child-support-policies-and-domestic-violence>; and Pearson, Jessica and Esther Ann Griswold, *Child Support Policies And Domestic Violence: A Preliminary Look at Client Experiences with Good Cause Exemptions to Child Support Cooperation Requirements*, prepared under a grant from the Federal Office of Child Support Enforcement (Grant No. 90–FF–0027) to the Colorado Department of

coordinates closely with ACF’s Family and Youth Services Bureau (FYSB) to support implementation of recognized domestic violence protocols in child support programs and to conduct training and technical assistance. OCSE is committed to continuing to work with FYSB, States, and advocates to ensure that best practices are in place to safeguard the families we serve.

By identifying and responding effectively to domestic violence, providing safe opportunities to disclose domestic violence, and developing safe and confidential responses to domestic violence, child support programs can put the safety of families and program staff at the forefront of child support work. There are a number of points of heightened domestic violence risks during the establishment and enforcement process, and States should be providing domestic violence safeguards throughout the process. We encourage States to work with their local domestic violence programs and coalitions to establish appropriate safeguards. It is the responsibility of each State to ensure that their domestic violence provisions are adequate for both paternity-only limited services and full services application requests.

Historically, the custodial parent has typically been the applicant for State child support services. However, in providing an avenue for fathers to establish paternity for their child, we recognize that the potential exists for a noncustodial father to apply for paternity-only limited services without the cooperation or consent of the custodial parent mother due to domestic violence concerns. Clearly, it is never OCSE’s intent to create a dangerous situation for a parent who is a victim of domestic violence. Although Federal law is silent on this specific scenario, there is nothing in Federal statute or regulation that would preclude States from developing additional policies and procedures to address the safety needs of custodial parents in non-public assistance cases who are found to have good cause for refusing to cooperate with the State child support agency in establishing paternity, or for whom the State child support agency determines it is against the best interest of the child to pursue paternity issues. Under section 454(29) of the Act, it is up to each State to define the criteria for “good cause” and to choose which

Human Services for the Model Office Project, Center for Policy Research, January 1997, available at: https://childsupport.state.co.us/siteuser/do/vfs/Read?file=/cm:Publications/cm:Reports/cm:Model_x0020_Office_x0020_Project_x0020_Grant/cm:Child_x0020_support_x0020_policies_x0020_and_x0020_dv.pdf.

agency will determine if the good cause exception is warranted. Section 303.11(b)(14) provides that a good cause determination can be made by either the IV–A, IV–D, IV–E, Medicaid or SNAP agency. Section 305.2(a)(1) reiterates this, declaring that the count of children in establishing paternity performance levels shall not include “. . . any child whose parent is found to have good cause for refusing to cooperate with the State agency in establishing paternity, or for whom the State agency determines it is against the best interest of the child to pursue paternity issues.” Lastly, § 302.31(b) and (c) mandate that the State child support agency suspend all activities to establish paternity or secure support until notified of a final determination by the appropriate agency, and will not undertake to establish paternity or secure support in any case for which it receives notice that there has been a finding of good cause unless there has been a determination that support enforcement may safely proceed without the participation of the caretaker or other relative.

Section 302.38—Payments to the Family

1. Comment: One commenter stated that by preventing assignments to attorneys, we could limit custodial parents’ ability to find legal representation. Another commenter stated that the NPRM as written appears to prohibit the disbursement of payments to anyone other than the payee. Several commenters suggested that the provision be changed so that disbursements to a third party, such as a private attorney or conservator representing custodial parents in child support collection actions or relatives or guardians, are authorized at the request of the custodial parent. Another commenter stated that States should retain the right to send payments to a conservator or private attorney representing the custodial parent and child with a legal fiduciary duty to act in the child’s best interest.

Response: OCSE agrees that States should retain the right to send payments to a judicially-appointed conservator with a legal and fiduciary duty to the custodial parent and the child; however, we do not view private attorneys in this same category, particularly when collecting fees. Based on the American Bar Association Model Code of Professional Responsibility, many States disfavor contingency fees in child support cases because they would reduce support to the child and could adversely affect family relationship.

We have revised § 302.38 to expand the list of entities to whom child

support payments under §§ 302.32 and 302.51 can be made. The provision now requires that a State’s IV–D plan “shall provide that any payment required to be made under §§ 302.32 and 302.51 to a family will be made directly to the resident parent, legal guardian, caretaker relative having custody of or responsibility for the child or children, judicially-appointed conservator with a legal and fiduciary duty to the custodial parent and the child, or alternate caretaker designated in a record by the custodial parent. An alternate caretaker is a nonrelative caretaker who is designated in a record by the custodial parent to take care of the children for a temporary time period.

2. Comment: One commenter believed that private attorneys should be in the same category as a collection agency.

Response: We agree. Therefore, this rule does not authorize payments to be made directly to a private attorney or a private collection agency.

3. Comment: Several commenters recommended that we modernize the rule to refer to caretaker rather than relative caretaker to accommodate nonrelative caretakers and guardians. In addition, the commenters recommended expanding the definition of “to a family” because custodial parents may need the ability to designate an alternate recipient in situations where doing so may benefit the family, which is common. Another commenter asked if OCSE meant to disallow situations in which the mother requests payments be directed to caretakers who are not relatives and not legal guardians.

Response: OCSE agrees and updated the language in § 302.38 to include an alternate caretaker designated in a record by the custodial parent in those circumstances when the parent does not obtain a formal court order to change custody, for example, before going into the hospital or jail, or being deployed. An alternate caretaker is a nonrelative caretaker who is designated in a record by the custodial parent to take care of the children for a temporary time period.

4. Comment: One commenter asked that we clarify that payments must be made to the resident parent, legal guardian, or caretaker relative who is the petitioner or named custodial parent obligee in the petition for support and the support order. According to the commenters, this would ensure that the proposed revision to § 302.38 is not read as authority for State IV–D agencies to unilaterally amend the obligee in a child support case when custody changes.

Response: This provision only addresses a IV–D agency’s requirements when disbursing child support

payments. Section 302.38 does not authorize child support agencies to unilaterally change a child support order when custody changes. State laws govern such changes.

5. Comment: Two commenters suggested changing the language to specifically prohibit disbursements to private collection agencies if that is the sole intent.

Response: Section 454(11)(A) and (B) of the Act clearly provides that a State plan for child support must provide that amounts collected as support shall be distributed as provided in section 457; and provide that any payment required to be made under section 456 or 457 to a family shall be made to the resident parent, legal guardian, or caretaker relative having custody of or responsibility for the child or children. The intent of this rule is to disburse child support payments directly to families.

Our intent is not to regulate private collection agencies, but rather to ensure that child support programs are not facilitating, and the taxpayer is not subsidizing, potentially inappropriate business practices of some private collection agencies not under contract to States. In addition, the ethics codes of most state bar associations prohibit private attorneys from taking fees from current child support, and several prohibit fees from arrears on public policy grounds. In order to provide protections for families and fulfill the intent of the original child support legislation and subsequent amendments, § 302.38 requires that child support payments owed and payable to families be disbursed directly to families.

6. Comment: One commenter suggested changing case closure provisions to authorize case closure if the IV–D applicant contracts with a private collection agency or there is no longer a resident parent, legal guardian, or caretaker to whom the IV–D agency can disburse payments.

Response: We do not agree that the case closure provisions should be changed to authorize case closure if the IV–D applicant contracts with a private collection agency because there is no prohibition against a custodial parent contracting with a private collection agency. If there is no longer a resident parent, legal guardian, or caretaker relative having custody of or responsibility for the child or children, judicially-appointed conservator with a legal and fiduciary duty to the custodial parent and the child, or alternate caretaker designated in a record by the custodial parent to whom the IV–D agency can disburse payments, the State

may close the case if it meets any of the case closure criteria in § 303.11(b).

7. *Comment:* Two commenters suggested that OCSE encourage States to help custodial parents obtain bank accounts so they can avoid predatory fees from check-cashing businesses and not lose considerable shares of their payments to fees.

Response: We support States' issuance of debit cards, which will help custodial parents avoid predatory fees from check-cashing businesses. We encourage States to provide training or technical assistance to custodial and noncustodial parents to improve financial literacy, financial management, and financial responsibility.

8. *Comment:* One commenter suggested OCSE should clarify that IV-D agencies are not responsible to confirm that payments deposited directly to bank accounts are bank accounts under the control of the parent or caretaker. If the parent enrolls in direct deposit, the IV-D agency permits it without further confirmation.

Response: Child support agencies are not required to confirm that the bank accounts, to which the State sends payments, are under the control of the parent or caretaker. We are not making this a new requirement. However, States are required to establish a mechanism to identify payments through the SDU that are going to private collection agencies. See Comments/Responses 15 and 16.

9. *Comment:* One commenter suggested that the rule requires States to presume that the TANF recipient is the legal guardian in such instances.

Response: We disagree. The State determines whether the TANF recipient is the legal guardian.

10. *Comment:* Several commenters were concerned with the use of the term "directly" and felt it may cause issues with the arrangements that families have in order to care for their children. Some commenters feel that 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. Several commenters recommended that OCSE not use the term "directly."

Response: We have expanded the list of entities to whom child support payments under §§ 302.32 and 302.51 can be made to allow for alternate caretakers designated in writing or in a record by custodial parents.

11. *Comment:* One commenter suggested that a clear definition of the term "private collection agency" should be provided by OCSE for purposes of uniformity.

Response: OCSE notes that the Department of Treasury defines a private collection agency as a private sector company specializing in the collection of delinquent debt. A private collection agency will attempt to find and contact a debtor by searching various databases, making telephone calls, and sending collection letters. Once the debtor is located and contacted, the private collection agency will encourage the debtor to satisfy the debt.¹⁶

12. *Comment:* One commenter asked that OCSE address the treatment of interstate/Uniform Interstate Family Support Act (UIFSA) cases where money is sent to the initiating State's SDU and international cases, which may order support payment directly to the child and/or to other caretaker situations.

Response: In interstate cases, § 303.7(d)(6)(v) requires the responding State IV-D agency to collect and forward child support payments to the location specified by the initiating agency. The initiating State IV-D agency must specify its SDU as the location for receiving payments in intergovernmental cases in accordance with section 454B of the Act and § 303.7(d)(6)(v) and is responsible for distributing and disbursing child support payments in accordance with § 303.7(c)(10) and as directed in § 302.38 in the same manner it handles intrastate cases.

Similarly, in an international case where the State is enforcing and collecting child support payments (in accordance with section 454(32) and 459A of the Act) as the responding State IV-D agency, the payment processing requirements in § 303.7(d)(6)(v) apply. State IV-D agencies, as responding agencies in international child support cases, are required to forward child support payments "to the location specified by the initiating agency." The term "initiating agency" is defined in § 301.1 to include an agency of a country that is either a foreign reciprocating country or a country with which the State has entered into a reciprocal arrangement and in which an individual has applied for or is receiving child support enforcement services. In international cases, the Central Authority or its designee in the foreign country will identify where payments should be sent, for example, to the Central Authority, court, custodial parent, caretaker, emancipated child, etc. In these cases, the responding

State IV-D agency satisfies title IV-D requirements by collecting and forwarding collections as directed by the Central Authority in the foreign country in accordance with § 303.7(d)(6)(v).

13. *Comment:* The commenter asked that OCSE clarify if this provision only applies to IV-D agencies and if it applies to child support payments that are subject to income withholding, not subject to income withholding, or both.

Response: This provision applies to all payments that flow through the SDU.

14. *Comment:* One commenter asked how States should handle existing cases that have been set up to send payments to the private collection agencies. For example, should States now ignore the contracts and alternate payee forms submitted by the collection agencies and send any collections directly to the custodial parent? Another commenter asked if States will be obligated to notify obligees that the IV-D agency will no longer disburse his/her payments to a private collection agency as the obligee previously. One commenter indicated that requiring disbursement directly to a family is contrary to existing contracts that custodial parents have signed with private collection agencies.

Response: It is not the responsibility of the child support agency to enforce private contracts. Private contracts are between the parent and the private entity. State child support agencies should notify obligees that the agency will no longer disburse child support collections to private collection agencies. However, the custodial parent can negotiate with private collection agencies, as this provision only deals with the child support agency's disbursement of child support collections. Once the SDU disburses the child support collections to the obligee, the obligee still has the ability to pay the private collection agency's fees for contractual services.

15. *Comment:* One commenter asked for detail on how local child support agencies might identify cases in which the payment is being disbursed to a private collection agency and how they would identify the collection agency.

Response: Each State will be required to set up its own mechanisms to identify cases in which the payment is being disbursed to a private collection agency and to identify the collection agency.

16. *Comment:* One commenter expressed concern that it will be difficult for States to ensure that payments are made directly to the family for non-IV-D SDU cases.

Response: States are required to ensure that payments are made directly to the family for all non-IV-D

¹⁶ Further information is available at: https://www.fiscal.treasury.gov/fservices/gov/debtColl/dms/xserv/pca/debt_pca.htm.

collections being disbursed by the SDU. States should put the necessary policies and procedures in place to ensure that this provision is followed in all applicable cases. States need to develop procedures to obtain information from the custodial parents to ensure that payments for non-IV-D cases are sent directly to the family.

17. Comment: A few commenters opposed the provision, indicating that they had personal experience working with private collection agencies, and proposed that custodial parents should be able to choose where their child support payments are disbursed. One commenter indicated that some States have laws that allow a private collection agency to contract directly with a custodial parent.

Response: This provision does not prohibit custodial parents from entering into agreements with private collection agencies. As noted above, the rule does not prevent companies from charging and collecting fees for services rendered. Parents may pay private collection agencies directly for provided services once they receive disbursement of their child support payments.

Section 302.56—Guidelines for Setting Child Support Orders

General Comments

1. Comment: Several commenters requested public hearings around the country on the proposed changes to the child support guidelines so noncustodial parents could get their chance to tell OCSE what they think.

Response: While the Administrative Procedures Act provides agencies with discretion on whether to hold public hearings, OCSE determined that the opportunity to submit written comments during the comment period provided effective opportunity for public input. Therefore, OCSE did not hold hearings on the NPRM. We received over 2,000 sets of comments from State and county agencies, child support organizations, court associations, advocacy groups, parent groups, researchers, noncustodial parents, and custodial parents, which we carefully considered in developing this final rule.

2. Comment: Several commenters suggested that at high incomes, there should be a fixed dollar cap on child support orders. Their rationale for the dollar cap is that it would reduce conflict, reduce the need to hire lawyers and other professionals, and ultimately increase resources available for the children. Also, they indicated that many studies show that reasonable amounts of child support are more likely to be paid

regularly and the amount of unpaid arrearages will be substantially reduced. Another commenter suggested that the maximum amount of the support obligation should be no more than 20 percent of the obligor's income.

Response: We do not agree that the Federal government should set a cap (either a fixed dollar amount or a maximum percentage rate) on child support payments. States determine the numeric criteria included in their guidelines.

3. Comment: A few commenters proposed that guidelines should call for prompt modification of existing child support orders upon filing of a complaint for modification, if there has been a significant change of circumstances. They thought that "significant change of circumstances" should be defined to include a change in the income and earnings of either parent of 5 percent or more.

Response: The commenters are correct that Federal statute, section 466(a)(10) of the Act, requires review and, if appropriate, adjustment of a child support order upon request of either parent if there is a substantial change of circumstances. However, the NPRM did not propose a change to the existing provision in § 303.8(c) that the "State may establish a reasonable quantitative standard based upon either a fixed dollar amount or percentage, or both. . . ." OCSE already has established timeframes for review and adjustment in § 303.8(e), which indicates that within 180 calendar days of receiving a request for a review or locating the non-requesting parent, whichever occurs later, a State must conduct a review of the child support order and adjust the order upward or downward, upon a showing that there has been a substantial change of circumstances, in accordance with this section. We encourage States to streamline their procedures in order to promptly modify child support orders upward or downward when there are significant changes of circumstances.

4. Comment: Several commenters proposed that guidelines should terminate child support at age 19 or upon graduation from secondary school, whichever occurs earlier. One commenter added that one exception should be if the child who is the subject of the order has special medical or educational needs. The commenter also thought that State statutes providing for the support of older children of intact marriages should be applied identically to parents who are not married. One commenter further explained that married parents are under no legal obligation in most States to support

their children beyond age 19, except in extraordinary circumstances. This commenter questioned why any State has an interest in mandating support for children of divorced and separated parents up to age 23, but not for those of married parents; the commenter found such requirements discriminatory on their face. The commenter also stated that when he last checked, 33 States terminate the child support obligation upon the child's attaining age 19.

Response: While we understand the commenters' point, States have discretion and flexibility in defining the age of emancipation for child support orders. In accordance with the Child Support Enforcement Amendments of 1984, Congress has mandated that States must have procedures that permit the establishment of the paternity of any child at any time prior to such child's 18th birthday. However, it is a matter to be determined by the State in accordance with State law.

Compliance Date [§ 302.56(a)]

1. Comment: While many commenters appreciated that OCSE's proposed revision in § 302.56(a) coincided with the next quadrennial review, for States whose quadrennial reviews commence shortly after the rule is finalized, the commenters indicated that they needed additional time to conduct further analysis and research on implementation issues and potential system changes. They recommended an additional extension of 1 year. In other words, the guideline changes would be required to be in effect within 1 year after completion of the first quadrennial review of its guidelines that commences more than 1 year after the publication of the final rule.

Response: We agree with this suggestion and have made this change in § 302.56(a). We understand that States will need additional time to do research and prepare for the quadrennial review based on the revisions in the final rule. Therefore, we are revising the language in paragraph (a) to indicate that within 1 year after completion of the State's next quadrennial review of its child support guidelines, that commences more than 1 year after publication of the final rule, in accordance with § 302.56(e), as a condition of approval of its State plan, the State must establish one set of guidelines by law or by judicial or administrative action for setting and modifying child support order amounts within the State that meet the requirements in this section.

2. Comment: A few commenters recommended a faster implementation date than what was proposed in the

NPRM. They recommended that the new revisions be effective “within 1 year after publication of the final rule.”

Response: As a result of the final rule, States must review, and if necessary, revise their guidelines. A 1-year implementation date would be unrealistic since it would be a time-consuming and costly process for States to review their guidelines outside of the required 4-year review cycle. We believe that the revisions will require the States to do extensive research and analysis of case data, economic factors, and other factors in developing guidelines that meet the revised Federal requirements.

3. *Comment:* A few other commenters recommended that States would need two quadrennial reviews to implement the final rule. They thought that one quadrennial review period was not sufficient time to obtain new data, complete new economic studies based on that data, build new guidelines tables, and enact the required legislation to approve the new tables.

Response: A two-quadrennial review period, or 8 years, is an unreasonable length of time to delay implementation of these new revisions. States should implement the guidelines, review and adjustment, and civil contempt provisions within a reasonable period of time to ensure that child support orders do not exceed a noncustodial parent’s ability to pay. Most commenters either agreed that conforming guidelines during the next quadrennial review was sufficient time, or commented that the implementation period should be shorter.

Availability of the Guidelines [§ 302.56(b)]

1. *Comment:* We had many commenters suggest that the guidelines be made available to all persons in the State who request them, rather than only to the persons in the State whose duty it is to set child support award amounts. They thought that the guidelines are a matter of enormous public and individual import and therefore must be freely available to all who request them.

Response: We agree that child support guidelines should be readily available to all persons in the State through such means as posting on their Web sites, child support brochures, or some other method for disseminating educational materials. In fact, most States already make their guidelines available on their Web sites. We also agree that principles of government transparency would indicate that the guidelines should be available to the general public since the guidelines impact citizen rights and responsibilities. As a result, we have

removed the phrase “whose duty it is to set child support award amounts” from the end of the sentence in § 302.56(b).

Ability To Pay [§ 302.56(c)(1)]

1. *Comment:* Many commenters agreed that guidelines should result in child support orders based on the noncustodial parent’s ability to pay. One commenter indicated that setting right-sized orders is as much an art as it is a science. Each State has its own set of constituencies and circumstances that influence how guidelines are set. The commenters also thought that the court should have the ability to look at all factors, including the lifestyle of the noncustodial parent, testimony provided in court, previous work history, education and training, and any information provided by the custodial parent. They thought the proposed regulation limited the discretion of the court, and could have a negative impact on the program.

Response: The “ability to pay” standard for setting orders has been Federal policy for almost 25 years,¹⁷ and many existing State guidelines explicitly incorporate the “ability to pay” standard. Consistent with comments, we have redrafted the rule to codify this standard. We also added language that States consider the noncustodial parent’s specific circumstances in making an ability to pay determination when evidence of income is limited, and added language more clearly articulating the basis upon which States may use imputed income to calculate an order. These revisions are discussed in more detail below.

Over time, we have observed a trend among some States to reduce their case investigation efforts and to impose high standard minimum orders without developing any evidence or factual basis for the child support ordered amount. Our rule is designed to address the concern that in some jurisdictions, orders for the lowest income noncustodial parents are not set based upon a factual inquiry into the noncustodial parent’s income and ability to pay, but instead are routinely set based upon a standardized amount well above the means of those parents to pay it. The Federal child support guidelines statute requires guidelines that result in “appropriate child support award” and is based on the fundamental principle that each child support order should take into consideration the

noncustodial parent’s ability to pay.¹⁸ Therefore, we have codified this longstanding policy guidance as the leading guidelines principle in § 302.56(c)(1).

Research suggests that setting an accurate child support order based upon the noncustodial parent’s ability to pay improves the chances that the noncustodial parent will continue to pay over time.¹⁹ Compliance with support orders is strongly linked to actual income and ability to pay.²⁰ Many low-income noncustodial parents do not meet their child support obligations because they do not earn enough to pay what is ordered.²¹ Orders set beyond a noncustodial parents’ ability to pay can result in a number of deleterious effects, including unmanageable debt, reduced low-wage employment, increased underground activities, crime, incarceration, recidivism, and reduced contact with their children.²² Research consistently finds that orders set too high are associated with less consistent payments, lower compliance, and increased child support debt.²³ In fact,

¹⁸ Section 467(a) of the Social Security Act, 42 U.S.C. 667(a).

¹⁹ HHS Office of Inspector General, *The Establishment of Child Support Orders for Low-Income Non-custodial Parents*, OEI-05-99-00390, (2000), available at: <http://oig.hhs.gov/oei/reports/oei-05-99-00390.pdf>.

²⁰ Meyer, Daniel, R. Yoonsook Ha, and Mei-Chen Hu, “Do High Child Support Orders Discourage Child Support Payments?” *Social Service Review*, (2008), 82(1): 93–118; Huang, Chien-Chung, Ronald B. Mincy, and Irwin Garfinkel, “Child Support Obligations and Low-Income Fathers” *Journal of Marriage and Family*, (2005), 67(5): 1213–1225.

²¹ Kathryn Edin and Timothy J. Nelson, *Doing the Best I Can: Fatherhood in the Inner City*, University of California Press, (2013); Pearson, Jessica, Nancy Thoennes, Lanae Davis, Jane C. Venohr, David A. Price, and Tracy Griffith, 2003, *OCSE responsible fatherhood programs: Client characteristics and program outcomes*, available at: <http://www.frpn.org/file/61/download?token=CNMvAIQn>.

²² Pamela Holcomb, Kathryn Edin, Jeffrey Max, Alford Young, Jr., Angela Valdovinos D’Angelo, Daniel Friend, Elizabeth Clary, Waldo E. Johnson, Jr. (2015), *In Their Own Voices: The Hopes and Struggles of Responsible Fatherhood Program Participants in the Parents and Children Together Evaluation*. Report submitted to the Office of Planning, Research, and Evaluation. OPRE Report #2015-67 available at: <http://www.acf.hhs.gov/programs/opre/resource/in-their-voices-hopes-struggles-responsible-fatherhood-parents-children-evaluation>; and Maureen Waller and Robert Plotnick. (2001). “Effective child support policy for low-income families: Evidence from street level research” *Journal of Policy Analysis and Management* 20(1): 89–110.

²³ Meyer, Daniel, R. Yoonsook Ha, and Mei-Chen Hu (2008) “Do High Child Support Orders Discourage Child Support Payments?” *Social Service Review*, 82(1): 93–118; Huang, Chien-Chung, Ronald B. Mincy, and Irwin Garfinkel. (2005) “Child Support Obligations and Low-Income Fathers” *Journal of Marriage and Family*, 67(5): 1213–1225; Carl Formoso, *Determining the Composition and Collectibility of Child Support*

¹⁷ AT-93-04, available at: <http://www.acf.hhs.gov/programs/css/resource/presumptive-guidelines-establishment-support-unreimbursed-assistance-and-PIQ-00-03>, available at: <http://www.acf.hhs.gov/programs/css/resource/state-iv-d-program-flexibility-low-income-obligors>.

studies find that orders set above 15 to 20 percent of a noncustodial parent's income increases the likelihood that the noncustodial parent will pay less support and pay less consistently, resulting in increased arrears.²⁴ The conclusion from this research is that families do not benefit from orders that noncustodial parents cannot comply with because of their limited income. High orders do not translate to higher payments when the noncustodial parent has limited income.²⁵

The final rule added paragraph (c)(1) to provide that the child support order is based on the noncustodial parent's earnings, income, and other evidence of ability to pay. Paragraph (c)(1)(iii) requires consideration of the specific circumstances of the noncustodial parent when imputing income. This will be discussed in further detail later in this section.

2. Comment: One commenter recommended that a sentence be added to the regulation stating that the receipt of Supplemental Security Income (SSI) or combined SSI and Social Security Disability Income (SSDI) benefits establishes a *prima facie* case that the individual does not have the ability to pay child support unless the presumption of insufficient means and inability to work is successfully rebutted by submission of opposing evidence.

Response: When the noncustodial parent is receiving SSI or concurrent SSI and SSDI benefits, the State has

Arrearages: Final Report, Volume 1: The Longitudinal Analysis, Washington State Division of Child Support (2003), available at: <https://www.dshs.wa.gov/sites/default/files/ESA/dcs/documents/cvol1prn.pdf>; Mark Takayesu, *How Do Child Support Order Amounts Affect Payments and Compliance?* Orange County, CA Department of Child Support Services, (2011), available at: http://ywcss.com/sites/default/files/pdf-resource/how_do_child_support_orders_affect_payments_and_compliance.pdf.

²⁴ HHS Office of Inspector General, *The Establishment of Child Support Orders for Low-Income Non-custodial Parents*, OEI-05-99-00390, (2000), available at: <http://oig.hhs.gov/oei/reports/oei-05-99-00390.pdf>; Carl Formoso, *Determining the Composition and Collectibility of Child Support Arrearages: Final Report, Volume 1: The Longitudinal Analysis*, Washington State Division of Child Support (2003), available at: <https://www.dshs.wa.gov/sites/default/files/ESA/dcs/documents/cvol1prn.pdf>; and Mark Takayesu, *How Do Child Support Order Amounts Affect Payments and Compliance?* Orange County, CA Department of Child Support Services, (2011), available at: http://ywcss.com/sites/default/files/pdf-resource/how_do_child_support_orders_affect_payments_and_compliance.pdf.

²⁵ National Women's Law Center and the Center on Fathers, Families, and Public Policy, *Dollars and Sense: Improving the Determination of Child Support Obligations for Low-Income Mothers, Fathers, and Children* (2002), available at: <http://www.nwlc.org/sites/default/files/pdfs/CommonGroundDollarsandSense.pdf>.

flexibility on whether and how to address the receipt of such benefits in its guidelines. We encourage States to consider receipt of SSI and concurrent SSDI benefits as a part of the circumstances in the case that they will consider in ensuring that support orders are based on "ability to pay." In order to receive these benefits, an individual must have a significant disability that prevents or limits work, and in the case of SSI (including concurrent receipt), eligibility is also based on an individual's basic needs. Regardless of whether the State considers SSI and concurrent SSDI benefits as income for purposes of order establishment, it may not garnish these benefits in accordance with § 307.11.

All Income [§ 302.56(c)(1)(i)]

1. Comment: Several commenters were opposed to our proposed revisions in § 302.56(c)(1), which has been redesignated as paragraph (c)(1)(i) because they questioned the difference between "actual" earnings and income and "all" earnings and income. They thought that "actual" income was too restrictive. They were concerned that the NPRM would introduce uncertainty into State guidelines definitions of "income" if the provision requiring "all income" to be considered were eliminated. One commenter asked whether replacing the term "all" with the term "actual" prevented States from considering depreciation as an adjustment to a parent's income. The commenter thought that the revision would make it difficult to determine the income of contractors and the self-employed. Other commenters thought that our proposed revision only allowed consideration of the use of the noncustodial parent's "actual" income in calculating child support obligations, in other words, the State could never use imputed income, but would be limited to actual income in every factual situation, despite evidence of ability to pay.

Response: Based on the comments that we received on proposed paragraph (c)(1), redesignated as paragraph (c)(1)(i), we did not make the proposed revision, but instead codified the longstanding guidelines standard that orders be based upon "earnings, income, and other evidence of ability to pay." We also retained the provision in the former rule to require consideration of "all earnings and income" in paragraph (c)(1). To be clear, the guidelines must provide that orders must be based upon evidence of the noncustodial parent's earnings and income and other evidence of ability to pay in the specific case. In addition, the

guidelines must provide that if income is imputed, the amount must reflect the specific circumstances of the noncustodial parent to the extent known, and may not order a standard amount imposed in lieu of fact-gathering in the specific case. The expectation is that in IV-D cases, the IV-D agency will investigate each case sufficiently to base orders on evidence of the noncustodial parent's ability to pay. Orders issued in IV-D cases should not reflect a lower threshold of evidence than applied in private cases represented by legal counsel.

2. Comment: One commenter requested clarification regarding what constitutes "actual" earnings and income in the proposed paragraph (c)(1). For example, would it be permissible under the proposed regulatory revisions for a noncustodial parent to allocate a greater percentage of his/her earnings as voluntary contributions to a deferred compensation plan and thereby minimize "actual" earnings? Many commenters suggested that the Federal government define income as the Federal Adjusted Gross Income, while others suggested that we consider the household income of the custodial parent. Other commenters suggested that Smith-Ostler orders²⁶ be eliminated or better reflect the tax consequences of the payor. One commenter also suggested that the noncustodial parent's ability to pay be calculated after mandatory deductions, such as taxes. Another commenter was concerned about how actual earnings and income would be determined and what benefits, resources, and sources of income would be considered for the purpose of this provision.

Response: In response to comments, the final rule requires States to consider all earnings and income for the noncustodial parent under paragraph (c)(1)(i), subject to the requirement that orders be based on earnings, income, and other evidence of ability to pay. We are establishing only minimum components for child support guidelines. States have the discretion and responsibility to define earnings and income, for example in the manner proposed by commenters, since they are in a better position to evaluate the economic factors within their States and

²⁶ Sometimes one or both parents have income that varies, fluctuates, or is otherwise unpredictable. When calculating child support, the court often uses a "Smith-Ostler order" to account for commissions, bonuses, or overtime income. In these cases, the court will set an amount for child support and issue a Smith-Ostler order to account for overtime and bonus income. The Smith-Ostler order will set a fixed percentage of all bonus income to be paid as additional child support.

have broad discretion to set guidelines policies.

3. *Comment:* One commenter suggested that guidelines be required to take into consideration the assets of the noncustodial parent, in addition to earnings and income.

Response: We have decided to retain the former language in the rule that “all” earnings and income be taken into consideration in § 302.56(c)(1)(i). This language has been extensively interpreted and applied in every State for over two decades. Retaining the term “all income” allows States to consider depreciation, deferred income, or other financial mechanisms used by self-employed noncustodial parents to adjust their actual income. In addition, we added “assets” to the list of specific circumstances in paragraph (c)(1)(iii) that the State must consider when the State guidelines authorize imputation of income. States have discretion to determine whether to add assets or define which assets should be considered in their child support guidelines as a basis for determining child support amounts.

4. *Comment:* Many commenters proposed that actual income and earnings should be considered for both parents. In support, they pointed out that the 1988 Advisory Panel on Child Support Guidelines (on which the original § 302.56 language was based) recommended that: “Both parents should share legal responsibility for support of their children, with the economic responsibility divided between the parents in proportion to their income.” This recommendation was never incorporated into the Federal regulations at § 302.56. The commenters believed that now was the time to include a requirement to consider the income and earnings of both parents.

Response: We agree that both noncustodial and custodial parents have a responsibility to support their children. However, the NPRM did not propose that States revise this aspect of their child support guidelines, which impacts the particular guidelines model a State has adopted. Some States do not explicitly take the custodial parent’s income into account in the guidelines model they have adopted. The NPRM did not address State guidelines models. Therefore, the adoption of a guidelines model continues to be a matter of State determination.

However, in § 302.56(c)(1)(i) through (iii), we have added a parenthetical to indicate that at the State’s discretion, the State may consider the circumstances of the custodial parent if it is required or applicable in their guidelines computation. We encourage

States that use the income shares model for guidelines, which considers the custodial parent’s earnings and income, to also consider it for applying § 302.56(c)(1)(i) through (iii).

5. *Comment:* One commenter indicated that we should require States to have laws that require the parties (who have the best access to their own income information) to provide financial data so as to ensure accurate and appropriate orders.

Response: We have revised § 303.4, *Establishment of support obligations*, to require State IV–D agencies to investigate earnings and income information through a variety of sources, for example, by expanding data sources and implementing the use of parent questionnaires, “appear and disclose” procedures, and case conferencing. Often, better investigations would enable States to obtain more accurate information needed in establishing and modifying child support orders. We know that many States already have procedures in place to obtain financial information from the parents. In fact, in cases where the noncustodial parent does not receive a salary or wages, income, assets, and standard of living information can often be obtained directly through contact with both parents. State law may require the parties to provide this information to the child support agency.

6. *Comment:* One commenter stated that instead of changing the laws on how courts establish child support, the National Directory of New Hires (NDNH) should provide more timely and accurate information. The commenter recommended its expansion to include data on Form 1099 payments as well as assets and income sources. The commenter also stressed the need for States to enforce laws requiring the timely and complete reporting of information to the State Directory of New Hires (SDNH). The commenter noted that consistent receipt of this information would assist IV–D agencies in establishing support based on “actual” income.

Response: We appreciate the suggested improvements; however, expanding the NDNH to include Form 1099 payments requires statutory changes by Congress. Regarding the SDNH, section 453A of the Social Security Act authorizes States to impose civil money penalties on noncomplying employers. Specifically, a State has the option to set a State civil money penalty which shall not exceed (1) \$25 per failure to meet the requirements of this section with respect to a newly hired employee; or (2) \$500 if, under State law, the failure is the result of a

conspiracy between the employer and the employee to not supply the required report or to supply a false or incomplete report.

Subsistence Needs of the Noncustodial Parents [§ 302.56(c)(1)(ii)]

1. *Comment:* There were many suggestions related to the requirement that State guidelines “[t]ake into consideration the noncustodial parent’s subsistence needs” in proposed § 302.56(c)(4), which was redesignated as (c)(1)(ii) in the final rule. Many commenters requested more guidance on subsistence needs or wanted OCSE to develop an operational definition. Others asked what the State should do when the noncustodial parent is making less than the subsistence needs. Many commenters thought that the States need discretion to carefully weigh and balance the considerations of low-income obligors and the needs of the children and the custodial parents’ households. Other commenters requested that OCSE also consider the subsistence needs of the custodial parent. Some were opposed to the proposed revision because they did not think that Federal regulations were necessary since many States already have low-income formulas. However, many more commenters indicated that we need stronger protections to recognize the subsistence needs of very poor noncustodial parents.

Response: We considered these comments in revising the NPRM. In the final rule in paragraph (c)(1)(ii), we require that child support guidelines must “[t]ake into consideration the basic subsistence needs of the noncustodial parent (and at the State’s discretion, the custodial parent and the children) who has a limited ability to pay by incorporating a low-income adjustment, such as a self-support reserve or some other method determined by the State.” A low-income adjustment is the amount of money a parent owing support needs to support him or herself at a minimum level. It is intended to ensure that a low-income parent can meet his or her own basic needs as well as permit continued employment. A low-income adjustment is a generic term. A self-support reserve is an example of a low-income adjustment that is commonly used by the States.

The revision allows States’ flexibility to determine the best approach to adjusting their guidelines to take into consideration the basic subsistence needs of low-income noncustodial parents. All but five States have already incorporated such low-income adjustments such as self-support reserves into their child support

guidelines.²⁷ We encourage States to continue to review their policies affecting low-income parents during each quadrennial review to assure that the policies are working as intended.

Our goal is to establish and enforce orders that actually produce payments for children. Both parents are expected to put their children first and to take the necessary steps to support them. However, if the noncustodial parent cannot support his or her own basic subsistence needs, it is highly unlikely that an order that ignores the need for basic self-support will actually result in sustainable payments. One of the unintended, but pernicious, consequences of orders that are not based on ability to pay is that some noncustodial parents will exit low wage employment and either avoid the system entirely or turn to the drug trade or other illegal activities to pay support obligations and contempt purge payments.²⁸ It is not in children's best interests and counterproductive to have their parents engage in a cycle of nonpayment, illegal income generation, and incarceration.

2. Comment: A few commenters indicated that they thought State laws must be flexible enough to address both low-income situations and those situations where noncustodial parents use creative means to avoid their responsibility.

Response: We agree with these comments and have revised the child support guidelines requirements to more clearly reflect some of the commenters' concerns. The order establishment process must be able to hold noncustodial parents accountable

²⁷ Venohr, Jane, "Child Support Guidelines and Guidelines Reviews: State Differences and Common Issues," *Family Law Quarterly*, 47(3), Fall 2013, pages 327–352, available at: http://static1.squarespace.com/static/5154a075e4b08f05dc20996/t/54e34d2e4b04c0eab578456/1424182738603/3fall13_venohr.pdf.

²⁸ Mincy, Ronald et al, *Failing Our Fathers: Confronting the Crisis of Economically Vulnerable Nonresident Fathers*, Oxford University Press, 2014; Kotloff, Lauren, J., *Leaving the Street: Young Fathers Move From Hustling to Legitimate Work*, Public/Private Ventures (2005), available at <https://hmrj.acf.hhs.gov/resources/fathers-at-work/initiative-reports/leaving-the-street-young-fathers-move-from-hustling-to-legitimate-work/>; and Rich, Lauren, M., "Regular and Irregular Earnings of Unwed Fathers: Implications for Child Support Practices." *Children and Youth Services Review*, April–May 2001, 23(4): 353–376, which is available at: https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=0ahUKewiq2fW_i8nKAhXEtIMKHabpD5gQFggmMAE&url=http%3A%2F%2Fwww.sciencedirect.com%2Fscience%2Farticle%2Fpii%2FS0190740901001396%2Fpdf%3Fmd5%3D7f4e344844155112ff3e1b55528fbde6%26pid%3D1-s2.0-S0190740901001396-main.pdf&usq=AFQjCNHlcoC8Zj_abOHen6w2LXDgEMYA&sig2=LOBYbUWWp2UgHBqV5BD-Og&bvm=bv.112766941,d.dmo.

when they have the means to pay support but attempt to withhold their resources from their children. The challenge is distinguishing between cases in which the noncustodial parent has the means to pay and those in which the noncustodial parent is unable to pay much. More contact with both parents and investigation into the facts will help the child support agency learn more about the noncustodial parent's specific circumstances. Custodial parents can be a particularly good source of information. Imputation should not serve as a substitute for fact-gathering.

3. Comment: Several commenters suggested that we define subsistence needs or low-income in this rule.

Response: OCSE does not agree with this suggestion. States should use their discretion and flexibility to define these terms based on the economic and demographic factors in their State.

Imputing Income [§ 302.56(c)(1)(iii)]

1. Comment: Many commenters agreed that child support guidelines should reflect the basic statutory principle that child support orders are based on the noncustodial parent's ability to pay. However, many commenters opposed this aspect of the NPRM because they believed we were eliminating the practice of imputing income to the noncustodial parent to establish orders. Although our NPRM preamble indicated otherwise, several commenters thought that imputed income would only be allowed when a noncustodial parent's standard of living was inconsistent with reported income. Commenters articulated three types of circumstances where they believed imputation is appropriate and grounded in case law: (1) When a parent is voluntarily unemployed, (2) when there is a discrepancy between reported earnings and standard of living, and (3) when the noncustodial parent defaults, refusing to show up or provide financial information to the child support agency. Some commenters thought that the courts should be able to evaluate the circumstances of the case when imputing income for the noncustodial parent.

One commenter referenced the National Child Support Enforcement Association policy statement, issued on January 30, 2013, that indicated: "As a general rule, child support guidelines and orders should reflect actual income of parents and be changed proactively to ensure current support orders reflect current circumstances of the parents and to encourage regular child support payments."

Response: There was considerable misunderstanding about the scope and intent on this aspect of the NPRM. Our intent was to require a stronger focus on fact-gathering and setting orders based on evidence of the noncustodial parent's actual income and ability to pay, rather than based on standard imputed (presumed)²⁹ amounts applied across the board. However, we also intended to recognize certain established grounds for imputation when evidentiary gaps exist, including voluntary unemployment and discrepancies between reported income and standard of living.

Considering commenters' concerns and suggested revisions, we made significant revisions in paragraph (c) to clearly articulate the longstanding requirement that State guidelines must provide that child support orders are based on the noncustodial parent's earnings, income, and other evidence of ability to pay. We have also added in paragraph (c)(1)(iii) providing that when imputation of income is authorized, the guidelines must take into consideration the specific circumstances of the noncustodial parent (and at the State's discretion, the custodial parent) to the extent known.

Presently, some State guidelines allow income to be imputed without evidence that the noncustodial parent has or can earn a standard amount of income. Although the original use of imputation was to fill specific evidentiary gaps in a particular case, over time we have observed a trend among some States of reducing their case investigation efforts and imposing high standard minimum child support orders across-the-board in low-income IV–D cases, setting orders without any evidence of ability to pay.³⁰

Many States do take steps to determine the factual circumstances in a particular case and build an

²⁹ OCSE views presumed income and imputed income similarly since they are both based on fictional income. Therefore, we use these terms interchangeably.

³⁰ According to a report recently released by the National Center for State Courts on civil litigation generally (and not specifically child support litigation), recent studies have found widespread instances of judgments entered in high-volume, civil cases in which the defendant did not receive notice of the complaint or the plaintiff failed to demonstrate an adequate basis for relief sought. The report "strongly endorsed" by State chief justices, in July 2016, recommends that courts must implement systems to ensure that the entry of final judgments complies with basic procedural requirements for...sufficiency of documentation supporting the relief sought. For further information, see *Call to Action: Achieving Civil Justice for All*, Recommendations to the Conference of Chief Justices by the Civil Justice Improvements Committee, pp. 33–34, available at: <https://www.ncsc.org/-/media/Microsites/Files/Civil-Justice/NCSC-CJI-Report-Web.ashx>.

evidentiary basis for the order, imputing income on a case-by-case basis when there is an evidentiary gap. However, some jurisdictions set high minimum orders across the board in low-income cases, regardless of available evidence of the noncustodial parent's specific circumstances. Others do so, except under a very narrow set of circumstances, for example, a demonstrated disability. In fact, some States impute standard amounts of income even when there is evidence of involuntary unemployment, part-time employment, and low earnings.

Overuse of imputed income frequently results in IV–D orders that are not based on a realistic or fair determination of ability to pay, leading to unpaid support, uncollectible debt, reduced work effort, and underground employment. Because such orders are not based on the noncustodial parent's ability to pay, as required by Federal guidelines law, they typically do not yield consistent payments to children.

While States have discretion to determine when imputation of income is appropriate and allowed, section 467 of the Act indicates that “a written finding or specific finding that the application of the guidelines would be unjust or inappropriate in a particular case, as determined under criteria established by the State, shall be sufficient to rebut the presumption in that case.” Thus, we encourage States to establish deviation criteria when to impute income and document the deviation in a finding on the record that is rebuttable. Many, but not all, States currently use deviation criteria and make a rebuttable finding on the record when they impute income as the basis for an order in a particular case. Fictional income should not be imputed simply because the noncustodial parent is low-income, but instead only used in limited circumstances when the facts of the case justify it.

We revised § 302.56(c)(1) to clarify that the child support guidelines established under paragraph (a) must provide that the child support order is based on the noncustodial parent's earnings, income, and other evidence of ability to pay. The guidelines must take into consideration all earnings and income, the basic subsistence needs of the noncustodial parent who has a limited ability to pay, and if income is being imputed, the specific circumstances of the noncustodial parent (and at the State's discretion, the custodial parent) to the extent known, including such factors as the noncustodial parent's assets, residence, employment and earnings history, job skills, educational attainment, literacy,

age, health, criminal record and other employment barriers, and record of seeking work, as well as the local job market, the availability of employers willing to hire the noncustodial parent, prevailing earnings level in the local community, and other relevant background factors in the case.

This approach emphasizes the expectation that support orders will be based upon evidence to the extent available, while recognizing that in limited circumstances, income imputation allows the decision-maker to address evidentiary gaps and move forward to set an order. While we recognize that most State IV–D agencies have limited resources, case investigation to develop case-specific evidence is a basic program responsibility. The revised final rule is closely aligned with many of the comments we received. Imputed or default orders should occur only in limited circumstances.³¹ We also revised paragraph (c)(1)(iii) to address concerns about the need for State guidelines to consider the specific circumstances of the noncustodial parent when imputing income.

2. *Comment:* Most commenters were concerned that the proposed revisions in § 302.56(c)(4), which has been redesignated and revised as paragraph (c)(1), related to exceptions to the “actual” income provisions were too vague, restrictive, and did not sufficiently provide for a broad range of circumstances where it may be appropriate to impute income, such as when the noncustodial parent is working in the underground economy or failing to provide sufficient evidence to the court. Many commenters were concerned that the NPRM curtailed the ability of States to impute income to ensure support for children. One commenter supported reducing the use of default orders; however, the commenter stated that default orders continue to be necessary when the noncustodial parent refuses to appear and participate, despite multiple opportunities provided by the court and the IV–D agency. Many commenters further indicated that while the NPRM did not expressly prohibit default orders, there appeared 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. They also read the

NPRM to mean that if the IV–D agency could not obtain current income information or evidence of current lifestyle, then the NPRM would prohibit an entry of a support order altogether. These commenters stated that such a 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 court in order to force a zero dollar order. They considered this a perverse incentive to avoid support that was not in the best interest of the child and the family. While many commenters were in favor of right-sized orders, they believed the proposed language was too limiting to allow setting a fair order in many circumstances.

Response: As we have previously discussed in response to comments, it was not OCSE's intention in the NPRM to limit imputation of income only to situations where there is evidence that the noncustodial parent's standard of living is inconsistent with reported income. The State has the discretion to determine when it is appropriate to impute income consistent with guidelines requirements. Therefore, we revised the proposed language in § 302.56(c)(1) to clearly indicate that a child support order must be based on the noncustodial parent's ability to pay using evidence of the parent's earnings, income, and other evidence of ability to pay whenever available. We have also added § 302.56(c)(1)(iii) to indicate that if imputation is authorized in the State's guidelines, the State's guidelines must require the State to consider evidence of the noncustodial parent's specific circumstances in determining the amount of income that may be imputed, including such factors as the noncustodial parent's assets, residence, employment and earnings history, job skills, educational attainment, literacy, age, health, criminal record and other employment barriers, and record of seeking work, as well as the local job market, the availability of employers willing to hire the noncustodial parent, prevailing earnings level in the local community, and other relevant background factors.

If the State IV–D agency has no evidence of earnings and income or insufficient evidence to use as the measure of the noncustodial parent's ability to pay, then we have added in § 303.4(b)(3) that the State's IV–D agency's recommended support obligation amount should be based on available information about the specific circumstances of the noncustodial parent, including such factors as those listed in § 302.56(c)(1)(iii). It is the IV–

³¹ The National Child Support Enforcement Association policy statement, *Setting Current Support Based on Ability to Pay*, dated January 30, 2013, is available at: http://www.ncsea.org/documents/Ability_to_Pay-final.pdf.

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

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

3. Comment: One commenter supported imputing income, when appropriate in an individual case, if there was evidence showing that either parent was employed voluntarily less than 30 hours of week. Moreover, if the noncustodial parent was gainfully employed for at least 30 hours per week, this commenter believed that no income should be imputed to the noncustodial parent if the custodial parent was working voluntarily less than 30 hours per week. Finally, the commenter believed that exceptions should be allowable if the custodial parent had children with special medical or educational needs or children less than 2 years of age.

Response: We do not agree that these specific suggestions should be incorporated into Federal rules. The commenter suggests a generic "30 hour" rule imposed without a case-by-case review of the specific circumstances of the noncustodial parent, evidence of the voluntariness of unemployment or underemployment, and a case-specific

determination of the noncustodial parent's ability to pay. Also, as discussed previously, States may determine when imputation of income is allowed, so long as the resulting order considers the factors listed in § 302.56(c)(iii) and reflects a noncustodial parent's ability to pay it.

4. Comment: One commenter was opposed to the proposed § 302.56(c)(4), which has been redesignated and revised as paragraph (c)(1), because the language would apply to both IV-D and non-IV-D cases, resulting in imposing substantial revisions on the private bar and judiciary without justification. Another commenter, noting that guidelines are used not only by the IV-D agency, but also by the entire private bar and *pro se* litigants, was concerned that most private attorneys would not have access to income reports for the parents. Another commenter indicated that many of the proposed requirements contained in the NPRM would not receive full support by non-IV-D representatives, particularly where the new requirements would have the effect of reducing and/or limiting the flexibility of attorneys, parties, and the judicial authority in non-IV-D matters. As an example, the commenter stated that imposing limitations on imputing income would affect all family cases and could be seen as a restriction on judicial authority. Finally, another commenter believed that child support guidelines have historically been a State issue with much flexibility, as the guidelines impact both IV-D and non-IV-D cases.

Response: The final rule amends existing OCSE regulations implementing Federal statutory requirements. State child support guidelines were adopted pursuant to a title IV-D State plan requirement and a condition of Federal funding, and specific guidelines requirements derive from Federal law. Our rule is modeled on the best practices currently implemented in a number of States to improve order accuracy and basic fairness, and is based on OCSE's authority to set standards to establish requirements for effective program operation under section 452(a)(1) and State plan provision that the State will comply with such requirements and standards under section 454(13) of the Act. In promulgating these rules, our primary concern is that in some jurisdictions, orders are not based on a factual determination of a particular noncustodial parent's ability to pay, but instead are based upon on standardized amounts that are routinely imputed to indigent, typically unrepresented,

noncustodial parents.³³ Imputed income is fictional income, and without an evidentiary foundation of ability to pay, orders cannot be considered fair and accurate.

Compared to IV-D cases, private cases are more likely to involve legal counsel, and result in child support orders based on actual income. When imputed income is used in private cases, it typically is used in the way originally intended—to fill evidentiary gaps in specific cases to support a reasonable inference of the noncustodial parent's ability to pay in situations of voluntary unemployment or discrepancies in reported income and standard of living. We point out that private litigants are expected to support their position with evidence. The majority of the NPRM comments, including comments from courts and attorneys, support the direction of our rules.

To address the concerns related to the general applicability of State guidelines, we moved the requirements specifically related to State IV-D agencies under § 303.4, *Establishment of support obligations*, and those requirements related to all cases in the State under § 302.56, *Guidelines for setting child support orders*. Although the NPRM did not include any revisions to § 303.4, we received numerous comments on IV-D agency responsibilities in determining the noncustodial parent's income and imputation of income when establishing child support orders pursuant to § 303.4. Based on these comments, we made revisions to § 303.4 that result in a more narrow application of the regulation. We revised § 303.4(b) to require IV-D agencies to use appropriate State statutes, procedures, and legal processes in establishing the child support obligation and assist the decision-maker in accordance with § 302.56 of this chapter, which must include, at a minimum:

(1) Taking reasonable steps to develop a sufficient factual basis for the support obligation, through such means as investigations, case conferencing, interviews with both parties, appear and

³² Cammet, Ann, "Deadbeats, Deadbrokes, and Prisoners," *Georgetown Journal on Poverty Law & Policy*, 18(2): 127–168, Spring, 2011, which is available at: http://ywcss.com/sites/default/files/u258/deadbeats_deadbrokers_and_prisoners_university_of_las_vegas.pdf; Brito, Tonya, "Fathers Behind Bars: Rethinking Child Support Policy Toward Low-Income Noncustodial Fathers and Their Families," *The Journal of Gender, Race & Justice*, 15:617–673, Spring 2012, which is available at: http://racism.org/index.php?option=com_content&view=article&id=1514:fathersbehind-bars&catid=53&Itemid=176&showall=1&limitstart=; and HHS Office of Inspector General, *The Establishment of Child Support Orders for Low-Income Non-custodial Parents*, OEI-05-99-00390, (2000), available at: <http://oig.hhs.gov/oei/reports/oei-05-99-00390.pdf>.

³³ Elaine Sorensen, Liliana Sousa, and Simon Schaner, *Assessing Child Support Arrears in Nine Large States and the Nation* (2007), available at: <https://aspe.hhs.gov/basic-report/assessing-child-support-arrears-nine-large-states-and-nation>; Mark Takayesu, *How Do Child Support Order Amounts Affect Payments and Compliance?* Orange County, CA Department of Child Support Services, (2011), available at: http://ywcss.com/sites/default/files/pdf-resource/how_do_child_support_orders_affect_payments_and_compliance.pdf; and Passarella, Letitia Logan and Catherine E. Born, *Imputed Income Among Noncustodial Parents: Characteristics and Payment Outcomes*, University of Maryland School of Social Work (2014), available at: <http://www.familywelfare.umaryland.edu/cscase/loadspecialreports.htm>.

disclose procedures, parent questionnaires, testimony, and electronic data sources;

(2) Gathering information regarding the earnings and income of the noncustodial parent and, when earnings and income information is unavailable or insufficient in a case, gathering available information about the specific circumstances of the noncustodial parent, including such factors as those listed under § 302.56(c)(iii);

(3) Basing the support obligation or recommended support obligation amount on the earnings and income of the noncustodial parent whenever available. If earnings and income are unavailable or insufficient to use as the measure of the noncustodial parent's ability to pay, then the recommended support obligation amount should be based on available information about the specific circumstances of the noncustodial parent, including such factors as those listed in § 302.56(c)(iii); and

(4) Documenting the factual basis for the support obligation or recommended support obligation in the case record.

IV–D agencies have a basic responsibility to take all necessary steps to investigate the case and provide the court or administrative authority information relating to the income, earnings, and other specific circumstances of the noncustodial parent so that the decision-maker has an evidentiary foundation for establishing an order amount based on the noncustodial parent's ability to pay. These required steps merely specify the standard case review procedures that many States currently use to investigate and obtain income information for the parties.

Since the beginning of the program, we have provided FFP to IV–D agencies undertaking investigation activities involving the development of evidence, and, when appropriate, bringing court actions for the establishment and enforcement of support obligations (§ 304.20(b)(3)(i)), and determining the amount of the child support obligation including developing the information needed for a financial assessment (§ 304.20(b)(3)(ii)). However, over time, and as resources have become more constrained, we have found that some jurisdictions no longer put resources into case investigation, and instead rely on standard presumptions and fictional income to set orders.

It is critical that a IV–D agency conducts investigative work prior to sending a case to the court since child support agencies have many tools available to gather the information. There are many procedural techniques

and practices that help facilitate establishing an appropriate child support order.³⁴ Many States have implemented early intervention, parental engagement, and information-gathering techniques, and we encourage all States to implement these successful practices.

The final rule revises regulations governing the State's guidelines to focus on the fundamental principle that child support obligations are based on the noncustodial parent's ability to pay. This principle should be applied to both IV–D and non-IV–D cases in accordance with the Federal guidelines statute. The revisions have been addressed throughout this section.

5. *Comment:* One commenter supported requiring States to consult and use all data sources available to determine income, such as quarterly wage and new hire data before imputing income (such as imputing a full-time minimum wage salary). Commenters also suggested that States be required to have a methodology for imputing income and to record how and why imputation was done, similar to the requirement that there be a finding when an order deviates from the guideline amount. In this way, imputation would not be prohibited, but would further OCSE's goal to discourage routine use of imputation without sufficient investigation or consideration of the facts in a particular case.

Response: As discussed previously, the final rule at § 302.56(g) reflects these comments by providing a framework for determining the amount of imputed income. A written or specific finding on the record that application of the guidelines would result in an inappropriate or unjust order is required to rebut the presumption that the application of the guidelines results in the correct child support amount. Findings that rebut the guidelines shall state the amount of support that would have been required under the guidelines and include a justification as to why the order varies from the guidelines. Therefore, support obligations can deviate from guidelines, but the decision-maker must state the reasons, on the record, that justify the deviation and consider the factors listed in § 302.56(c)(1)(iii). Several States treat income imputation as a deviation from the guidelines, with a finding on the record.

³⁴ *Setting Appropriate Child Support Orders: Practical Techniques Used in Child Support Agencies and Judicial Systems in 14 States*, Subcommittee Report, National Judicial-Child Support Task Force, Avoiding Inappropriate Orders Subcommittee, August 2007.

6. *Comment:* One commenter thought that there was conflict between the proposed § 302.56(c)(1) requiring that orders be based on actual income and proposed paragraph (c)(4) requiring that any support ordered amounts be based on available data related to earnings, income, assets, or such testimony that income or assets are not consistent with the noncustodial parent's current standard of living. This commenter interpreted proposed paragraph (c)(1) as based on "actual" income only, while proposed paragraph (c)(4) appeared to provide for income imputation if evidence of ability to pay existed. The commenter noted that the actual income requirement could be used to argue against income imputation in cases where the parent was capable of earning income but was voluntarily unemployed or underemployed or where there was no evidence of income because the parent worked in the underground economy. The commenter explained that economists estimate that the underground economy amounts to \$2 trillion. This volume and type of income should not be overlooked in the guidelines calculation. The commenter further indicated that evidence from a study conducted by Mincy and Sorensen (1998) found that 34 to 41 percent of young noncustodial fathers are not paying child support, but are actually able to pay.³⁵

Response: As we discussed under Comment/Response 1 in this subsection, States have discretion to determine the criteria on when to deviate from guidelines. Therefore, we have revised proposed paragraph § 302.56(c)(4), which is redesignated as paragraphs § 302.56(c)(1)(ii) and (iii).

It is important to note that the referenced study examined all young noncustodial fathers, not those with a child support order, and is based on data that are over 25 years old and reflect very different economic conditions than exist today. Studies that examine noncustodial parents with an obligation to pay find much lower percentages of obligors who do not pay and have an ability to pay.³⁶

7. *Comment:* One commenter indicated that about half of the States have guidelines that provide for a floor when imputing income (e.g., income realized from full-time employment at

³⁵ Mincy, Ronald and Elaine J. Sorensen, "Deadbeat and Turnips in Child Support Reform," *Journal of Policy Analysis and Management*, Vol. 17, No. 1 (Winter 1998), pp. 44–51.

³⁶ Elaine Sorensen, Liliana Sousa, and Simon Schaner, *Assessing Child Support Arrears in Nine Large States and the Nation* (2007), available at: <http://aspe.hhs.gov/basic-report/assessing-child-support-arrears-nine-large-states-and-nation>.

minimum wage). This commenter was concerned about the presumption that a parent, at a minimum, is capable of working full-time (or nearly full-time in some States) at the minimum wage while many low-income parents cannot get a job or retain steady employment to realize full-time employment. Therefore, the commenter recommended that we “prohibit the presumption of a minimum amount of income to a parent in excess of the parent’s actual or potential income as verified or ascertained using state-determined evidence of income that must include income data from automated sources available to the IV–D agency in a IV–D case unless evidence is presented that the parent is voluntarily unemployed or underemployed and has the capacity to earn the minimum amount of income presumed or more.”

Response: We considered this suggestion and revised the final rule to clarify that child support orders must be based on the noncustodial parent’s earnings, income, and other evidence of ability to pay in § 302.56(c)(1). We revised the rule to indicate that if income is imputed, the guidelines must provide that the order must be set based on a consideration of the specific circumstances of the noncustodial parent.

Section 303.4(b)(3) requires that if information about earnings and income are not available, the amount of income imputed to the noncustodial parent must be based on factors listed in 302.56(c)(1)(iii).

8. Comment: One commenter indicated that OCSE should avoid using the term “data” when referring to “income data” since this is not a term common to private family law attorneys. The Merriam-Webster dictionary defines data as “that is produced or stored by a computer.” However, the most common sources of income verification in non-IV–D cases are tax returns and paystubs. According to the commenter, it is arguable whether these sources are stored in a computer.

Response: In the final rule, we avoided using the term “data” when referring to income and earnings.

9. Comment: One commenter stated that in most family law cases, courts are requiring evidence beyond the testimony of the custodial parent before it will impute income to a noncustodial parent and are demanding documentary evidence of the noncustodial parent’s income or assets. The commenter believed that these requirements disadvantage low-income litigants who do not have the means to prove that a noncustodial parent has unreported employment (*i.e.*, “working under the

table”) or is voluntarily participating in an underground economy. In these instances, the commenter noted, it is the child who is deprived of his or her basic subsistence because the noncustodial parent refuses to seek or obtain employment where his or her actual income and resources can be ascertained.

Response: Taking this comment into consideration, we have revised the § 303.4 regulatory text, as discussed in Comment/Response 5 in this subsection, to require the IV–D agency to take appropriate steps in building the documentary evidence related to the case so that this evidence can be used by the courts or administrative authorities in establishing or modifying child support obligations based on the noncustodial parent’s ability to pay.

10. Comment: Several commenters had concerns about the proposed language in § 302.56(c)(4) related to “testimony that income or assets are not consistent with a noncustodial parent’s current standard of living.” One commenter asked us to define “testimony” for those agencies that use an administrative process rather than a judicial process to establish and modify orders. This commenter thought that the proposal would create a substantial burden of proof for child support agencies. A few commenters thought using the term “testimony” implied that if States wanted to impute income, they would have to take cases to court if they could not locate any financial history for the noncustodial parent. The commenters thought this would place an additional burden on the court system and cause delays in getting cases processed. For States that use an administrative process, commenters stated that the requirement would cause delays in case processing as well as place additional burdens on attorneys and judges. One commenter asked how agencies would set child support orders in default cases when there is neither evidence nor testimony from any source with regard to parents’ subsistence needs or actual income. The commenter noted that a significant number of child support orders for very low-income families are set by default, and felt that Federal regulations should provide guidance to States for those situations. Several commenters suggested using the term “documentary evidence” rather than “testimony.”

Response: The use of “testimony” in the NPRM was intended to illustrate one form of evidence, not to limit evidence to testimony. We agree that most evidence will be documentary. In setting orders, States always have at least one piece of information about a

noncustodial parent—they know where the noncustodial parent lives. Residence can provide some insight about the noncustodial parent’s standard of living. In revising our proposed language for § 302.56 and § 303.4(b), we have used terms that are appropriate for both judicial and administrative processes.

11. Comment: Several commenters expressed concerns that substantially limiting the use of imputed income in guideline calculations would cause delays in the establishment and modification of child support orders.

Response: In redrafting the guidelines provision, we looked to comments, existing State guidelines, and State best practices related to investigation and order-setting. We agree that the final rule may result in increased time to establish and modify a child support order, but it will also result in more orders that are legitimately based on a noncustodial parent’s ability to pay, as required by Federal child support guidelines law and policy. Support orders based on ability to pay should result in better compliance rates and higher collections rates, saving time and resources required to enforce orders and resulting in actual payments to more children. One State told OCSE that by doing more investigative work to develop the evidence, it has experienced less conflict between the parents, fewer requests for hearings, and less time spent on enforcement. As a result, staff has more time to develop the documentary evidence needed to establish a child support order based on the noncustodial parent’s ability to pay.

12. Comment: Some commenters maintained that imputed income should only be used as a last resort, when evidence suggests that the noncustodial parent is voluntarily unemployed or underemployed, or when the noncustodial parent’s reported income or assets is inconsistent with the parent’s standard of living. One commenter specifically noted that imputing income to a low-income, noncustodial parent who is acting in good faith often leads to a child support order that is based on unrealistic expectations and exceeds the noncustodial parent’s ability to pay. This commenter further requested that the State guidelines give courts and administrative agencies the flexibility to use reliable, circumstantial evidence to establish and modify child support orders when traditional income information is not available and the noncustodial parent is acting in bad faith. The commenter stated this type of evidence does not lead to orders based on assumptions, but rather to orders grounded on reasonable inference given

the evidence presented. This commenter believed that there should be no automatic use of minimum wage or any other standardized metric to impute income.

Response: We agree that imputed income should only be used as a last resort, and that States need to exercise discretion on a case-by-case basis in determining a low-income noncustodial parent's ability to pay when evidence of earnings and income is not available. We encourage States to take this into consideration in developing the criteria for determining when to impute income.

13. Comment: One commenter indicated that overuse of imputing income may be avoided by implementing other measures such as: Requiring that the support obligation not reduce the noncustodial parent's income below a subsistence level; requiring that all findings related to the calculation and imputation of income be based on the facts in the court record; requiring that all findings regarding the calculation or imputation of income be written and subject to appellate review; requiring that the court first consider all available direct evidence of income, earnings, assets or state what steps have been made to obtain such information before using direct or circumstantial proof of income or ability to earn; expanding the admissibility of income information from regular, reliable data sources (such as new hire and quarterly wage reports); and requiring mandatory financial disclosure in all cases with appropriate penalties for noncompliance.

Response: We have evaluated research and practice in this area and have incorporated measures into our regulations to increase investigation and establish evidence-based orders, rather than routinely applying presumptions and imputing income. While State laws establish the admissibility of evidence, this does not lessen the IV-D agency's responsibility to conduct further investigation when evidence of earnings and income is not available. We are also aware of several States that mandate financial disclosure by parents with appropriate penalties for noncompliance, a practice that is intended to increase accurate order-setting and decrease overuse of imputation.

14. Comment: One commenter suggested that in cases where the noncustodial parent has committed acts of domestic violence against the custodial parent or the children resulting in incarceration or the issuance of a protected order, the abuser should be subject to a support order that reflects income imputed to an abuser.

Response: Under the rule, the court or administrative authority has the discretion to consider the specific circumstances of the case. However, in doing so, it is important to be clear that establishing, modifying, or enforcing a child support order is not a form of punishment for incarcerated noncustodial parents. "The child support system is not meant to serve a punitive purpose. Rather, the system is an economic one, designed to measure the relative contribution each parent should make—and is capable of making—to share fairly the economic burdens of child rearing."³⁷

Incarcerated parents have been sentenced for the crime they committed and are repaying their debt to society. Imputing income based upon the nature of the crime is considered an adverse collateral consequence of incarceration that imposes additional civil sanctions beyond the criminal sentence. Other examples of collateral consequences include denial of employment, housing, public benefits, student loans, and the right to vote. Such collateral consequences undermine successful reentry and rehabilitation. In 2011, the U.S. Attorney General wrote to every State Attorney General asking them to assess their State statutes and policies imposing collateral consequences to determine if any should be eliminated.³⁸

15. Comment: One commenter thought that our proposed provision in § 302.56(c)(4) would restrict a State's ability to establish child support orders when the noncustodial parent chose to avoid the legal process. The commenter further explained that, based on his experience in local child support operations, this provision would seriously disadvantage a custodial parent in a case where the noncustodial parent, despite being afforded due process, refused to participate in the administrative or judicial process, including fully disclosing income.

Response: The final rule does not indicate when States are allowed to impute income; however, the final rule at § 302.56(c)(1)(iii) indicates that if imputation of income is allowed, the child support order should be based on the specific circumstances of the noncustodial parent.

16. Comment: One commenter stated that in one State, they assume that a noncustodial parent has an ability to pay unless there is information

indicating otherwise, such as receipt of public assistance benefits, receipt of SSI payments, or a physician's statement indicating inability to work. The commenter stated that the proposed regulation would reverse this assumption and instead would presume that the noncustodial parent has no ability to pay unless data was available related to the parent's actual earnings, income, or assets, or if there was testimony that the noncustodial parent's income or assets were not consistent with the noncustodial parent's standard of living.

Response: The amount of child support ordered should be based on facts, not assumptions. However, when support orders are based on broad (or general) assumptions and do not have a factual basis, they often do not result in payments and the children do not benefit. Such assumptions can be rooted in a lack of awareness about the availability of jobs in low-income communities that are open to parents with limited education and job history. The rule explicitly requires States to consider these factors in determining the circumstances in which imputing income is appropriate. In particular, an incarceration record is an important consideration in determining whether it is reasonable to impute earnings from a full-time job, as incarceration often serves as a barrier to employment. One study showed that after release from jail, formerly incarcerated men were unemployed nine more weeks per year, their annual earnings were reduced by 40 percent, and hourly wages were 11 percent less than if they had never been incarcerated.³⁹

Many States work diligently to develop a factual basis for orders. However, in some jurisdictions, a two-tiered system exists with better-off noncustodial parents receiving support orders based upon evidence and a determination of their individual income. Poor, low-skilled noncustodial parents, usually unrepresented by counsel, receive standard-issue support orders. Such orders lack a factual basis and are instead based upon fictional income, assumptions not grounded in reality, and beliefs that a full-time job is available to anyone who seeks it. Orders that routinely lack a factual basis and are based upon standard presumptions erode the sense of procedural fairness and the legitimacy of the orders, resulting in lower compliance. Thus, it is critically important that States take

³⁷ *Lambert v. Lambert*, Ind. Sup. Ct. (2007).

³⁸ White House Fact Sheet, *Enhancing the Fairness and Effectiveness of the Criminal Justice System* (July 14, 2015), available at: <https://www.whitehouse.gov/the-press-office/2015/07/14/fact-sheet-enhancing-fairness-and-effectiveness-criminal-justice-system>.

³⁹ The Pew Charitable Trusts, *Collateral Costs: Incarceration's Effect on Economic Mobility*, September 2010, available at: http://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs_assets/2010/collateralcosts1pdf.pdf.

reasonable efforts to develop a sufficient factual basis for all cases by fully investigating their cases.

17. *Comment:* One commenter recommended that the NPRM be revised to allow States to use imputed income, such as State median wage, occupational wage rates, or other methods of imputation as defined by State law, as a last resort when the parent has not provided financial information and the agency cannot match to automated sources.

Response: Imputing standard amounts in default cases based upon State median wage or statewide occupational wage rates does not comply with this rule because it is unlikely to result in an order that a particular noncustodial parent has the ability to pay. When other information about the noncustodial parent's ability to pay is not available, information about residence will often provide the decision-maker with some basis for making this calculation. In addition, information provided by the custodial parent can provide the basis for a reasonable calculation, particularly in situations when the noncustodial parent fails to participate in the process. OCSE revised the final rule so that if there is no evidence or insufficient evidence of earnings and income, or it is inappropriate to use earnings and income as defined in § 302.56(c)(1), then the State's guidelines must provide that the State take into consideration the specific circumstances of the noncustodial parent as delineated in § 302.56(c)(iii) and impute income under criteria developed by the State based upon the noncustodial parent's ability to pay the amount.

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

order to State or local discretion and policy.

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

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

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

20. *Comment:* One commenter indicated that the number of existing child support orders that are based on imputed income are evidence of child support agencies' and courts' difficulties with acknowledging the reality of chronic unemployment and adults with no or very low actual income.

Response: OCSE also has these concerns and therefore is regulating to ensure that child support guidelines are based on the noncustodial parent's ability to pay. Some States need to do a better job in gathering information about the noncustodial parent's actual income or income history and developing the circumstantial evidence that can be used by the courts or the administrative authority in setting the child support orders.

21. *Comment:* One commenter indicated that in IV-D cases when the noncustodial parent's income is unknown and the parent fails to provide information, one State's law currently requires child support to be based on "presumed" income. This is not "actual income," but the State's law also requires that the order be set aside as soon as the noncustodial parent's actual income is determined. The commenter said that the NPRM references "presumed" income as a problem, but it is never a problem when the law is properly applied. Rather, according to

the commenter, it is an efficient "locate" tool that encourages cooperation while not shifting unnecessary burden to the custodial parent.

Response: We understand there will be situations where income must be imputed, but this should only occur after investigative efforts by the IV-D agency staff. The problem is that some States do not impute income based on the specific circumstances of the noncustodial parent to fill evidentiary gaps—instead, imputation has become the standard practice of first resort in lieu of fact-gathering. While this State's law sets aside an order when the actual income is determined, we are concerned that unrealistic and high arrearages will accumulate, particularly in cases involving indigent, unrepresented noncustodial parents prior to the order being set aside. When an arrearage accumulates, it often results in a low compliance rate over the life of the child support order, which does not benefit the children and families. For this reason, States should impute income to set child support order amounts only in limited situations.

22. *Comment:* Some commenters indicated that in cases where there is domestic violence, it is particularly important that victims have access to the full range of tools courts use to argue for imputed earnings because in these cases, abusers often fail to comply with discovery, do not provide full disclosure to the courts, and otherwise engage in bad faith tactics designed to further harass the custodial parent. The commenters indicated they have found that in domestic violence cases, the courts routinely impute earnings in cases where the noncustodial parent is uncooperative for these reasons. Another commenter also discussed that the NPRM needs to provide judges more guidance on imputing income, especially in a case involving domestic violence when one parent refuses to comply with discovery, does not disclose income, or engages in bad faith tactics.

Response: Domestic violence is one of the specific circumstances of the noncustodial parent that the State should consider when developing and investigating the case prior to establishing a support obligation. In accordance with § 302.56(c), if the State is not able to obtain any income information for the noncustodial parent, and the parent has been uncooperative in the State's efforts, then the courts or administrative authority should attempt to analyze all the specific circumstances on which to base a child support obligation amount. If this information is

not available, the courts or administrative authority may impute income taking into consideration factors listed in § 302.56(c)(1)(iii) such as economic data related to the noncustodial parent's residence.

23. Comment: One commenter addressed the statewide standard that his State had used when imputing income. He commented that his State used to apply the Federal Minimum Basic Standard Adequate Care (MBSAC) to impute income. In 2003, that amount was an annual income of \$26,400, yielding an order of \$423. In today's dollars that would yield a presumptive order of \$602 per month for one child. The State thought a responsible low-earnings noncustodial parent, upon learning of such a high ordered amount, would come forward for a modification. However, experience showed that the low-earnings noncustodial parents did not respond that way. Based on a recommendation of the Urban Institute in 2003, the State abandoned the MBSAC standard in favor of a full-time minimum wage imputation. However, according to the commenter, economic events since 2003 (a significant decrease in true full-time jobs) would argue in favor of further reduction of that recommendation.

Response: We agree that States need to evaluate the economic factors such as unemployment rates, prevalence of full-time job opportunities available to parents of similar skills and history, growth of part-time skills and contingent work. The job market for low-skilled men and women has changed since the 1990's, and incarceration policies have impacted the ability of many parents to find work. This is why we added a requirement that the guidelines committee must review these types of factors when reviewing their child support guidelines under § 302.56(h). Based on comments, we revised the final rule at § 302.56(c)(iii) to require that if a State imputes income to a noncustodial parent, the guidelines must take into consideration the specific circumstances of the noncustodial parent including factors listed in § 302.56(c)(1)(iii) even if only one source of information such as residence is available.

Health Care Needs [§ 302.56(c)(2)]

1. Comment: Several commenters recommended that in proposed § 302.56(c)(3), which has been redesignated as § 302.56(c)(2) in the final rule, we remove the phrase "in accordance with § 303.31 of this chapter." They indicated that § 303.31 applies only to IV–D cases while the guidelines must apply to all child

support cases, so the reference is inappropriate. Commenters also indicated that § 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.

Response: We agree that because the child support guidelines apply to all cases, the reference to § 303.31 should be removed since this section only applies to IV–D cases. Therefore, we made this revision in the final rule. Additionally, to conform to the changes we made in the final rule to align § 303.31 with the ACA, we made conforming changes in § 302.56(c)(2) to reference the health care needs through "private or public health care coverage and/or cash medical support."

Incarceration as Voluntary Unemployment [§ 302.56(c)(3)]

1. Comment: Over 600 commenters supported the proposed § 302.56(c)(5), which has been redesignated as § 302.56(c)(3), to prohibit the treatment of incarceration as "voluntary unemployment." However, four commenters believed that such a limitation should not apply where the parent is incarcerated for a crime against the supported child or custodial parent. Some commenters also thought that this limitation should not apply where the parent has been incarcerated for intentional failure to pay child support. These commenters thought that strong public policy dictates against affording relief to an obligor who commits a violent crime against the custodial parent or child, or an obligor who has the means to pay child support but refuses to do so. The commenters urged OCSE to include these important exceptions in the final rule. One additional commenter indicated that support for a policy change in this area was based on the overwhelming consensus that this is the best practice for families and IV–D agencies, regardless of where they are located.

Response: We agree with the overwhelming majority of commenters, and do not make changes in response to the four commenters' suggestion for an exception based on the nature of the crime. Three-quarters of States have eliminated treatment of incarceration as voluntary unemployment in recent years.

As discussed in Comment/Response 13 in the *Imputing Income* [§ 302.56(c)(1)(iii)] subsection, establishing, modifying, or enforcing a child support order is not a form of punishment for incarcerated

noncustodial parents,⁴⁰ and the collateral consequences of the treatment of incarceration as voluntary unemployment include uncollectible debt, reduced employment, and increased recidivism.

Per section 466(a)(10) of the Social Security Act, all parents facing a substantial change of circumstances such as a substantial drop in income, through a loss of employment or otherwise, are entitled to request a review, and if appropriate, adjustment of their support orders. Incarceration surely qualifies as a substantial change in circumstances, yet State laws and policies—rooted in 19th century jurisprudence—that treat incarceration as "voluntary unemployment" in effect block the application of the statutory review and adjustment provision. In most cases, this practice results in child support orders that are unrealistically high, which research indicates undermine stable employment and family relationships, encourage participation in the underground economy, and increase recidivism.⁴¹

Despite the significant research on the consequences of continuing the accrual of support when it is clear there is no ability to pay, one-quarter of States continue treating incarceration as "voluntary unemployment." Failing to provide an opportunity for review and possible adjustment of a child support order when a parent is incarcerated does not mean that most noncustodial parents will have the ability to make payments to their children while in prison or after release.⁴² Studies find that incarcerated parents leave prison with an average of \$15,000 to \$30,000 or more in unpaid child support, with no means to pay upon release.⁴³ Not

⁴⁰ *Lambert v. Lambert*, 861 NE. 2d 1176 (Ind. 2007), available at: <http://www.ai.org/judiciary/opinions/pdf/02220701rts.pdf>.

⁴¹ U.S. Department of Health and Human Services, Office of Child Support Enforcement, *Incarceration, reentry and Child Support Issues: National and State Research Overview* (2006), available at: http://www.acf.hhs.gov/programs/cse/pubs/2006/reports/incarceration_report.pdf.

⁴² Hager, Eli. "For men in prison, child support debt becomes a crushing debt." *The Washington Post* and the Marshall Project, October 19, 2015, available at: <https://www.themarshallproject.org/2015/10/18/for-men-in-prison-child-support-becomes-a-crushing-debt>.

⁴³ See Esther Griswold and Jessica Pearson, "Twelve Reasons for Collaboration Between Departments of Correction and Child Support Enforcement Agencies," *Corrections Today* (2003) which is available at: <http://www.thefreelibrary.com/Twelve+reasons+for+collaboration+between+departments+of+correction...+a0123688074>; Jessica Pearson, "Building Debt While Doing Time: Child Support and Incarceration," *Judges' Journal* (2004), which is available at: <https://csgjusticecenter.org/courts/publications/building-debt-while-doing-time-child-support-and-incarceration-2/>; Nancy Thoennes,

considering incarceration as a substantial change of circumstances makes it less likely that noncustodial parents will work and pay support upon release and more likely that they will recidivate.⁴⁴ As a result, we have also revised § 303.8(c) to indicate that the reasonable quantitative standards that the State develops for review and adjustment must not treat incarceration as a legal bar for petitioning for and receiving an adjustment of an order.

2. *Comment:* Several commenters believed that the manner by which the child support system treats incarcerated obligors should be a State matter, not subject to any mandate. They stated that this is a significant public policy issue with considerable state-specific case law that is not appropriate for Federal regulation. Some commenters believed that reducing obligations was rewarding bad behavior, and it was not appropriate for the NPRM to attempt to override that State policy decision. In addition, they noted that the proposal would ultimately lead to a reduced child support obligation even if the reason for incarceration was willful failure to pay child support or some other heinous crime against the child. Other commenters believed that discretion in how to treat incarceration was at the core of judicial decision making, as reflected in the State's case law that almost uniformly affirms lower court rulings denying relief to the incarcerated obligor.

Response: All but 14 States have eliminated this policy.⁴⁵ In *Lambert v.*

Child Support Profile: Massachusetts Incarcerated and Paroled Parents (2002), which is available at: <http://cntrpolres.qwestoffice.net/reports/profile%20of%20CS%20among%20incarcerated%20&%20paroled%20parents.pdf>; and Pamela Ovwigho, Correne Saunders, and Catherine Born. *The Intersection of Incarceration & Child Support: A Snapshot of Maryland's Caseload* (2005), which is available at: <http://www.familywelfare.umaryland.edu/reports1/incarceration.pdf>. See also Federal Interagency Reentry Council, *Reentry Myth Buster on Child Support* (2011), available at: https://csgjusticecenter.org/documents/0000/1063/Reentry_Council_Mythbuster_Child_Support.pdf.

⁴⁴ Pearson, Jessica, "Building Debt While Doing Time: Child Support and Incarceration," *Judges' Journal* 43:1, Winter 2004, which is available at: [https://csdaca.org/wp-content/uploads/resources/1/Research/Arrears/BuildingDebt%20\(2\).pdf](https://csdaca.org/wp-content/uploads/resources/1/Research/Arrears/BuildingDebt%20(2).pdf); and Harris, Alexes, Heather Evans, and Katherine Beckett, "Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States," *American Journal of Sociology*, 115:6, 1753–1799, May 2010, which is available at: <http://faculty.washington.edu/kbeckett/articles/AJS.pdf>.

⁴⁵ "Voluntary Unemployment," *Imputed Income, and Modification Laws and Policies for Incarcerated Noncustodial Parents, PAID—Child Support Fact Sheet #4* (companion piece), June 20, 2012, available at: <http://www.acf.hhs.gov/programs/css/resource/voluntary-unemployment-imputed-income-and-modification-laws-and-policies>.

Lambert, the Indiana Supreme Court found that "incarceration does not relieve parents of their child support obligations. On the other hand, in determining support orders, courts should not impute potential income to an imprisoned parent based on pre-incarceration wages or other employment related income, but should rather calculate support based on the actual income and assets available to the parent."⁴⁶ While some States have prior case law finding that incarceration should be considered voluntary unemployment, most States have updated case law, guidelines and court rules to allow for review of the specific facts of the case, and, if appropriate, adjustment of the order.

The rule does not provide special treatment for incarcerated parents. Rather, it requires application of Federal review and adjustment requirements, including that orders be reviewed and adjusted upward or downward in *all* cases upon a showing of any substantial change in circumstances, including a substantial change in circumstances due to unemployment or incarceration. Implementation of § 302.56(c)(3) will ensure that States consider incarceration as a substantial change of circumstances that warrants the child support order to be reviewed and, if appropriate, adjusted based on the noncustodial parent's ability to pay. If an incarcerated parent has income or assets, these can be taken into consideration in reviewing the order. However, States should not assume an ability to earn based on pre-imprisonment wages, particularly since incarceration typically results in a dramatic drop in income and ability to get a job upon release.

Moreover, once released, noncustodial parents tend to view the methods employed to collect support and arrearages as a disincentive to seek legitimate gainful employment. Research suggests that using maximum-level income withholding rates and other enforcement mechanisms tend to discourage employment, particularly among individuals in low socioeconomic communities.⁴⁷ When

⁴⁶ *Lambert v. Lambert*, 861 NE. 2d 1176 (Ind. 2007), available at: <http://www.ai.org/judiciary/opinions/pdf/02220701rts.pdf>.

⁴⁷ Harry J. Holzer and Paul Offner, "The Puzzle of Black Male Unemployment," *The Public Interest* (2004) Spring, 74–84, which is available at: http://www.nationalaffairs.com/doclib/20080710_20041546the_puzzle_of_black_male_unemployment_harry_j_holzer.pdf; Harry J. Holzer, Paul Offner, and Elaine Sorensen, "Declining Employment among Young Black Less-Educated Men: The Role of Incarceration and Child Support," *Journal of Policy Analysis and Management*, (2005) 24(2): 329–35, which is available at: http://www.urban.org/research/publication/declining-employment-among-young-black-less-educated-men/view/full_report.

combined with the difficulty faced by formerly incarcerated parents in obtaining employment, there is a strong incentive to seek work in the "underground economy" where it is difficult for authorities and custodial parents to track earnings and collect payments.⁴⁸ Research demonstrates that when high support orders continue through a period of incarceration and thus build arrearages, the response by the released obligor is to find more methods of avoiding payment, including a return to crime. It is unrealistic to expect that most formerly incarcerated parents will be able to repay high arrearages upon release. To the extent that an order fails to take into account the real financial capacity of a jailed parent, the system fails the child by making it more likely that the child will be deprived of adequate support over the long term.

The child support system is not meant to serve a punitive purpose. Rather, the system is an economic one, designed to measure the relative contribution each parent should make—and is capable of making—to share fairly in the economic burdens of child rearing.⁴⁹ Considering the existing evidence, imposing high support payments on incarcerated parents serves as a punitive measure, becomes an additional collateral consequence of incarceration, and does not serve the best interests of the child by damaging the parent-child relationship and the prospect for consistent child support payments in the future.⁵⁰

In 2005, the Council of State Governments, a nonpartisan association of all three branches of State government, issued the *Report of the Re-Entry Policy Council: Charting the Safe and Successful Return of Prisoners to the Community*, which provided consensus-based recommendations to improve successful reentry of formerly incarcerated people into society. Many of these recommendations were subsequently incorporated into the

⁴⁸ Council of State Governments, *Report of the Re-Entry Policy Council: Charting the Safe and Successful Return of Prisoners to the Community* (2005), Justice Center, available at: <https://csgjusticecenter.org/reentry/publications/the-report-of-the-re-entry-policy-council-charting-the-safe-and-successful-return-of-prisoners-to-the-community/>.

⁴⁹ *Lambert v. Lambert*, 861 NE. 2d 1176 (Ind. 2007), available at: <http://www.ai.org/judiciary/opinions/pdf/02220701rts.pdf>.

⁵⁰ Cammett, Ann, "Expanding Collateral Sanctions: The Hidden Costs of Aggressive Child Support Enforcement Against Incarcerated Parents," *Georgetown Journal on Poverty Law & Policy*, 13:2, 312–339, Summer 2006, which is available at: http://www.academia.edu/2582076/Expanding_Collateral_Sanctions_The_Hidden_Costs_of_Aggressive_Child_Support_Enforcement_Against_Incarcerated_Parents.

Second Chance Act of 2007 (Pub. L. 110–199).⁵¹ The report specifically identified child support obligations, especially arrearages, as a barrier to successful re-entry into society because they have a tendency to disrupt family reunification, parent-child contact, and the employment patterns of formerly incarcerated parents.⁵²

Marginal Cost To Raise a Child/ Adjustment for Parenting Time [§ 302.56(c)(4)]

1. *Comment:* Several commenters suggested that proposed § 302.56(c)(2), which was redesignated in the final rule as § 302.56(c)(4), should be revised to indicate that the guidelines should be “based on the statewide median marginal cost for the average family to raise a first, second, or subsequent child, and result in a computation of a the support obligation that does not exceed such median marginal cost by more than 20%.” One commenter specifically indicated that they recommended that child support orders be based on the marginal cost to raise a child rather than parental income. Many other commenters suggested more detailed revisions related to the marginal cost to raise children. Some commenters suggested that, as part of the review of a State’s guidelines, a State must consider economic data on the marginal cost of raising children, and the child support orders resulting from the guidelines must approximate the obligor’s specified share of such marginal costs. These commenters believed that the objective is to establish child support orders that approximate the true cost of supporting children, over and above what it costs the parents to support themselves. They noted that if the amount of support ordered is too low, the child suffers. However, they noted, child support orders that constitute a windfall to the receiving parent are a potent cause of bitter custody battles, resentment, and hostility that can last throughout the years of childhood. Moreover, according to the commenters, if the child support order is too high, there is a built-in incentive for the parent who expects to win custody to resist shared parenting.

Response: We do not agree with this suggestion. State child support guidelines are required to be based on

the noncustodial parent’s income, earnings, and other evidence of ability to pay. However, States have discretion and flexibility in defining the specific descriptive and numeric criteria used to compute the amount of the child support obligation. Once a parent’s income is ascertained, the rule does not limit States’ flexibility in defining the percentage or amount of income ordered to be paid as child support, so long as the resulting order takes into consideration the noncustodial parent’s ability to pay it. State guidelines should not be based on the marginal cost of raising the child without taking into consideration the noncustodial parent’s ability to pay. This rule only establishes minimum components for State child support guidelines consistent with Federal law, and does not impose more specific requirements, that are not inconsistent with Federal law and regulations.

2. *Comment:* Many commenters recommended that proposed § 302.56(c)(2), which has been redesignated in the final rule as § 302.56(c)(4), include adjustments for the amount of parenting time each parent is willing and able to provide.

Response: Currently, child support guidelines in 36 States provide for adjustments in the child support order for the amount of parenting time each parent has with the children. While we support this concept and recognize that in most State guidelines the consideration of parenting time is part of the support order establishment process, States are in the best position to determine how to consider parenting time in calculating the amount of the child support obligation since the child support guideline formula is at the discretion of the State.

Quadrennial Review [§ 302.56(e)]

1. *Comment:* While most commenters generally supported the requirement in § 302.56(e), that “[t]he State must review, and revise, if appropriate, the guidelines established under paragraph (a) of this section at least once every 4 years to ensure that their application results in the determination of appropriate child support award amounts,” a few commenters thought that the reports from the quadrennial review, the effective date of the guidelines, and the date of the next review should be published on the internet and made accessible to the public. They also made recommendations regarding who should be on the reviewing body. They specifically recommended that the following language be added to this provision indicating that the State shall

publish on the internet and make accessible to the public all reports of the reviewing body, the membership of the reviewing body, when the guidelines became effective, and the date of the next quadrennial review.

These commenters argued that child support guidelines are not a matter to be developed by a closed group. They viewed guidelines as a matter of immense public import with huge individual impact on millions of people. They recommended that the guideline committee include at least two members of the general public—one advocating for payors and one advocating for recipients. They believed that this was a first step towards bringing transparency to the creation of child support guidelines.

They further commented that no reasonable objection could be raised to this provision. Commenters also indicated that possible objections to including members of the general public might be that such people could lack knowledge of the intricacies of child support or the law, could advocate for narrow interests, or could be disruptive. Given that the two members of the public would undoubtedly be outnumbered by those who traditionally are called upon to write child support guidelines, fear that these members could control the outcome is unreasonable.

Response: OCSE agrees and we added at the end of § 302.56(e) the following: “The State shall publish on the internet and make accessible to the public all reports of the reviewing body, the membership of the reviewing body, the effective date of the guidelines, and the date of the next quadrennial review.” We also agree that the quadrennial review process/report should be public information that is shared.

Regarding the composition of the committee or body conducting the quadrennial review, we further agree that the quadrennial review should provide for a meaningful opportunity for participation by citizens and particularly low-income citizens, representing both custodial and noncustodial parents. The child support guidelines review body should also include participation by the child support agency. While we are not mandating the specific composition of the review body, we are requiring in § 302.56(h)(3) meaningful opportunity for public input, including input from low-income custodial and noncustodial parents and their representatives, and the views and advice of the State IV–D agency.

⁵¹ The text of the Pub. L. 110–199 is available at: <https://www.congress.gov/110/plaws/publ199/PLAW-110publ199.pdf>.

⁵² Council of State Governments, *Report of the Re-Entry Policy Council: Charting the Safe and Successful Return of Prisoners to the Community*, Justice Center, 2005, available at: <http://www.csgjusticecenter.org/wp-content/uploads/2013/04/1694-11.pdf>.

Rebuttable Presumption [§ 302.56(f)]

1. *Comment:* Over 500 commenters from private citizens, most of them identical comments from mass mailings, proposed that we add language at the end of § 302.56(f) that indicates that the presumption can be rebutted successfully with genetic evidence that the obligor is not the biological parent of the child, and by the lack of written adoption records, in which case there will be no support obligation.

They commented that this addition is meant to update our support laws to reflect the power of modern genetics. They cited the directives in Executive Order 13563 as controlling. Section 5 of that Executive Order states:

Sec. 5. *Science.* Consistent with the President's Memorandum for the Heads of Executive Departments and Agencies, "Scientific Integrity" (March 9, 2009), and its implementing guidance, each agency shall ensure the objectivity of any scientific and technological information and processes used to support the agency's regulatory actions.

The President's 2009 Memorandum referenced therein, states:

To the extent permitted by law, there should be transparency in the preparation, identification, and use of scientific and technological information in policymaking.⁵³

The commenters further explained that DNA evidence is indisputable. They argued that it is time to update Federal regulations so that support obligations are not imposed on the wrong individuals.

Response: Many States have legal provisions related to parentage in addition to genetic evidence and evidence of adoption records. Given how rapidly the fields of genetic testing and assisted reproduction are changing, OCSE agrees that this area is an appropriate area to review. However, a full discussion of the issues is required and beyond the scope of this rule. It is our view that changes to existing Federal regulations to address this important area would call for a specific notice in the **Federal Register**, to allow for a public comment period.

Written Findings [§ 302.56(g)]

1. *Comment:* Some commenters recommended that we qualify in proposed § 302.56(g) that a written finding or specific finding on the record of a judicial or administrative proceeding for the award of child support that the application of the guidelines established under paragraph (a) of this section would be unjust or

inappropriate in a particular case will be sufficient to rebut the presumption in that case, as determined under criteria established by the State “; but in no event shall the award exceed the limit specified in proposed paragraph (c)(2) unless the child has special needs as certified and quantified by a licensed medical doctor.”

Response: We did not make this specific revision to § 302.56(g) because the paragraph already requires that the criteria must take into consideration the best interest of the child. States have the flexibility and discretion to establish such criteria. Therefore, States may take into consideration a child with special needs as certified and quantified by a licensed medical doctor.

Parenting Time [Proposed § 302.56(h)]

1. *Comment:* The majority of commenters supported the proposed § 302.56(h), allowing States to recognize parenting time provisions when both parents have agreed to the parenting time provision or pursuant to State guidelines. Many commenters expressed support for improved coordination between child support and parenting time procedures, and were supportive of the proposed language. However, some commenters indicated confusion about the intended scope of the provision and raised a number of implementation questions. Some comments reflected a misunderstanding about the extent to which FFP would become available for parenting time activities and raised questions about cost allocation. Other commenters questioned the role of the child support program in creating, monitoring, and enforcing a parenting time order, and the legal relationship between child support payments and parenting time. Still other comments expressed concerns regarding the child support agency's lack of experience in handling complex family issues, such as domestic violence and encouraged us to take advantage of our parenting time pilot grant program to develop additional technical assistance resources. Commenters also sought clarity regarding the combination of child support and custody or visitation processes and monitoring compliance with parenting time orders. A number of State commenters suggested that a new rule was not necessary to affirm the general principle that States are not required to implement costly and complex cost allocation plans if such expenditures are *de minimis* and incidental to reimbursable child support program activities.

Response: While expressing support for the rule, the commenters sought clarification about the intent, scope, and

implementation of the proposed provision. Our intention in proposing § 302.56(h) was not to open up child support funding for a new set of parenting time activities, which Congress must authorize, or to collapse separate child support and parenting time legal rights. Our intention was to acknowledge existing policies and practices in many States, and to provide a technical clarification that addressed audit and cost allocation questions arising from current practices in a number of States.

IV–D program costs related to parenting time arrangements must continue to be minimal and incidental to IV–D child support order establishment activities and not have any impact on the Federal budget. In light of the comments received on the proposed parenting time provisions and the unintended confusion regarding these proposals, OCSE determined that new rules are not necessary. Therefore, we deleted the proposed paragraph (h).

OCSE recognizes that the inclusion of an uncontested and agreed upon parenting time provision incidental to the establishment of a child support order aligns with Pub. L. 113–183, “*Preventing Sex Trafficking and Strengthening Families Act.*”⁵⁴ Section 303 of this recent law indicated that it is the sense of the Congress that “(1) establishing parenting time arrangements when obtaining child support orders is an important goal which should be accompanied by strong family violence safeguards; and (2) States should use existing funding sources to support the establishment of parenting time arrangements, including child support incentives, Access and Visitation Grants, and Healthy Marriage Promotion and Responsible Fatherhood Grants.” Any new costs related to parenting time provisions would require the State to identify and dedicate funds separate and apart from IV–D allowable expenditures consistent with HHS cost principles codified in 45 CFR part 75, subpart E.

Thirty-six States have adopted guidelines that recognize parenting time arrangements in establishing child support orders. In practical terms, parenting time is an important corollary to child support establishment because the child support agency, or finder of fact, needs information about the parenting time arrangements in order for the guideline amount to be effectively calculated. Other States have parenting time guidelines or have other procedures in place to coordinate child

⁵³ The President's 2009 Memorandum is available at: <https://www.whitehouse.gov/the-press-office/2009/03/09/memorandum-heads-executive-departments-and-agencies-3-9-09>.

⁵⁴ Available at: <http://www.gpo.gov/fdsys/pkg/PLAW-113publ183/pdf/PLAW-113publ183.pdf>.

support and parenting time processes. These longstanding practices have not changed the fact that parenting time is a legally distinct and separate right from the child support obligation.

Including both the calculation of support and the amount of parenting time in the support order at the same time increases efficiency, and reduces the burden on parents of being involved in multiple administrative or judicial processes with no cost to the child support program.

We encourage States to continue to take steps to recognize parenting time provisions in child support orders when both parents have agreed to the parenting time provision or in accordance with the State guidelines when the costs are incidental to the child support proceeding and there is no cost to the child support program.

Child Support Guidelines Review/ Deviation Factors [§ 302.56(h)]

1. Comment: While most commenters supported that States should maintain flexibility in defining deviation factors, one commenter recommended that proposed § 302.56(i), which has been redesignated as § 302.56(h), further specify that deviation factors established by the State must be “in the best interest of the child.”

Response: We do not agree. This section establishes steps a State must take when reviewing its child support guidelines. Section 302.56(h)(2) provides that deviation from the presumptive child support amount may be based on factors established by the State. It is appropriate for the State to have discretion to establish such factors.

Section 302.56(g) requires that a written finding or specific finding on the record of a judicial or administrative proceeding for the establishment or modification of a child support order that the application of the guidelines established under paragraph (a) of this section would be unjust or inappropriate in a particular case will be sufficient to rebut the presumption in that case, as determined under criteria established by the State. Such criteria must take into consideration the best interests of the child. The requirement in § 302.56(g) relates to how the deviation may be applied on a case-by-case basis, including having a written finding or finding on the record justifying the deviation from the child support guidelines.

2. Comment: Many commenters suggested additional factors that the State must consider during its guideline review such as economic data on the marginal cost of raising children and an analysis of case data, by gender,

gathered through sampling or other methods, on the application of, and deviations from, the guidelines. The commenters thought that an analysis of case data by gender must be used in the State’s review of the guidelines to ensure that gender bias is declining steadily, and that deviations from the guidelines are limited. Although not specifically related to this paragraph, throughout the comments to the proposed guideline regulation, commenters expressed concerns that: Guidelines needed to consider economic data on local job markets, guidelines did not take into consideration low-income noncustodial parents, and the rate of default orders were increasing inappropriately.

Response: Considering all of the various concerns about how States were developing criteria for guidelines, we have revised proposed § 302.56(i), which has been redesignated as § 302.56(h), to add factors that the States must consider when reviewing their guidelines for the required quadrennial review. We added paragraph (h)(1) to require that the States consider economic data on the cost of raising children, labor market data (such as unemployment rates, employment rates, hours worked, and earnings) by occupation and skill-level for the State and local job markets, the impact of guideline policies and amounts on custodial and noncustodial parents who have family incomes below 200 percent of the Federal poverty level, and factors that influence employment rates among noncustodial parents and compliance with current child support orders.

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

3. Comment: Several commenters questioned whether § 302.56(i), redesignated as § 302.56(h), was

necessary. They thought that the proposed new sentence regarding deviations from child support guidelines appeared redundant with the reference to rebuttal criteria in paragraph (f). They suggested that the new language be deleted or clarified in the final rule.

Response: We carefully reviewed the language to ensure it was not redundant. Section 302.56(h) lists steps a State must take as part of its review of the State’s guidelines. The analysis of the data must be used to ensure that deviations are limited and guideline amounts are appropriate based on criteria established by the State under paragraph (g). The compliance date is for the first quadrennial review of the guidelines commencing after the State’s guidelines have initially been revised under this final rule. However, proposed § 302.56(g) requires a written finding or specific finding on the record of a judicial or administrative proceeding for the establishment or modification of a child support order that the application of the guidelines would be unjust or inappropriate in a particular case in order to rebut the presumption that the guideline amount is the correct amount of child support to be awarded.

Section 302.70—Required State Laws

1. Comment: Commenters overwhelmingly supported increasing the exemption period allowed under section 466(d) of the Act from 3 years to 5 years; however, one commenter suggested that consideration also be given to the development of an abridged submission process for renewals.

Response: OCSE appreciates the suggestion; however, submission of the required information is statutory. Section 466(d) states that if a State demonstrates to the satisfaction of the Secretary, through the presentation to the Secretary of such data pertaining to caseloads, processing times, administrative costs, and average support collections, and such other data or estimates as the Secretary may specify, that the enactment of any law or the use of any procedure or procedures required by or pursuant to this section will not increase the effectiveness and efficiency of the State child support enforcement program, the Secretary may exempt the State, subject to the Secretary’s continuing review and to termination of the exemption should circumstances change, from the requirement to enact the law or use the procedure or procedures involved.

Section 302.76—Job Services

1. *Comment:* This proposed provision received overwhelming support from states, Members of Congress, and the public, but it also was opposed by some Members of Congress who did not think the provision should be included in the final rule. Many supportive commenters focused on ways to incorporate employment services for noncustodial parents within a broader workforce agenda. One commenter suggested that States that offer job services as part of their child support enforcement strategy should leverage funds to provide different, but complementary services while coordinating training costs with other Federal programs. Several commenters had questions about how States would coordinate with other Federal job services programs to ensure efficiency, reduce duplication, cover costs appropriately, and reduce administrative burden. One commenter suggested allowing braided funding for providing complementary services under different funding streams.

Response: While we appreciate the support that the commenters expressed, we think allowing for federal IV–D reimbursement for job services needs further study and would be ripe for implementation at a later time. Therefore, we are not proceeding with finalizing the proposed provisions at §§ 302.76, 303.6(c)(5), and 304.20(b)(viii). We encourage State IV–D agencies to leverage other resources—e.g., job services provided under WIOA, TANF, and SNAP E&T—when developing strategies to improve consistent on-time payments of child support. In addition, states interested in providing job services not eligible for FFP continue to have the ability to submit a request for a waiver under section 1115 of the Act, or section 458A(f)(2) of the Act with respect to use of incentive funds.

Section 303.3—Location of Noncustodial Parents in IV–D Cases

1. *Comment:* While many commenters supported the proposed change to add “corrections institutions” to the list of locate sources, one commenter requested that OCSE specify “Federal, State, and local” correctional institutions and that automation be recommended where possible.

Response: We would like to clarify that the term “corrections officials” refers to Federal, State, tribal, and local corrections officials. However, this clarification was not added to the regulatory text since this is dependent upon what sources are available to the State for locate purposes. Section

303.3(b)(1) does not address whether or not the sources should be automated; this is based on availability of databases in the State and whether the IV–D agency has access to them.

2. *Comment:* Another commenter suggested that we add “utility companies” to the list of locate sources. In addition, commenters recommended the following change in terminologies: “food stamps” to “Supplemental Nutrition Assistance Program (SNAP)”; “the local telephone company” to “electronic communications and internet service providers”; and change “financial references” to “financial institutions.”

Response: We agree with the commenters’ suggestions for technical revisions. Supplemental Nutrition Assistance Program (SNAP) is the official name of the food stamps program, and the two other revisions update classifications for communications and financial companies. In addition, we added utility companies to the list of locate sources since these companies have been valuable locate sources that many States use.

3. *Comment:* One commenter requested OCSE assist IV–D agencies in working with correctional institutions to identify incarcerated parents. Incarcerated parents may be hesitant to acknowledge that they have children or child support orders, possibly due to misinformation about child support shared among prisoners. Also, people are convicted and imprisoned under alias names. Because of these challenges, the commenter stated that State IV–D programs and correctional institutions need to understand and share each other’s data if IV–D programs are to be successful in locating noncustodial parents in jails or prisons. Another commenter discussed the challenges in trying to obtain timely information from county jails.

Response: As a result of their efforts to collaborate, IV–D programs and correctional institutions often agree that they need to know more about the parents in each other’s caseloads if both programs are to be successful in accomplishing their missions.⁵⁵ Section

⁵⁵ Jessica Pearson and Esther Ann Griswold, “Lessons from Four Projects Dealing with Incarceration and Child Support,” *Corrections Today*, July 1, 2005, 67(4): 92–95, which is available at: <http://www.thefreelibrary.com/Lessons+from+four+projects+dealing+with+incarceration+and+child...+a0134293586>; U.S. Department of Health and Human Services, *Working with Incarcerated and Released Parents: Lessons from OCSE Grants and State Programs*, 2006, available at www.acf.hhs.gov/programs/css/resource/working_with_incarcerated_resource_guide.pdf; and Council of State Governments,

453(e)(2) of the Act authorizes the Secretary of the Department of Health and Human Services to obtain information from Federal agencies including the Bureau of Prisons (BOP). OCSE currently has a match with BOP which covers 99 percent of the prison population. It includes 5,407 correctional facilities, including Federal, State, county, and other local prisons. The information is provided to States in the Social Security Administration (SSA) State Verification and Exchange System (SVES) match—they can receive the information on request and proactively. Our match, however, does not have all the data a direct interface could offer States. For example, we do not receive updates on the release date. The release date is very important to States—and updates are even more important because they monitor when the noncustodial parent is released. Release typically triggers order modifications and enforcement actions. We are going to explore the option to interface directly with the BOP and/or State facilities in order to obtain additional or updated information.

It is a system certification requirement to have automated interfaces with State sources, when appropriate, feasible, and cost effective, to obtain locate information, and this includes the Department of Corrections. We also encourage States to develop electronic interfaces with child support data being shared with Federal, State, Tribal, and local corrections institutions to maximize identification of incarcerated parents and program efficiency, and to establish practices for serving parents in correctional facilities. Identifying the fact of incarceration is important to set and keep support orders consistent with the parent’s current ability to pay, avoid the accumulation of arrears, and increase the likelihood that support will be consistently paid after release.

4. *Comment:* Another commenter was concerned that the addition of corrections institutions to the list of required locate sources will require an agreement with the corrections institutions in addition to enhancements to the locate interfaces to match corrections information with State child support information within the statewide automated child support enforcement system. If implemented, an understanding of any local agreements local child support agencies may have with their local law enforcement

Report of the Re-entry Policy Council: Charting the Safe and Successful Return of Prisoners to the Community. Justice Center, 2005, available at <https://csgjusticecenter.org/wp-content/uploads/2013/03/Report-of-the-Reentry-Council.pdf>.

partners would be appreciated. Also, a few commenters indicated that this was a list of required locate sources.

Response: In this final rule, as we discussed above, we are encouraging States to include corrections institutions as a locate source, but we are not requiring it. This change is intended to encourage child support agencies to use available locate tools to identify incarcerated noncustodial parents and ensure that their orders are appropriate. Additionally, in § 302.34 in this final rule, we have also added “corrections officials” to the list of entities with which a State may enter into agreements for cooperative arrangements. This addition encourages child support agencies to collaborate with corrections institutions and community corrections officials (probation and parole agencies).

We do not consider the list of appropriate locate sources in § 303.3(b)(1) to be required locate sources, but rather an extensive nonexclusive list of sources that the State should consider using to locate noncustodial parents or their sources of income and/or assets when location is needed to take a necessary action. Additionally, after the State has determined what locate sources they have access to, the State will need to determine what locate sources should be used on a particular case. For example, some locate sources may not be able to be used if the noncustodial parent’s social security number is unknown.

Section 303.6—Enforcement of Support Obligations

Civil Contempt Proceedings [§ 303.6(c)(4)]

1. Comment: Many commenters expressed concerns about our proposed revisions related to civil contempt. These commenters believed that the proposed requirements went beyond the *Turner v. Rogers* decision.⁵⁶ One commenter thought a regulation

⁵⁶ 564 U.S. ___, 131 S.Ct. 2507 (2011). The question in *Turner* was whether the due process clause of the Fourteenth Amendment of the U.S. Constitution requires States to provide legal counsel to an unrepresented indigent defendant person at a child support civil contempt hearing that could lead to incarceration in circumstances where neither the custodial parent nor the State was represented by legal counsel. The U.S. Supreme Court decision held that under those circumstances, the Fourteenth Amendment does not automatically require the States to provide counsel if the State has “in place alternative procedures that assure a fundamentally fair determination of the critical incarceration-related question, whether the supporting parent is able to comply with the court order.” The Court found that the Petitioner’s incarceration violated due process because he received neither counsel in the proceedings nor the benefit of adequate alternative procedures.

requiring that States must have procedures requiring that the courts take into consideration the subsistence needs of the noncustodial parent went beyond the *Turner v. Rogers* decision. Several commenters thought that the *Turner* decision merely requires a State either to provide legal counsel or alternative procedural safeguards. These commenters did not believe that any additional due process safeguards were required if counsel was being provided to the defendant.

Response: After careful consideration of the comments, we have decided to refocus the regulation on the criteria that IV–D agencies use to determine which cases to refer and how they prepare cases for a civil contempt proceeding. As the Federal agency responsible for funding and oversight of State IV–D programs, OCSE has an interest in ensuring the constitutional principles articulated in *Turner* are carried out in the child support program, that child support case outcomes are just and comport with due process, and that enforcement proceedings are cost-effective and in the best interest of the child. The *Turner* case provides OCSE and State child support programs with an opportunity to evaluate the appropriate use of civil contempt in today’s IV–D child support program. As the U.S. Supreme Court stated in *Turner*, a noncustodial parent’s ability to pay constitutes “the critical question” in a civil contempt case, whether the State provides legal counsel or alternative procedures designed to protect the indigent obligor’s constitutional rights.⁵⁷ Contempt is an important tool for collection of child support when used in appropriate cases where evidence exists that the noncustodial parent has the income and assets to pay the ordered monthly support obligation, but willfully fails to do so, and the purge amount or conditions are within the noncustodial parent’s ability to pay or meet. The *Turner* opinion provides the child support program with a guide for conducting fundamentally fair and constitutionally acceptable proceedings. The revisions to § 303.6(c)(4) are designed to reduce the risk of erroneous deprivation of the noncustodial parent’s liberty in IV–D cases, without imposing significant fiscal or administrative burden on the State. Accordingly, in

⁵⁷ See U.S. Department of Justice, Civil Rights Division, Office for Access to Justice, Dear Colleague Letter, March 14, 2016, <https://www.justice.gov/crt/file/832461/download>, cited in OCSE Dear Colleague Letter, DCL–16–05, March 21, 2016, <http://www.acf.hhs.gov/programs/css/resource/justice-department-announces-resources-to-reform-practices>.

response to comments, the final rule requires that State IV–D agency must maintain and use an effective system for enforcing the support obligation by establishing guidelines for the use of civil contempt citations in IV–D cases. The guidelines must include requirements that the IV–D agency: (i) Screen the case for information regarding the noncustodial parent’s ability to pay or otherwise comply with the order; (ii) provide the court with such information regarding the noncustodial parent’s ability to pay, or otherwise comply with the order, which may assist the court in making a factual determination regarding the noncustodial parent’s ability to pay the purge amount or comply with the purge conditions; and (iii) provide clear notice to the noncustodial parent that his or her ability to pay constitutes the critical question in the civil contempt action.

2. Comment: Some commenters felt that our proposed requirement related to civil contempt infringed on the inherent powers of the judiciary and would be unenforceable by the IV–D agency. Others commented that it was a violation of separation of powers. One commenter thought that the court should be the body to determine the requirements of *Turner* decision. Another commenter questioned our authority to regulate in this area.

Response: As discussed above, we have revised the proposed § 303.6(c)(4) to focus on IV–D agency decisions made at an earlier point in civil contempt proceedings. The revised § 303.6(c)(4) requires IV–D agencies to establish guidelines for the appropriate use of contempt in IV–D cases.

OCSE, IV–D agencies, and courts under cooperative agreements to carry out the IV–D program are required to ensure that noncustodial parents receive the due process protections required by the Constitution. The Federal government has a substantial interest in the effective and equitable operation of the child support program, including the use of contempt proceedings in the enforcement of IV–D cases. In addition, the Secretary of Health and Human Services has authority under section 452(a)(1) of the Act to “establish such standards for locating noncustodial parents, establishing paternity, and obtaining child support . . . as he determines to be necessary to assure that such programs will be effective.” Section 454(13) provides that “the State will comply with such other requirements and standards as the Secretary determines to be necessary to the establishment of an effective program for locating noncustodial parents, establishing paternity,

obtaining support orders, and collecting support payments.”

Research shows that routine use of civil contempt is counterproductive to the goals of the child support program.⁵⁸ All too often it results in the incarceration of noncustodial parents who are unable to pay to meet their purge requirements.⁵⁹ A study that examined the Milwaukee County Jail system found that 58 percent of the individuals incarcerated between 2005 and 2010 for criminal nonsupport of child support had no reported earnings in the unemployment insurance system and 75 percent were African-American.⁶⁰ This same study found that for those noncustodial parents with formal earnings, the average annual earnings were \$4,396, and the average annual child support owed for all incarcerated noncustodial parents was \$4,356.

Incarceration, in turn, means that the noncustodial parent loses whatever work he or she may have had, further reducing their ability to pay their child support. Once out, their ability to find work is negatively affected, resulting in some turning to the underground economy, which makes it even more difficult to collect child support.⁶¹ One study found that incarceration results in 40 percent lower earnings upon release.⁶² Moreover, contact between the parent and child is severed, which, generally, is detrimental to the child.⁶³ And the custodial family loses any other

form of support that this parent provided.⁶⁴

Most States use civil contempt as a last resort option, recognizing that routine use of this enforcement tool is not cost effective and can be counterproductive when the noncustodial parent is indigent.⁶⁵ Since the U.S. Supreme Court’s decision in *Turner v. Rogers*, some States have gone further and implemented significant changes to their contempt process to further ensure that indigent noncustodial parents are not wrongly incarcerated for child support debt.⁶⁶ These changes include implementing case screening, new referral procedures, developing new information and forms, and requiring specific findings by the court on the present ability to pay the ordered purge amount to ensure accurate and defensible orders.⁶⁷

Finally, the government’s interests also favor additional procedural safeguards to ensure that only those parents with a present ability to pay are confined for civil contempt. While the State has a strong interest in enforcing child support orders, it secures no benefit from jailing a noncustodial parent who cannot discharge his obligation. The period of incarceration makes it less, rather than more, likely that such parent will be able to pay child support.⁶⁸ Meanwhile, the State incurs the substantial expense of confinement. While child-support recovery efforts once “followed a

business model predicated on enforcement” that “intervened only after debt, at times substantial, accumulated and often too late for collection to be successful, let alone of real value to the child,” experience has shown that alternative methods—such as order modifications, increased contact with noncustodial parents, and use of “automation to detect non-compliance as early as possible”—are more effective than routine enforcement through civil contempt.⁶⁹

3. *Comment:* Several commenters expressed concerns that the proposed requirements related to civil contempt proceedings would reduce the efficiency and flexibility of the enforcement process through the courts. One commenter thought that the NPRM would weaken the enforcement remedy of contempt when used to enforce the obligation of contemnors who have an ability to arrange payments from assets held by others, even though the IV–D agency had been unable to affirmatively show the existence of income and assets. One commenter thought that the proposed requirements would be overly burdensome in civil contempt proceedings involving chronic nonpayers. Another commenter thought that the NPRM would result in increases in court and attorney time necessary to comply with all of the new requirements or would translate into less court resources available for other child support actions, such as establishment and modification actions.

Response: We do not agree with these comments. Based on comments, the revisions to § 303.6(c)(4) are designed to reduce the risk of an erroneous deprivation of liberty without imposing significant fiscal or administrative burden on the State.

Research shows that implementing constitutional due process safeguards, such as those delineated in the *Turner* decision, increases compliance with court orders by increasing litigants’ perception of fair treatment.⁷⁰ Procedural fairness matters to litigants and influences their behavior. The safeguards included in *Turner* are designed to provide procedural fairness.

⁵⁸ See Elizabeth G. Patterson, *Civil Contempt & the Indigent Child Support Obligor: The Silent Return of Debtor’s Prison*, 18 Cornell Journal of Law & Public Policy 95, 126 (2008) (*Civil Contempt*), available at: <http://www.lawschool.cornell.edu/research/jlpp/upload/patterson.pdf>.

⁵⁹ See Rebecca May & Marguerite Roulet, Ctr. for Family Policy & Practice, *A Look at Arrests of Low-Income Fathers for Child Support Nonpayment: Enforcement, Court and Program Practices*, 40 (2005), which is available at: <http://www.cffpp.org/publications/LookAtArrests.pdf>.

⁶⁰ Cook, Steven. *Child Support Enforcement Use of Contempt and Criminal Nonsupport Charges in Wisconsin*, University of Wisconsin, Institute for Research on Poverty, 2015.

⁶¹ The Pew Charitable trusts. *Collateral Costs: Incarceration’s Effect on Economic Mobility*, September 2010, available at: http://www.pewtrusts.org/~media/legacy/uploadedfiles/pes_assets/2010/collateralcosts1pdf.pdf; and Judi Bartfeld & Daniel R. Meyer, *Child Support Compliance Among Discretionary and Nondiscretionary Obligor*, 77 Soc. Serv. Rev. 347, 364–65 (2003).

⁶² The Pew Charitable trusts. *Collateral Costs: Incarceration’s Effect on Economic Mobility*, September 2010, available at: http://www.pewtrusts.org/~media/legacy/uploadedfiles/pes_assets/2010/collateralcosts1pdf.pdf.

⁶³ See Amanda Geller, Carey E. Cooper, Irwin Garfinkel, Ofira Schwartz-Soicher, and Ronald B. Mincy. “Beyond Absenteeism: Father Incarceration and Child Development,” *Demography* (2012) 49(1): 49–76.

⁶⁴ Jeremy Travis and Bruce Western, Eds, *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, National Academy of Sciences, 2014.

⁶⁵ Carmen Solomon-Fears, Alison M. Smith, and Carla Berry, *Child Support Enforcement: Incarceration, As the Last Resort Penalty For Nonpayment of Support*, Congressional Research Service R42389, 2012, which is available at: http://greenbook.waysandmeans.house.gov/sites/greenbook.waysandmeans.house.gov/files/2012/documents/R42389_gb.pdf.

⁶⁶ Mary Pat Gallagher, “Court Takes Steps To Protect Rights of Poor Child-Support Delinquents,” *New Jersey Law Journal*, 2014; Ethan C. McKinney, “Contempt After *Turner*” Presentation at 2014 Annual Conference, Eastern Regional Interstate Child Support Association, 2014, which is available at: <http://www.ericcsa.org/2014-conference-agenda-handouts>; Pam Lowry, “Rebalancing the Program Through Conversation with All Staff” *Child Support Report* 34(10): 1 (October–November 2012), which is available at: <http://www.acf.hhs.gov/sites/default/files/programs/css/csr1211.pdf>.

⁶⁷ Pamela Lowry and Diane Potts, *Illinois Update on Using Civil Contempt to Collect Child Support*; Ethan C. McKinney (2014) “Contempt After *Turner*” Presentation at 2014 Annual Conference, Eastern Regional Interstate Child Support Association, which is available at: <http://www.ericcsa.org/2014-conference-agenda-handouts>.

⁶⁸ See Elizabeth G. Patterson, *Civil Contempt & the Indigent Child Support Obligor: The Silent Return of Debtor’s Prison*, 18 Cornell Journal of Law & Public Policy 95, 126 (2008) (*Civil Contempt*), available at: <http://www.lawschool.cornell.edu/research/jlpp/upload/patterson.pdf>.

⁶⁹ See National Child Support Enforcement, U.S. Dep’t of Health & Human Services, *Strategic Plan: FY 2005–2009*, at 2, 10 (*Strategic Plan*), <http://www.acf.hhs.gov/programs/css/resource/national-child-support-enforcement-strategic-plan-fy2005-2009>.

⁷⁰ See Kevin Burke & Steve Leben’s report “Procedural Fairness: A Key Ingredient in Public Satisfaction,” A White Paper of the American Judges Association, *Court Review* 44:1/2, available at: http://www.proceduralfairness.org/~media/Microsites/Files/procedural-fairness/Burke_Leben.ashx.

In *Turner*, the Court noted “the routine use of contempt for non-payment of child support is likely to be an ineffective strategy” over the long-term.⁷¹ Contempt actions are expensive and time consuming for courts, agencies, and parents, and do not typically result in ongoing support for children. One State finds that contempt is its least cost-effective enforcement tool, estimating that collections in contempt actions barely break even with the costs—for every dollar spent on contempt proceedings, the State collects \$1.26.⁷² Another State found that when it cut back on its routine use of contempt hearings and increased use of administrative locate and enforcement remedies, total collections increased.⁷³ Resources put into investigations, “appear and disclose” procedures, parent interviews, case conferencing, and expanded data sources are generally a more cost-effective use of Federal and State dollars than using contempt hearings in order to discover information.

States must provide adequate safeguards to ensure that the noncustodial parent has the ability to comply with the order. The revised language in paragraph (c)(4) sets out minimum requirements that IV–D agencies must meet when bringing a civil contempt action involving parties in a IV–D case and ensures that contempt is used in appropriate cases where evidence exists that the noncustodial parent has the income and assets to pay the ordered monthly support obligation, but willfully fails to do so, and the purge amount or conditions are within the noncustodial parent’s ability to pay or meet.

It is the responsibility of the IV–D agency to ensure that prior to filing for civil contempt that could result in incarceration, the IV–D agency has carefully reviewed each case to ascertain whether the facts would support a finding that the noncustodial parent has the “actual and present” ability to comply with the support order, and the requested purge amount or condition, and to bring those facts to the court’s attention.⁷⁴ States must also

provide clear notice to the noncustodial parent that his or her ability to pay constitutes the critical question in the contempt action.

OCSE strongly encourages State child support agencies to consider some of the innovative alternatives to incarceration put into practice by a number of States and discussed in OCSE IM–12–01.⁷⁵ In addition, it is the noncustodial parent, not other relatives, friends, or the custodial parent, who is responsible for child support based upon his or her ability to pay it. A procedure that pressures family members and friends to pay in order to keep the noncustodial parent out of jail is inconsistent with constitutional principles, damaging to family relationships, and ultimately ineffective and counterproductive in obtaining ongoing support for children. As a practical matter, reliance on relatives and friends likely will not result in regular support payments for the families.

4. Comment: One commenter indicated that any reference in § 303.6 to the noncustodial parent’s subsistence needs or actual earnings/income should be replaced with a reference to the noncustodial parent’s ability to pay.

Response: In § 303.6(c)(4), we have revised the proposed language to delete reference to the noncustodial parent’s subsistence needs as a separate determination, and instead reference to the noncustodial parent’s ability to pay the child support order or ability to comply with the order. However, subsistence needs are an inherent factor in determining a noncustodial parent’s ability to pay. Everyone, even noncustodial parents, have basic self-support needs, including food and shelter that cannot be ignored when determining ability to pay.

5. Comment: One commenter indicated that States do not file contempt proceedings as fishing expeditions, but rather file them solely to use the jail power to coerce compliance with a support order after the agency has exhausted administrative enforcement remedies and has screened the case for contempt. States often file contempt proceedings against noncustodial parents who hide income, are willing to lie in court, work at cash jobs, and have other ways to make themselves look unable to pay support. The commenter believed that our

www.justice.gov/crt/file/832461/download, cited in OCSE Dear Colleague Letter, DCL–16–05, March 21, 2016, <http://www.acf.hhs.gov/programs/css/resource/justice-department-announces-resources-to-reform-practices>.

⁷⁵ IM–12–01 is available at: <http://www.acf.hhs.gov/programs/css/resource/alternatives-to-incarceration>.

proposed requirements would actually serve to limit child support collections on the tough to collect cases.

Response: State practice related to contempt proceedings varies widely. We are encouraged that some States are already using administrative enforcement remedies and case screening prior to initiating civil contempt proceedings. Contempt actions should be used selectively in those cases when the facts warrant its use, not routinely, especially in nonpaying cases where the reason for nonpayment is low income. Contempt is an important tool for collection of child support when used in appropriate cases where evidence exists that the noncustodial parent has the income and assets to pay the ordered monthly support obligation, but willfully fails to do so, and the purge amount or conditions are within the noncustodial parent’s ability to pay or meet. However, routine contempt actions and the threat of jail are not a cost-effective way to conduct discovery. The *Turner* opinion provides the child support program with a guide for conducting fundamentally fair and constitutionally acceptable proceedings. The revisions to § 303.6(c)(4) are designed to reduce the risk of erroneous deprivation of the noncustodial parent’s liberty in IV–D cases consistent with the *Turner* decision, without imposing significant fiscal or administrative burden on the State.

We agree that filing for contempt may be the right remedy in some difficult to collect cases—those where there is evidence that the noncustodial parent has the ability to pay, but chooses to ignore child support obligations. However, if a case is difficult to collect because the noncustodial parent lacks the ability to pay support, there are more effective and less costly tools that meet due process requirements. Sometimes, the IV–D agency does not have sufficient facts to determine the difference. We recognize that it is difficult to build a case. It is our position, however, that State IV–D agencies have the responsibility to investigate and screen the case for ability to pay before bringing a civil contempt action that can lead to jail. States need to develop and implement procedures and protocols for determining when it is effective to use contempt proceedings in IV–D cases. States need to ensure that the tools or mechanisms they use to enforce cases are cost-effective, productive, and in the best interest of the children.

6. Comment: Several commenters expressed concerns that the proposed provision related to civil contempt

⁷¹ *Turner*, 131 S. Ct. at 2516 (quoting Brief for United States as Amicus Curiae at 21–22, and n. 8), available at: <http://www.justice.gov/sites/default/files/osg/briefs/2010/01/01/2010-0010.mer.ami.pdf>.

⁷² Ann Coffin, *Florida’s Data Analytics: Compliance of Support Orders*, Presentation to the OCSE Strategic Planning Workgroup on Measuring Child Support Performance, 2014.

⁷³ Lowry, Pamela and Diane Potts, “Illinois Update On Using Civil Contempt To Collect Child Support.”

⁷⁴ See U.S. Department of Justice, Civil Rights Division, Office for Access to Justice, Dear Colleague Letter, March 14, 2016, <https://>

proceedings inappropriately shifts the burden of proof. They believed that the noncustodial parent would no longer have to prove his or her inability to pay; rather, the IV–D agency would have to prove the noncustodial parent’s ability to pay. Another commenter thought that a rule shifting the burden to the IV–D agency to show evidence of ability to pay would necessitate more discovery that would increase the expense of and slow down the completion of IV–D enforcement judicial actions. This same commenter indicated that even if the noncustodial parent is an employee paid in a documented form, the State staff cannot use records of wages as documentary evidence due to limitations on the use of workforce wage records by State law.

Response: We appreciate the difficulty of discovering information regarding ability to pay in some cases. However, State practices related to the use of contempt actions vary widely. We point out that many States build cases by using sound investigative practices and making efforts to talk with both parents before scheduling court hearings. All States should maximize their use of automated data sources. Additionally, many States use clear, easy to read forms seeking financial information from the parents. Other States routinely interview the parents, either through phone contacts, case conferencing, or compelled “appear and disclosure” administrative procedures, all of which impose little expense on the State or burden on the proceedings, but would help increase the accuracy of the court’s determination. These simple, minimally burdensome procedures would enable the IV–D agency to evaluate whether the noncustodial parent has the ability to comply with the support obligation.

The final rule does not address burden of proof. Rather, when the State considers bringing a civil contempt action in a IV–D case that can result in incarceration, often against an unrepresented, indigent noncustodial parent, the rule requires the IV–D agency to screen the case for ability to pay and, if proceeding with the contempt action, provide such evidence for the court to consider, in conjunction with any other evidence, in making a factual determination about the noncustodial parent’s ability to pay child support.⁷⁶

⁷⁶ See U.S. Department of Justice, Civil Rights Division, Office for Access to Justice, Dear Colleague Letter, March 14, 2016, <https://www.justice.gov/crt/file/832461/download>, cited in OCSE Dear Colleague Letter, DCL–16–05, March 21, 2016, <http://www.acf.hhs.gov/programs/css/>

7. Comment: One commenter thought that the proposed amendment related to civil contempt was irreconcilable with the intent and other terms of § 303.6, which provides State agencies with authority to take certain enforcement actions. The commenter believed that the proposed amendment unduly restricts judicial enforcement actions in civil contempt cases and requested OCSE to strike the proposed provision.

Response: As we indicated in AT–12–01,⁷⁷ the Federal government has “an interest in ensuring the constitutional principles articulated in *Turner* are carried out in the child support program, that child support case outcomes are just and comport with due process, and that enforcement proceedings are cost-effective and in the best interest of the children.” Civil contempt is different from other enforcement actions. It can lead to a loss of liberty through incarceration. Due process safeguards related to contempt actions are particularly important when the noncustodial parent is unrepresented, and has limited income and education. Too often, civil contempt proceedings are brought in some jurisdictions to enforce an underlying support order based on fictitious income that has been imputed to the noncustodial parent. Additionally, since the noncustodial parents often face attorneys in court, it is especially important that the State ensures that appropriate procedural safeguards are provided in IV–D cases enforced through contempt proceedings. Our objective is to prevent a cascade of legal consequences that begins with an order based on imputed income and ends in nonpayment and incarceration. For some defendants, what is missing at critical points in the process is evidence of ability to pay. Given the importance of the interest at stake in civil contempt proceedings, it is especially important that IV–D case procedures promote a fair hearing and accurate determination supported by the facts with respect to the key question in the case, ability to pay, such that any confinement imposed on a noncustodial parent is remedial rather than punitive.

8. Comment: One commenter suggested the following revision to our NPRM: “Have procedures ensuring that civil contempt proceedings are initiated after considering the noncustodial parent’s ability to earn income and that parent’s subsistence needs, if known.

resource/justice-department-announces-resources-to-reform-practices.

⁷⁷ AT–12–01 is available at: <http://www.acf.hhs.gov/programs/css/resource/turner-v-rogers-guidance>.

IV–D agencies shall provide the court with information regarding the noncustodial parent’s ability to comply when requesting a finding of contempt and a purge amount.”

Response: We agree. The revision to proposed § 303.6(c)(4) reflects this suggestion but we deleted the reference to the noncustodial parent’s subsistence needs as a separate determination from ability to pay.

9. Comment: One commenter questioned how to proceed in a case where there is no evidence that the defendant has the ability to pay either the ordered amount or the purge amount. Another commenter asked how the State IV–D agency will initiate a civil contempt if it has no earnings information on the noncustodial parent.

Response: If the noncustodial parent has no earnings or there is no evidence that the noncustodial parent has the ability to pay, the IV–D agency should not initiate civil contempt proceedings, but should investigate further, consider whether the support obligation should be modified, and refer the parent to employment or other services when available. See also the response to Comment 6 above regarding State strategies and practices for the appropriate use of contempt in IV–D cases.

10. Comment: What is the process by which a noncustodial parent would be ordered to participate in an “alternative to incarceration” program if his lack of actual income precludes the possibility of incarceration for contempt?

Response: The language of the rule includes the clause “ability to pay or otherwise comply with the order.” If the order requires the noncustodial parent to participate in services, and the court finds based on the evidence, after notice and other safeguards, that the noncustodial parent is able to comply with the order, the requirements of the rule have been met. Several child support agency programs have implemented proactive and early intervention practices to address the underlying reasons for unpaid child support and avoid the need for civil contempt proceedings leading to jail time. In OCSE IM–12–01,⁷⁸ we describe promising and evidence-based practices to help States increase reliable child support payments, improve access to justice to parents without attorneys, and reduce the need for jail time. Incarceration may be appropriate in those cases where noncustodial parents have the means to support their

⁷⁸ OCSE–IM–12–01 is available at: <http://www.acf.hhs.gov/programs/css/resource/alternatives-to-incarceration>.

children but willfully evade their parental responsibilities by hiding income and assets. However, several innovative strategies can reduce the need for routine civil contempt proceedings in cases involving low-income noncustodial parents, increase ongoing collections, and reduce costs to the public. Research suggests that such practices can actually improve compliance with child support orders, increasing both the amount of child support collected and the consistency of payment.⁷⁹ These practices include early engagement and efforts to contact and talk with both parents, increasing investigative and locate efforts, and setting accurate orders based upon the noncustodial parent's actual income,⁸⁰ improving review and adjustment processes,⁸¹ developing debt management programs,⁸² implementing work-oriented programs for unemployed noncustodial parents who are behind in their child support,⁸³ working with fatherhood and other community based programs as intermediaries, and encouraging mediation and case conferencing to resolve issues that interfere with consistent child support payments.⁸⁴

⁷⁹ See Jessica Pearson, Nancy Thoennes, and Lanae Davis, *Early Intervention in Child Support*. Center for Policy Research, 2007, which is available at: <http://www.centerforpolicyresearch.org/Publications/tabid/233/Default.aspx>.

⁸⁰ Mark Takayesu, *How Do Child Support Order Amounts Affect Payments and Compliance?*, Orange County Child Support Services, 2011, which is available at: <http://www.wuss.org/proceedings12/37.pdf>.

⁸¹ U.S. Department of Health and Human Services, *Using Automated Data Systems To Establish and Modify Child Support Orders*, November 2006, which is available at: http://www.acf.hhs.gov/sites/default/files/ocse/dcl_07_32a.pdf.

⁸² Carolyn Heinrich, Brett Burkhardt, and Hilary Shager, *Reducing Child Support Debt and Its Consequences: Can Forgiveness Benefit All?*, *Journal of Policy Analysis and Management*, 30(4): 755–774, 2011, which is available at: <https://www.lafollette.wisc.edu/images/publications/workingpapers/heinrich2010-018.pdf>.

⁸³ Daniel Schroeder and Nicholas Doughty, *Texas Non-Custodial Parent Choices: Program Impact Analysis*, Ray Marshall Center for the Study of Human Resources, Lyndon B. Johnson School of Public Affairs, The University of Texas at Austin, 2009, which is available at: https://www.utexas.edu/research/cshr/pubs/pdf/NCP_Choices_Final_Sep_03_2009.pdf. Also see Kye Lippold and Elaine Sorensen's report, *Strengthening Families Through Stronger Fathers: Final Impact Report for the Pilot Employment Programs*, Urban Institute, 2011, which is available at: http://www.urban.org/research/publication/strengthening-families-through-stronger-fathers-final-impact-report-pilot-employment-programs/view/full_report.

⁸⁴ Elaine Sorensen and Tess Tannehil, *Preventing Child Support Arrears in Texas by Improving Front-end Processes*, Urban Institute, 2006, which is available at: http://www.urban.org/research/publication/preventing-child-support-arrears-texas-improving-front-end-processes/view/full_report.

Purge Amounts: [§ 303.6(c)(4)]

1. *Comment:* One commenter thought that requiring purges be based on an evidentiary finding is unnecessary, beyond the scope of *Turner*, and has an unintended effect of delaying the efficiency of an expedited child support proceeding. Two other commenters thought that the proposed purge language was too restrictive and added unnecessary complexity to a fairly simple process.

Response: Although we have revised § 303.6(c)(4) significantly based on our consideration of the comments related to civil contempt, we do not necessarily agree with the interpretation of *Turner* presented in some of these comments. At issue are safeguards of obligors' constitutionally-protected liberty and property interests. We are requiring that State IV–D agencies provide the court with available information, which may assist the court in making a factual determination regarding the obligor's ability to pay the purge amount or comply with the purge conditions. As noted in *Turner*, under established Supreme Court principles, “[a] court may not impose punishment in a civil contempt proceeding when it is clearly established that the alleged contemnor is unable to comply with the terms of the order.”⁸⁵ The Court found that the noncustodial parent's ability to pay constitutes “the critical question in the case.” The revisions to § 303.6(c)(4) require the IV–D agency to assist the court by providing such information, thereby reducing the risk of erroneous deprivation of the noncustodial parent's liberty in IV–D cases, without imposing significant fiscal or administrative burden on the State.

2. *Comment:* Several commenters stated that the court makes the determination of what amount a noncustodial parent must pay to avoid incarceration. They indicated that the IV–D agency cannot control what the court ultimately sets as the amount. Two commenters believed that the proposed requirement related to a purge amount usurped the court's authority and discretion.

Response: We expect that State courts will adhere with the constitutional due process principles. However, in most States, it is the IV–D agency or the court, through cooperative agreement with the IV–D agency that initiates contempt actions in IV–D cases. Before filing a contempt action, the IV–D agency has a responsibility to the parties and to the court to screen the IV–D case for ability to pay, and if proceeding with the

contempt action, provide the court with such evidence. In addition, the IV–D agency may be able to contribute to judicial educational efforts to foster awareness of the need to set purge amounts based on ability to pay and enter an express finding that the noncustodial parent has the ability to pay the purge amount or comply with the purge conditions, consistent with the *Turner* decision.

3. *Comment:* Several commenters stated that they thought purge amounts should not be based on actual income. One commenter thought that the proposed language related to purge amounts disregarded the many cases in which the noncustodial parent is voluntarily unemployed and is being provided living expenses by another person; the commenter thought the language should focus on “all available income” instead of “actual income.” Another commenter indicated that the proposed provision could consistently hamper a judge's ability to enforce child support orders intended to benefit children. One commenter thought that requiring IV–D agencies to consider actual earnings prior to filing a contempt motion or recommending a purge amount limited agencies' options, especially in regards to parents who work in the underground economy or refuse to work. This commenter also thought that although a nonmonetary purge condition requiring participation in a job search or other similar activity was certainly appropriate in a situation when there is significant question as to a noncustodial parent's ability to comply with a financial purge, but the availability of a monetary purge remained essential for individuals who will only take support obligations seriously when a monetary purge is set and their freedom is at risk.

Response: We have revised the proposed language. The revised rule focuses on ensuring that the State IV–D agency establishes guidelines for the appropriate use of contempt in IV–D cases to ensure that constitutional procedural safeguards are provided in all IV–D cases by requiring that such guidelines include that the State screens the case for information regarding the obligor's ability to pay or otherwise comply with the order. The State must also provide the court with such information regarding the noncustodial parent's ability to pay, or otherwise comply with the order, to assist the court in making a factual determination regarding the noncustodial parent's ability to pay the purge amount or comply with any other purge conditions that may be set by the court. The State child support agency could provide the

⁸⁵ *Turner*, 131 S. Ct. at 2516 (quoting *Hicks v. Feiock*, 485 U. S. 624, 638, n. 9).

court with financial information received from financial forms sent to both parents, automated quarterly wage information from the National Directory of New Hires, as well as other relevant information that the State has ascertained through testimony, case conferencing, and investigations. Alternatively, the State could recommend to the court alternative purge conditions, such as conducting a job search, obtaining counseling for substance abuse, or obtaining job training.⁸⁶ The State must also ensure that the noncustodial parent is provided clear notice that his or her ability to pay constitutes the critical question in the contempt action.

4. Comment: A few commenters suggested alternative language proposals to what we had in the NPRM. One commenter suggested that: “A purge amount must be based upon a court finding that the noncustodial parent has the actual means to pay the amount.” Another suggested revision included: “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, including but not limited to any hidden income or assets of the noncustodial parent, or upon a written evidentiary finding that the noncustodial parent has failed to make reasonable and diligent efforts to seek employment.”

Response: OCSE has considered all of the suggested revisions. We have incorporated into the revised language a requirement that the purge amount be based upon the defendant’s “ability to pay,” consistent with the principles articulated in the *Turner* decision. We have also incorporated that information about the circumstances of the cases be provided to the courts based on the State IV–D efforts related to screening the case. For specifics related to the revised language, please see Comment/Response 3 in this section.

Section 303.8—Review and Adjustment of Child Support Orders

1. Comment: A few commenters stated that if incarceration is recognized as a change in circumstance, then the changes to § 303.8 are not necessary because current Federal law and regulation allow States to conduct accelerated reviews in circumstances that are identified by States as the most beneficial.

⁸⁶ In *Bearden v. Georgia*, 461 U.S. 660 (1983), the U.S. Supreme Court held that a State determines a fine or restitution to be an appropriate penalty, it may not thereafter imprison a person solely because he lacked the resources to pay for it, but should instead consider alternative measures.

Response: The revisions in this section are necessary to require all States to either implement § 303.8(b)(2) or (b)(7)(ii) and provide more specificity regarding review and adjustment and incarceration. Section 303.8(b)(2) allows States to elect in their State plan, the option to initiate review and adjustment, without the need for a specific request, after learning that the noncustodial parent is incarcerated for more than 180 calendar days. We encourage States to implement this proactive approach to ensure that orders are based on the noncustodial parent’s ability to pay during his or her incarceration. A number of States, including Arizona, California, Michigan, Vermont, and the District of Columbia have enacted State laws that permit their child support agency to initiate review and adjustment upon notification that the noncustodial parent has been incarcerated.⁸⁷ Additionally, if a State does not elect in its State plan to implement paragraph (b)(2) of this section, then we are requiring the State, under paragraph (b)(7)(ii), within 15 business days of when the IV–D agency learns that a noncustodial parent will be incarcerated for more than 180 calendar days, to send a notice to both parents informing them of the right to request the State to review and, if appropriate, adjust the order, consistent with this section.

Further, we agree that incarceration is a factor in determining a substantial change in circumstance. As such, we have revised § 303.8(c) to indicate that: (c) . . . [s]uch reasonable quantitative standard must not exclude incarceration as a basis for determining whether an inconsistency between the existing child support order amount and the amount of support determined as a result of a review is adequate grounds for petitioning for adjustment of the order.

2. Comment: A few commenters noted that section 466(10) of the Social Security Act (the Act) refers to periodic reviews and establishes a minimum 3-year review cycle “or such shorter cycles as the State may determine” which empowers the States, not OCSE, to create exceptions to the 3-year review process.

⁸⁷ In 2012, Vermont enacted Senate Bill 203 that allows the child support program to file a motion to modify child support if a party is incarcerated from more than 90 days. For information about the other jurisdictions, see Department of Health and Human Services, Office of Child Support Enforcement, “*Voluntary Unemployment, Imputed Income, and Modification Laws and Policies for Incarcerated Noncustodial Parents* (2012), Project to Avoid Increasing Delinquencies—Child Support Fact Sheet, available at: http://www.acf.hhs.gov/sites/default/files/ocse/paid_no4_companion.pdf.

Response: The Secretary of Health and Human Services has authority under section 452(a)(1) of the Act to “establish such standards for locating noncustodial parents, establishing paternity, and obtaining child support . . . as he determines to be necessary to assure that such programs will be effective.” Section 454(13) provides that “the State will comply with such other requirements and standards as the Secretary determines to be necessary to the establishment of an effective program for locating noncustodial parents, establishing paternity, obtaining support orders, and collecting support payments.”

3. Comment: A few commenters asked that we clarify the term “incarceration” and specify if it includes individuals who are sentenced, pending trial, on parole, or in a supervised release program (e.g., half-way house).

Response: Black’s Law Dictionary defines “incarcerated” as confined in a jail or penitentiary. Therefore, the review and adjustment notification requirements do not include noncustodial parents who are on parole or in a supervised release program. If the individual has been sentenced, the State may take steps to implement the notification requirement if the noncustodial parent will be incarcerated for more than 180 calendar days.

4. Comment: Many commenters had concerns that the proposed 90-day timeframe was too short and did not allow enough time to review and modify an order. Commenters requested the timeframe be increased to at least 6 months.

Response: Consistent with comments, we have extended the timeframe to 6 months. The current timeframe for review and adjustment, in § 303.8(e), allows 180 calendar days to conduct the review and, if appropriate, adjust the support order; therefore, in the final rule, we have increased the incarceration timeframe to 180 calendar days in § 303.8(b)(2) and added it to paragraph (b)(7)(ii) to align with the current review and adjustment timeframe.

5. Comment: A few commenters requested that the provision specify a timeframe when the child support agency has to initiate the review and adjustment process after learning of the incarceration.

Response: We agree that a timeframe may advance the review and modification of the child support order process. Therefore, we revised proposed § 303.8(b)(7)(ii) to include a timeframe of 15 business days to initiate the review and adjustment process after

learning that the noncustodial parent is incarcerated.

6. *Comment:* One commenter indicated that the proposed § 303.8(b)(7)(ii) requires the State to send notice of the parents' right to review their order when the IV-D agency learns of the noncustodial parent's incarceration without any minimum time period. For instance, the State could learn of the noncustodial parent's incarceration on day 88 of a 90-day sentence and, under the NPRM, the IV-D agency would need to send notice to both parties even though the potential reason for the modification ends 2 days later. According to the commenter, the provision should include a minimum time period before the IV-D agency is required to give notice of the right to review and any timeframe should begin only after the State learns of the incarceration. Regardless of the length of incarceration, it only matters how much time remains once the State learns of the incarceration, since the modification can only apply going forward.

Response: The timeframe "more than 180 calendar days" in both § 303.8(b)(2) and (b)(7)(ii) is applicable based on the date the IV-D agency learns the noncustodial parent is incarcerated. For instance, if the State learns of the noncustodial parent's incarceration on day 8 of a 200-day sentence, then this provision would apply since the noncustodial parent still has 192 days remaining in his or her sentence. However, if the State learns of the noncustodial parent's incarceration on day 178 of an 180-day sentence, then this provision would not apply because the State could not reasonably complete a review and adjustment process before the parent's release.

7. *Comment:* A few commenters suggested the requirement to automatically review and adjust orders, or automatically notify noncustodial parents of their right to request a review, be expanded to apply to disabled noncustodial parents receiving SSI, military service members, and disabled veterans, in addition to incarcerated noncustodial parents.

Response: The review and adjustment statute at section 466(a)(10)(B) of the Act requires States to review and, if appropriate, adjust orders following a request by either parent based upon a substantial change in circumstances—whether due to unemployment, disability, military service, or incarceration. However, provisions in § 303.8(b)(2) and (b)(7)(ii) that specifically address automatic review and adjustment, or automatic notification of the right to a review and

adjustment specifically for incarcerated parents because few incarcerated parents currently request for their child support orders to be reviewed and modified. Because incarcerated parents are involuntarily confined, unlike the other groups of parents mentioned in the comments, their access to the internet or cell phones often is restricted due to security concerns. They may not have access to legal counsel or other community-based resources that could provide timely information.⁸⁸ In many prisons, incarcerated parents do not know their rights to request review and adjustment of their orders and cannot easily contact the child support office. Consequently, their opportunity to seek information and request a review in time to prevent the accumulation of unmanageable debts often is limited or non-existent.⁸⁹

Research finds that many incarcerated parents do not understand the child support system and do not know their rights.⁹⁰ Most incarcerated people prior to incarceration lack a high-school diploma and are functionally illiterate.⁹¹ It is important that noncustodial parents know about their right to request a review and adjustment

⁸⁸ "Computer use for/by inmates," *Corrections Compendium* 34 (2): 24–31, Summer 2009 <http://www.thefreelibrary.com/Computer+use+for%2fby+inmates.-a0208273651>.

⁸⁹ Gorgol, Laura E., and Brian A. Sponsler, Ed.D., *Unlocking Potential: Results of a National Survey of Postsecondary Education in State Prisons*, Institute for Higher Education Policy, May 2011, available at: <http://www.ihep.org/research/publications/unlocking-potential-results-national-survey-postsecondary-education-state>; U.S. Department of Health and Human Services, *Working with Incarcerated and Released Parents: Lessons from OCSE Grants and State Programs*, 2006, available at: www.acf.hhs.gov/programs/css/resource/working_with_incarcerated_resource_guide.pdf; and Council of State Governments, *Report of the Re-entry Policy Council: Charting the Safe and Successful Return of Prisoners to the Community*, Justice Center, 2005, available at <https://csgjusticecenter.org/wp-content/uploads/2013/03/Report-of-the-Reentry-Council.pdf>.

⁹⁰ Jessica Pearson and Esther Ann Griswold, "Lessons from Four Projects Dealing with Incarceration and Child Support," *Corrections Today*, July 1, 2005, 67(4): 92–95, which is available at: <http://www.thefreelibrary.com/Lessons+from+four+projects+dealing+with+incarceration+and+child...-a0134293586> and Council of State Governments, *Report of the Re-entry Policy Council: Charting the Safe and Successful Return of Prisoners to the Community*, Justice Center, 2005, available at <https://csgjusticecenter.org/wp-content/uploads/2013/03/Report-of-the-Reentry-Council.pdf>.

⁹¹ Harlow, Caroline Wolf Ph.D., *Bureau of Justice Statistics Special Report: Education and Correctional Populations*, U.S. Department of Justice (September 2003), available at: <https://www.bjs.gov/content/pub/pdf/ecp.pdf>; and *Literacy Behind Prisoner Walls*, National Center for Education Statistics, U.S. Department of Education, Office of Educational Research and Improvement (1994), available at: <http://nces.ed.gov/pubs94/94102.pdf>.

early in their prison term because of the direct relationship among unmanageable child support debt, unemployment, nonpayment, and recidivism. Because of this, many State child support programs have implemented outreach strategies designed to educate incarcerated parents of their rights to request reviews of their support orders.

At the same time, the rule does not preclude States from using automatic review and adjustment, or automatic notices regarding the right to request a review and adjustment, in other situations, such as for disabled noncustodial parents receiving SSI, military service members, and disabled veterans who experience a substantial change in circumstances.

8. *Comment:* Several commenters indicated that changes to State statutes, administrative rules, and court rules will be required to be in compliance with this provision. Specifically, one commenter suggested OCSE align § 302.56, *Guidelines for setting child support orders* and this section.

Response: We agree that §§ 302.56 and 303.8 are closely related and both sections may require State statutes, administrative rules, and court rules changes; therefore, we are delaying the date by which the States must be in compliance with changes to these sections. The compliance date for these provisions will be within 1 year after completion of the State's next quadrennial review of its guidelines, that commences more than 1 year after publication of the final rule, in accordance with § 302.56(e), as a condition of approval of its State plan.

9. *Comment:* Multiple commenters believed the provision should exclude persons incarcerated as a result of nonpayment of child support, a crime committed against any child, or a crime committed against a party in the child support case.

Response: We do not agree. As discussed in Comment/Response 14 in § 302.56(d)—*Imputing Income* subsection, the child support program is not an extension of the criminal justice system. Establishing, modifying, or enforcing a child support order is not a form of punishment for incarcerated noncustodial parents. Parents have a statutory right to request a review and adjustment of their orders based on a substantial change of circumstances.

10. *Comment:* Several commenters noted there is no corresponding requirement in § 303.8 to notify the parties of the right to request a review when the obligor has been released from incarceration.

Response: States have the flexibility to develop procedures for shorter cycles to review and adjust, if appropriate, the child support order, including notice to the parties upon release from incarceration. We strongly encourage States to review child support orders after the noncustodial parent is released to determine whether the parent has been able to obtain employment and to set the orders based on the noncustodial parent's ability to pay. States should not automatically reinstate the order established prior to incarceration because it may no longer be based on the noncustodial parent's ability to pay, especially if the noncustodial parent is not able to find a job or find a job similar to pre-incarceration employment. A recent study found that incarceration results in 40 percent lower earnings upon release.⁹² Instead, the order should be reviewed and adjusted according to the State's guidelines under § 302.56.

11. Comment: A few commenters expressed concern that learning of noncustodial parents' incarceration or locating noncustodial parents in correctional facilities would require some sort of interface with Federal, State, local, and private prisons.⁹³ According to the commenters, the new requirements also presume that there would be some sort of Federal match with Federal prisons. A few commenters also asked whether they had to actively seek out incarcerated noncustodial parents for review and adjustment and send notifications as required in paragraph (b)(7)(ii), as this may be difficult since inmates move to different facilities throughout their incarceration.

Response: We encourage, but are not requiring, States to actively establish and maintain partnerships with Federal, State, local, and private prisons to conduct matches to locate, as well as to educate incarcerated parents about the child support program. As discussed in more detail in Comment/Response 3 in § 303.3—*Location of Noncustodial Parents in IV-D Cases*, currently, section 453(e)(2) of the Act authorizes the Secretary of the Department of Health and Human Services to obtain information from Federal agencies including the Bureau of Prisons (BOP). However, this match does not provide States with needed information

⁹² The Pew Charitable Trusts, *Collateral Costs: Incarceration's Effect on Economic Mobility*, September 2010, available at: http://www.pewtrusts.org/-/media/legacy/uploadedfiles/pes_assets/2010/collateralcosts1pdf.pdf.

⁹³ Private prison or for-profit prison is a place in which individuals are physically confined or incarcerated by a third party that is contracted by a government agency.

regarding release dates. We are going to explore the option to interface directly with the BOP and/or State facilities in order to obtain additional or updated information. We encourage States to develop electronic interfaces with corrections institutions to maximize identification of incarcerated parents and program efficiency.

12. Comment: A commenter stated that "upon request" in proposed § 303.8(b)(7)(ii) is unnecessary because it implies that a party must request an adjustment following completion of the review.

Response: We agree and have replaced "upon request" with "if appropriate." This revision aligns paragraph (b)(7)(ii) with the language in paragraph (b)(2).

13. Comment: One commenter indicated that, under one State's law, arrears that accrued during incarceration are modified as needed after the parent is released.

Response: Section 466(a)(9)(c) of the Act prohibits retroactive modification of child support orders except that such procedures may permit modification with respect to any period when there is a petition pending for modification, but only from the date that notice of such petition has been given to the parties. In situations where a parent requests a review and adjustment of the order, States may modify, if appropriate, the order back to the date the request is made to avoid the accumulation of arrearages. States need to ensure that their State laws are consistent with the provisions of the Act.

14. Comment: A commenter requested that OCSE provide guidance on whether a State that is taking steps under § 303.11(b)(8) to close a case due to the incarceration status of the noncustodial parent should first modify the child support obligation.

Response: Closing a case does not affect the legality of the underlying child support order and the order, including any payment or installment of support such as payment on arrearages due under the order, remains in effect and legally binding. Therefore, based on the reasons that a case is being closed, it may be appropriate in a specific case for the IV-D agency to take steps to review and adjust an order, if appropriate, prior to closing the child support case. See Comment/Response 5 in § 303.11, *Case Closure Criteria*.

15. Comment: A couple of commenters stated that it is too time consuming and costly to close a case under § 303.11(b)(8) and then initiate a new case once a parent is released.

Response: The review and adjustment revisions under § 303.8 are not intended

to encourage States to close cases when the noncustodial parent is incarcerated and reopen them when parents are out of prison. Rather, the provisions pertain to child support order review and adjustment when the noncustodial parent is incarcerated and based on the parent's ability to pay. Cases should not be closed under § 303.11(b)(8) when the noncustodial parent is incarcerated and then reopened when the noncustodial parent is released. A case can only be closed under § 303.11(b)(8) if the noncustodial parent is incarcerated throughout the duration of the child's minority (or after the child has reached the age of majority) and there is no income or assets available above the subsistence level that could be levied or attached. If the noncustodial parent is incarcerated for only a limited period of time, the case should not be closed. States can only close cases in accordance with the criteria under § 303.11(b) and (c).

16. Comment: Multiple commenters feel there should still be a burden of proof and believe that just because the noncustodial parent is incarcerated does not mean that the noncustodial parent has no resources. The parent's ability to pay may change multiple times while incarcerated, for example, when the parent is on work release.

Response: Some States automatically reduce a support order when a parent is incarcerated, while other States consider incarceration as one factor in determining whether to adjust a support order.⁹⁴ States should apply their child support guidelines, based on the noncustodial parent's ability to pay, and determine whether the parent has income or assets available that could be levied or attached for support, whether or not a parent is incarcerated.

17. Comment: A few commenters noted that if the notification in § 303.8(b)(7)(ii) is separate and distinct from the 3-year review, this will require a system change and incur costs.

Response: We agree this will require a State to make a minor system change; these costs were considered in the development of this rule.

18. Comment: Several commenters indicated that the requirement in § 303.8(b)(7)(ii) is redundant since their existing State statute, administrative rules, and court rules allow for the

⁹⁴ Jennifer L. Noyes, Maria Cancian, and Laura Cuesta, *Holding Child Support Orders of Incarcerated Payers in Abeyance: Final Evaluation Report, 2012*, available at: http://www.irp.wisc.edu/research/childsup/cspolicy/pdfs/2009-11/Task1_CS2009-11-MPP-Report.pdf; in addition, see related PowerPoint presentation available at <http://www.irp.wisc.edu/research/childsup/cspolicy/pdfs/2009-11/Task1-CS2009-11-MPP-PPT.pdf>

modification of a child support obligation upon incarceration by operation of law.

Response: We agree. Therefore, we added a sentence to the end of § 303.8(b)(7)(ii) to acknowledge that neither the notice nor a review is required under this paragraph if the State has a comparable State law or rule that modifies a child support obligation upon incarceration by operation of State law.

19. *Comment:* One commenter expressed concern with the NPRM at § 303.8(d) indicating a need for a threshold for when to review and adjust an order for health care needs similar to those used by States to require a review and adjustment for the child support awards. Without these thresholds, the commenter suggests that State child support agencies will face heavy workloads to modify these orders.

Response: OCSE has historically left the particular criteria for support order modifications up to States and their child support guidelines. However, when an order lacks a medical support provision, the situation warrants immediate attention for modification to remedy the medical support issue. By removing the sentence in § 303.8(d) which previously required States to review and adjust support orders to address health care coverage for child(ren) eligible for or receiving Medicaid benefits, we are making the requirement for review and adjustment less restrictive.

20. *Comment:* Several commenters indicated that the proposed revision in § 303.8(d) will require significant legislative, guidelines, and policy changes which will impact on its ability to implement this revision.

Response: We understand the commenters concerns that this will require changes. Therefore, we have made the effective dates for this section the same as the dates for *Guidelines for setting child support awards*. For further details see Comment/Response 2 in the *Dates* section.

21. *Comment:* Some commenters expressed their dissatisfaction with the deletion of the last sentence in § 303.8(d) feeling that it was an inadequate approach to aligning child support regulations fully with the Affordable Care Act.

Response: OCSE recognizes the tensions between the Social Security Act and provisions in the ACA when it comes to medical support. We aligned our regulatory requirements as closely as possible with the ACA within existing authority. In this particular section, we simply removed the last sentence in paragraph (d), which

conflicted with the ACA notion of what constitutes medical coverage and to conform to our revisions in § 303.31. The final regulations allow States more flexibility to coordinate medical support practices with the requirements of the ACA.

22. *Comment:* One State expressed the need for clarification on whether the proposed changes require the State to modify the language in an order to indicate that Medicaid coverage was sufficient for meeting the child's medical needs.

Response: Eliminating the provision that indicates that Medicaid cannot be considered sufficient does not necessarily mean that Medicaid must be considered sufficient in every case. There are circumstances in which Medicaid coverage may not be sufficient to meet a child's full needs. Therefore, OCSE has chosen not to prescribe how State child support agencies address medical support provisions in their orders. However, OCSE encourages States to consider adopting a broad medical support provision that encompasses all of the medical coverage options available to families under the ACA.

23. *Comment:* One State concluded their comment by requesting OCSE wait to modify medical support regulations until the time that the Social Security Act is consistent with the ACA.

Response: While we understand the frustration in the child support community regarding the inconsistencies between the ACA and the Social Security Act regarding medical enforcement, we have tried to align our regulations as much as possible with the new policy environment under the ACA, consistent with title IV–D. However, sections 452(f) and 466(a)(19) of the Social Security Act require specific medical support activities to be performed by State child support agencies.

24. *Comment:* One commenter opposed the proposed changes to the regulations in § 303.8(d) citing that private insurance should be enforced when it becomes available to an obligated parent and the child(ren) is(are) receiving public forms of coverage like Medicaid.

Response: See Comment/Response 2 in § 303.31, *Securing and Enforcing Medical Support Obligations* of this final rule.

Section 303.11—Case Closure Criteria (Including 45 CFR 433.152(b)(1))

1. *Comment:* Several commenters indicated their preference for keeping case closure optional, especially for a State that recoups assigned arrears.

Some commenters expressed concerns about how the greater flexibility to close cases would impact intergovernmental consistency and program performance. A few commenters recommended making case closure mandatory or requiring States to have a process for examining their cases to determine if they meet one of the case closure criteria and then consider closing them.

Response: The goal of the case closure regulation is not to mandate that cases be closed, but rather to clarify conditions under which States may close cases. The changes to the case closure regulation allows a State to direct resources to cases where collections are possible and to ensure that families have more control over whether to receive child support services. A decision to close a case is linked with notice to the recipient of services of the intent to close the case and an opportunity to respond with information or a request that the case be kept open.

OCSE has determined that this final rule strikes the appropriate balance between providing States with additional flexibility in closing cases that are unlikely to result in successful child support actions and ensuring families receive effective child support enforcement services. We do not agree with the commenters' concerns that the expanded case closure criteria will put some States at a competitive disadvantage. States make many decisions that affect their performance rates. For example, one State might charge interest and another might not or one State might adopt family-first distributions and another might not. The decision to close or not close cases with assigned arrears is at the State's discretion. As we indicated in the NPRM, the National Council of Child Support Directors provided OCSE with recommendations for improving the effectiveness and efficiency of the case closure criteria, ensuring that resources are directed to working cases and that children receive services whenever there is any reasonable likelihood for collections in the future. Since case closure is permissive, a State has the discretion to develop a process for examining its cases to determine whether case closure is warranted.

2. *Comment:* One commenter recommended that OCSE limit case closure to intrastate cases and a decision by the UIFSA initiating State. Another commenter indicated that the responding State should not enforce an intergovernmental case that the initiating State would close if it were an intrastate case.

Response: A State has the authority to determine when and whether to close its cases, both intrastate and intergovernmental cases, under § 303.11. The responding State may not unilaterally or automatically close its responding case. Rather, the initiating State makes the case management decisions on its own cases, including its initiating intergovernmental cases. A responding State may only close a case under the following circumstances: If it can document noncooperation by the initiating agency, and provides proper notice to the initiating agency per paragraph (b)(17); if it is notified that the initiating State has closed its case per paragraph (b)(18); or if it is notified that the initiating agency no longer needs its services per paragraph (b)(19).

3. *Comment:* A few commenters recommended adding a closure criterion for when a State no longer has legal jurisdiction in a case.

Response: We disagree with this suggestion because the State must keep the case open to provide IV–D services, such as to disburse child support payments when the custodial parent resides in the State.

4. *Comment:* One commenter recommended deleting the proposed requirement to maintain supporting documentation in the case record per § 303.11(b) and allowing a State the flexibility to maintain information as it determines appropriate.

Response: OCSE disagrees with this recommendation. The requirement to keep supporting documentation on the case closure decision in a case record is necessary because it documents whether the case has been closed appropriately and is evaluated as part of the State's annual self-assessment reviews.

5. *Comment:* A commenter requested clarification on whether § 303.11(b)(2) applies to a case in which the recipient of services does not want the State to collect recipient-owed arrears and there are state-owed arrears. Another commenter requested clarification on using this provision when it conflicts with State law on collecting state-owed arrears. Another commenter requested guidance on how to address custodial parent-owed arrears (*i.e.*, unassigned debt) and noncooperation with the State IV–D agency. Another commenter disagreed that the State IV–D agency needs approval from TANF or IV–E to close the case that has an assignment owed to them.

Response: The State cannot use § 303.11(b)(2) to close a case that has arrears owed to the State and the recipient of services (*i.e.*, assigned and unassigned debt). If the arrears are under \$500 and there is no longer a

current support order, the State may close the case in accordance with paragraph (b)(1). Unassigned debt is settled only at the discretion of the custodial parent by a specific agreement of the parties. Without this agreement, the State cannot compromise or remove unassigned debt owed to the custodial parent. When the recipient of services no longer wants IV–D services, the State may close the case if it meets one of the case closure criteria under § 303.11. Case closure does not affect the legality of the underlying order. The child support order, including any payment or installment of support such as arrearages due under the order, remains in effect and legally binding after a case is closed. Since the case closure criterion is optional, States always have the discretion to keep cases open when there is an assignment or arrears owed to the State. The decision of whether to close a case belongs to the State IV–D agency.

6. *Comment:* Several commenters recommended that OCSE describe the difference between case closure and order modification, and encourage States to modify orders to zero before closure pursuant to §§ 303.11(b)(5), (8), and (9) to avoid the accrual of arrearages if the case is reopened.

Response: These case closure provisions provide States with the flexibility to close uncollectible cases and to direct resources for cases where collections are possible. When appropriate and after determining whether the custodial parent wants to continue the case, the State should consider reviewing and, if appropriate under §§ 303.8 and 302.56, adjusting the order to stop the accrual of uncollectible debt before closing the case under the appropriate case closure criterion. Although the IV–D case is closed and no longer receiving IV–D services, the custodial parent may still pursue enforcement of the support obligation separately.

7. *Comment:* Several commenters requested that OCSE define certain terms used in §§ 303.11(b)(3) and (b)(8) and describe the required documentation to justify closure. One commenter requested clarification on how States should determine the cost of the care facility and whether to factor that cost and the receipt of SSA into the subsistence level under § 303.11(b)(3). The same commenter also questioned whether the State should investigate or consider the possibility of retirement plans or financial institution assets and how to treat combined income (*e.g.*, partial disability, VA disability). Another commenter questioned whether § 303.11(b)(3) included aging

noncustodial parents requiring minimal services such as meal preparation or housekeeping. Another commenter questioned whether the provision for senior citizens might create a special right for a specific group of noncustodial parents.

Response: OCSE does not plan to define subsistence level, home health care, or residential facility in the rule. States have the flexibility and discretion to define these terms. However, please note that we reference “subsistence level” in § 303.11 in a consistent manner. As we indicated in PIQ–08–02,⁹⁵ States have the discretion to determine the appropriate methods for verifying whether a case meets the conditions for case closure. States should use basic audit standards to determine how to document that a case meets the criteria for closure. If a State finds that the noncustodial parent has income or assets which may be levied or attached for support, then the case must remain open. We disagree with the comment that a case closure provision that targets low-income residents of long-term care provides them with a special right. There have been reported instances of old child support debt, carried well after the children have become adults and sometimes parents themselves, posing a barrier for aging parents to obtain assisted housing, basic income, and health care. We believe enforcement efforts against these noncustodial parents, who have no income or assets available above the subsistence level that could be levied or attached for support, are not only ineffective, but are also an inefficient way to expend child support resources. Case closure is permissive and the decision should be done on a case-by-case basis.

8. *Comment:* One commenter suggested § 303.11(b)(3) be expanded to include additional programs that serve individuals with significant and long-term disabilities and limited income or employment prospects, such as noncustodial parents who are receiving Adult Protective Services.

Response: We are not expanding § 303.11(b)(3) to include additional programs because there are other case closure criteria, such as paragraph (b)(8) that allows cases to be closed when the noncustodial parent has a medically-verified total and permanent disability that will occur throughout the duration of the child's minority (or after the child has reached the age of majority) if there

⁹⁵ PIQ–08–02 is available at: <http://www.acf.hhs.gov/programs/css/resource/noncustodial-receiving-ssi-benefits-and-unable-to-pay-child-support>.

is no income or assets available that could be levied or attached for support, or paragraph (a)(9) relating to when the noncustodial parent's income is from SSI payments or from concurrent SSI payments and SSDI benefits.

9. *Comment:* One commenter questioned whether an intact two-parent family referred in § 303.11(b)(5) includes a family that receives TANF or that has one parent in prison. Another commenter recommended deleting the phrase "intact two-parent" since "primary caregiver" was sufficient.

Response: There is no child support eligibility when the family is intact, whether or not the parent is temporarily physically away from the family, for example, when one of the parents has found work in another State. When the State IV-D agency receives a referral involving an intact two-parent family, the State may close the case based on the criterion under § 303.11(b)(20). We do not agree with the recommendation to delete "intact two-parent" household because we believe that it addresses the situation when the custodial and noncustodial parent continue to function as an intact family or reconciles, whereas the primary caregiver addresses the situation when the noncustodial parent becomes the custodial parent.

10. *Comment:* One commenter questioned whether a State could close a case in accordance with § 303.11(b)(5) when there is a current support obligation or arrearage due. Another commenter requested clarification on how a State should address a case where the custodial parent in an intact two-parent family wants to keep the case open.

Response: A State may close a case under § 303.11(b)(5) when there is current support and/or an arrearage due. However, when the recipient of services wants to continue receiving IV-D services, the case must remain open.

11. *Comment:* One commenter questioned whether legal or physical custody was sufficient to determine that the noncustodial parent is the primary caregiver, particularly for audit purposes.

Response: A State has the discretion to determine the circumstances in which a case meets the conditions for closure in accordance with § 303.11.

12. *Comment:* Many commenters questioned whether States had the discretion to add more restrictive language to the case closure criteria, such as no payments received in the previous six months. A few commenters requested clarification on whether States have the flexibility to use longer periods for locating noncustodial

parents than the times specified in § 303.11(b)(7).

Response: Yes, States have such flexibility. As we stated in OCSE AT-99-04⁹⁶ and AT-89-15,⁹⁷ there is nothing to prohibit a State from establishing criteria that make it harder to close a case than those established under § 303.11. For example, a State may specify a timeframe in which no payments are received before closing a case to ensure that all viable cases remain open. The State also has flexibility to use longer periods for locating noncustodial parents than the times specified in § 303.11(b)(7). The case closure provision sets the minimum criteria for determining when a case is eligible for closure.

13. *Comment:* One commenter requested clarification about verifying the Social Security Number (SSN) per § 303.11(b)(7)(iii) and handling new leads that do not result in locating the noncustodial parent.

Response: Although the State has sufficient information to initiate an automated locate effort, locate interfaces (e.g., Federal Parent Locator Service (FPLS) and Enumeration and Verification System (EVS)) may not be able to confirm or correct the SSN-name combination for the person sent. As we stated in the Case Closure Criteria Final Rule, 64 FR 11814, March 10, 1999, Comment/Response 5,⁹⁸ States are required to comply with Federal locate requirements in § 303.3 and make a serious and meaningful attempt to identify the biological father (or any individual sought by the IV-D agency). If the State has made a diligent effort using multiple sources in accordance with § 303.3, all of which have been unsuccessful to locate the noncustodial parent, then the State may close the case in accordance with § 303.11(b)(7).

14. *Comment:* Because the case closure provision § 303.11(b)(7) shortens the length of time for locate attempts, one commenter recommended expanding locate resources to include verification of Individual Tax Identification Numbers (ITINs), driver's licenses, or other unique identifiers.

Response: An analysis is currently underway to assess whether private sources can identify locate information and/or individuals with ITINs and locate information associated with

ITINs. Additionally, OCSE is evaluating the possibility of using ITINs to obtain locate information from current FPLS locate sources, such as Multistate Financial Institution Data Match (MSFIDM).

15. *Comment:* One commenter recommended removing the language "child has reached the age of majority" in § 303.11(b)(8) and replacing it with "after support is no longer due." Many commenters requested clarification regarding what OCSE meant by multiple referrals for services. One commenter thought that this criterion was too ambiguous. One commenter opposed adding multiple referrals for service as a case closure criterion and another commenter recommended removing the requirement for multiple referrals for services.

Response: OCSE disagrees with the first suggestion regarding the child reaching the age of majority since the language as written conveys the intent of the provision under § 303.11(b)(8). However, because of the confusion and opposition regarding the multiple referral case closure criterion, we have removed this from the proposed criterion in paragraph (b)(8).

16. *Comment:* Several commenters requested clarification regarding the documentation needed to justify case closure based on disability in accordance with § 303.11(b)(8).

Response: In OCSE PIQ-08-02,⁹⁹ we indicate that States have the discretion to determine what circumstances can result in a "medically verified total and permanent disability" in accordance with § 303.11(b)(8). States also have the discretion to determine appropriate methods of medically verifying that a disability is total and permanent. Refer to PIQ-04-03¹⁰⁰ for information regarding how States may access Health Insurance Portability and Accountability Act (HIPAA) privacy-protected information when the agency has issued a National Medical Support Notice. The State can also request the noncustodial parent to obtain his or her medical records in accordance with 45 CFR 164.524(b).

17. *Comment:* One commenter recommended that OCSE create a separate case closure criterion for incarceration and requested clarification about how to treat partial disability.

⁹⁶ AT-99-04 is available at: <http://www.acf.hhs.gov/programs/css/resource/final-rule-case-closure-criteria-45-cfr-part-303>.

⁹⁷ AT-89-15 is available at: <http://www.acf.hhs.gov/programs/css/resource/standards-for-program-operations>.

⁹⁸ This is available at: <http://www.acf.hhs.gov/programs/css/resource/final-rule-case-closure-criteria-45-cfr-part-303>.

⁹⁹ PIQ-08-02 is available at: <http://www.acf.hhs.gov/programs/css/resource/noncustodial-receiving-ssi-benefits-and-unable-to-pay-child-support>.

¹⁰⁰ PIQ-04-03 is available at: <http://www.acf.hhs.gov/programs/css/resource/medical-support-enforcement-under-iv-d-program-phi-hipaa>.

Response: We disagree with creating a separate case closure criterion for incarceration. We note that incarceration has been included as a criterion with psychiatric institutionalization and medically-verified total and permanent disability since the promulgation of the Federal case closure regulation on August 4, 1989. A State may not close a case under § 303.11(b)(8) based on the noncustodial parent's partial disability. The State should determine whether such a case meets another case closure criteria under § 303.11.

18. *Comment:* One commenter recommended removing the language "needs-based" and replacing it with "means-tested" in § 303.11(b)(9)(iii). Another commenter requested clarification on using the receipt of needs-based benefits as the basis for case closure, asking whether such benefits pertain to federally-funded programs, TANF, or time-limited benefits.

Response: Both "needs-based benefits" and "means-tested benefits" are the same. However, upon further consideration, we deleted "needs-based benefits" because these benefits are often time-limited and are not permanent. In the absence of a disability that impairs the ability to work, the ability of a parent to work and earn income may also fluctuate with time. Therefore, it is important for the child support agencies to take efforts on these cases to remove the barriers to nonpayment and build the capacity of the noncustodial parents to pay by using tools such as referring noncustodial parents to employment services provided by another State program or community-based organization.

19. *Comment:* Several commenters indicated that title II benefits are subject to income withholding and recommend that receipt of such benefits not be the basis for closing cases.

Response: There is a misunderstanding regarding how we are addressing title II benefits in this criterion. Title II benefits, such as Social Security Disability Insurance (SSDI) benefits, are considered remuneration from employment (based on how many work credits the person has earned during his or her time in the workforce), and therefore, the benefits may be garnished for child support directly from the Federal payor as authorized under section 459(h)(1)(A)(ii)(I) of the Social Security Act (see DCL-13-06; PIQ-09-01; DCL-00-103).¹⁰¹ However,

the case closure criterion at § 303.11(b)(9)(ii) only addresses a noncustodial parent who is receiving concurrent Supplemental Security Income (SSI) and SSDI benefits under title II of the Act, which means the disabled noncustodial parent qualifies for means-tested SSI benefits on the basis of his or her income and assets, but also qualifies for SSDI benefits. In that case, the Social Security Administration pays a combination of benefits up to the SSI benefit level. Concurrent benefits are means-tested on the same basis as SSI benefits. In other words, a concurrent SSI and SSDI beneficiary has no more income, and is no better off, than a beneficiary receiving SSI alone. A beneficiary of concurrent benefits has equally low income and an equal inability to pay support as an SSI recipient. Given that a noncustodial parent who is eligible for concurrent benefits meets SSI means-tested criteria and receives the same benefit amount as an SSI beneficiary, it is appropriate to close these cases on the same basis as an SSI case. Under § 303.11(b)(9)(ii), States have the flexibility to close such cases. As a result of comments, we added in paragraph (b)(9)(ii) the phrase "Social Security Disability Insurance (SSDI)" before benefits under title II. For further explanation regarding these concurrent benefits, please see Comment/Response 3 in § 307.11, *Functional Requirements for Computerized Support Enforcement Systems in Operation by October 1, 2000*.

20. *Comment:* One commenter suggested that OCSE instruct the Social Security Administration (SSA) not to honor Income Withholding Orders (IWOs) against SSI benefits, similar to how the VA will not honor IWOs against service-connected disability benefits.

Response: SSA does not implement IWOs for individuals who are receiving SSI benefits.

21. *Comment:* One commenter questioned whether a State is permitted to close a case under § 303.11(b)(9) without establishing a child support order when the noncustodial parent is receiving SSI.

Response: Yes, the case may be closed. If the noncustodial parent's only income is SSI, the State may close the case under paragraph (b)(9) without establishing a support order because SSI is not subject to garnishment.

benefits; PIQ-09-01 is available at: <http://www.acf.hhs.gov/programs/css/resource/garnishment-of-federal-payments-for-child-support-obligations>; DCL-00-103 is available at: <http://www.acf.hhs.gov/programs/css/resource/attachment-of-social-security-benefits>.

Additionally, the State can close a case at any time that it meets a case closure criterion regardless of where the case is in the child support process.

However, this does not preclude a State from establishing a \$0 support order (based on inability to pay), which could be modified later if the noncustodial parent went off SSI and began work or inherited assets. If States choose to establish an order prior to closing a case under § 303.4, States should use caution about establishing an order based on imputed income or a minimum ordered amount (other than \$0) because the child support order, including any payment or installment of support such as arrearages due under the order, remains in effect and legally binding after a case is closed. In these cases, we are allowing States to close cases when the noncustodial parent's income is SSI because SSI is not subject to garnishment.

22. *Comment:* Many commenters recommended sending closure notices under § 303.11(d)(6) in a limited services case to the recipient before the limited service case closes, not after. They stated that the earlier notice would be more effective and less burdensome on both the recipient and the IV-D agency, would allow the recipient to contact the IV-D agency should he/she have any questions or disagree with case closure, and would make it easier to address any issues prior to case closure.

Response: We are persuaded that giving advance notice of case closure when a limited service under § 302.33(a)(6) has been completed will eliminate potential confusion or case closure issues and will maintain uniformity with existing case closure processes that require a 60 calendar day advance notice. Therefore, the final rule at § 303.11(d)(4) requires that for cases closed under paragraph (b)(13) of this section, the IV-D agency must send a written notice to the recipient of services 60 days prior to closure of the case of the State's intent to close the case.

23. *Comment:* Some commenters asked for clarification regarding when a paternity-only limited services case is considered completed and can be closed under § 303.11(b)(13). They asked whether the case would be considered completed after an Acknowledgment of Paternity has been signed, after genetic testing has been completed and results obtained, after a court order establishing paternity has been entered, or after a birth certificate has been amended to reflect the new legal father.

Response: We acknowledge that there may be varying opinions on when paternity-only services should be

¹⁰¹ DCL-13-06 is available at: <http://www.acf.hhs.gov/programs/css/resource/garnishment-of-supplemental-security-income>

considered completed and the limited services case closed. We therefore recommend that States make this determination individually according to when paternity is legally determined under applicable State law.

24. Comment: One commenter was concerned that if a parent refuses to cooperate with genetic testing in a paternity-only limited services case, States will not have the ability to close that case under § 303.11(b)(13) because the limited service will never be completed.

Response: IV–D agencies typically have methods of recourse when a parent refuses to cooperate with genetic testing. This usually involves a court’s ordering the parent to submit to genetic testing; if the parent remains uncooperative, the parent may be found in contempt of that court order. Additionally, we encourage States to screen for domestic violence before initiating a paternity testing enforcement action. OCSE defers to States’ existing legal process and operating procedures to address this situation.

25. Comment: One State commented that system changes to implement a new limited services closure code per § 303.11(b)(13) would be cost prohibitive.

Response: As discussed in this final rule, paternity-only limited service is optional.

26. Comment: Two commenters questioned the removal of SNAP from the list of assistance programs described in § 303.11(b)(14) and recommended OCSE include it in the provision.

Response: We concur with these comments and have added SNAP to the list of assistance programs referenced in both paragraphs (b)(14) and (20).

27. Comment: One commenter questioned whether § 303.11(b)(15) applies to cases when payments are being disbursed on an unpinned debit card and the funds have not been spent.

Response: Yes. Although many State child support programs distribute payments through debit cards, it remains extremely important for the recipient of services to keep the State informed of his or her current mailing address to ensure that the case can be processed effectively. When the State disburses payments on an unpinned debit card and is unable to contact the custodial parent, the State should make a good faith effort to contact the recipient of services through at least two different methods to ensure that the child support payments are properly disbursed and received by the family. If the criteria under § 303.11(b)(15) are met, the State may close the case.

28. Comment: A few commenters expressed concerns about the requirement for two different methods of communication and recommended that OCSE require only one method of communication under § 303.11(b)(15).

Response: We disagree with this recommendation. With today’s technology, there are many different options to notify clients, such as first-class mail, electronic mail, text messaging, and telephone calls. The best notice to recipients of IV–D services is information provided through multiple methods. For example, a voice message and a text message count as two different methods of communication. However, we understand the difficulty in meeting the requirement to use two different methods of communication when the State child support agency has incomplete, inaccurate, or outdated contact information for the recipient of services. When the State only has an outdated or inaccurate address, the State IV–D agency should send the case closure notice to the last known address (see OCSE AT–93–03 and AT–99–04).¹⁰² Additionally, under § 303.6(d)(6) with the specific consent of the recipient of services, States are permitted to use electronic means to send case closure notices.

29. Comment: One commenter questioned whether § 303.11(b)(20) only applied to the assistance programs described in the provision. Two commenters requested guidance for determining an inappropriate referral and additional examples.

Response: Section 303.11(b)(20) is not limited to the assistance programs listed as examples. In addition to IV–A, IV–E, SNAP, and Medicaid, the State has the flexibility to close a case referred from other means-tested assistance programs if the IV–D agency deems it inappropriate to establish, enforce, or continue to enforce a child support order in the case and the custodial parent has not applied for IV–D services. Section 454(4)(A) of the Act requires State IV–D agencies to provide services as appropriate. A State should determine whether child support enforcement services are appropriate in a referred case, as it would with any other case. This provision provides States with the flexibility to close inappropriate referrals on a case-by-case basis. Case closure is permissive. Our understanding is that inappropriate referrals are limited in number. An

¹⁰² AT–93–03 is available at: <http://www.acf.hhs.gov/programs/css/resource/clarification-of-case-closure-criteria>; AT–99–04 is available at: <http://www.acf.hhs.gov/programs/css/resource/final-rule-case-closure-criteria-45-cfr-part-303>.

example of an inappropriate TANF, Medicaid, etc. referral is one involving an intact family where there is no parent living apart or a widowed custodial parent.

30. Comment: One commenter suggested OCSE include language to indicate that a IV–A agency should not consider case closure under § 303.11(b)(20) as noncooperation by the recipient of services.

Response: As indicated in the NPRM, the State IV–D agency should communicate with the IV–A agency to ensure that the decision to close the IV–D case will not be viewed by the IV–A agency as noncooperation by the recipient of services.

31. Comment: Several commenters indicated that the proposed § 303.11(b)(21) was too restrictive, based on outdated guidance (e.g., PIQT–05–01), and hindered the case transfer processes established through existing State-Tribal agreements. One commenter suggested expanding the provision to including case transfer processes developed under OCSE approved State-Tribal agreements.

Response: OCSE acknowledges the concerns expressed in these comments. We developed the guidance in PIQT–05–01¹⁰³ in the early stages of the Tribal IV–D program. The final rule builds upon and revises this guidance to increase the flexibility for the transfer and closure of cases between State and Tribal IV–D programs. However, we retain the consent requirement of the recipient of services. The recipient of services must provide his or her consent to transfer and close the case because, as both a member of the Tribe and a resident of the State, the recipient has the right to determine the agency that provides the IV–D services. However, based on comments, we have added § 303.11(b)(21)(iv) to address State-Tribal agreements regarding the transfer and closure of cases. OCSE must review and approve these State-Tribal agreements and they must include consent from the recipient of services to transfer the case. The agreements should also address enforcement of state-owed arrears, repayment agreements, and arrears adjustment and compromise when applicable. Any State debt owed under the preexisting order remains in effect and legally binding. Once the case is transferred and closed, Tribal IV–D programs must extend the full range of services under their IV–D plan as required by § 309.120(a). As such, a Tribe must enforce any state-owed debt

¹⁰³ PIQT–05–01 is available at: <http://www.acf.hhs.gov/programs/css/resource/transfer-of-cases-to-tribal-iv-d-agencies-case-closure-criteria>.

when there is not an agreement to permit the Tribe to compromise any state-assigned arrearages.

32. *Comment:* Several commenters described the problems with or importance of requiring consent from the recipient of service to transfer of the case to the Tribe. Other commenters questioned the exclusion of consent from the other party involved in the IV-D case and suggested removing the consent requirement under § 303.11(b)(21).

Response: Under section 454(4) of the Act, the IV-D agency is required to provide services related to the establishment of paternity or the establishment, modification, or enforcement of child support obligations when (1) an individual applies for, and receives, certain forms of public assistance (TANF, IV-E foster care, medical assistance under Title XIX, and when cooperation with IV-D is required of a SNAP recipient), unless good cause or another exception to cooperation with IV-D exists; or (2) an individual files an application for IV-D services. Once a IV-D case is established, the recipient of services is the individual who either received the aforementioned form of public assistance or applied for IV-D services. As a tribal member and State resident, the recipient of services has the right to decide whether to continue receiving services from the State or to begin receiving services from the Tribal IV-D agency. Therefore, the State IV-D agency must obtain the recipient of services' consent before transferring the recipient's case to a Tribal IV-D agency and then closing the State case. There is no requirement that the other party or parent also consent to the transfer and closure of the case when requested by the recipient of services.

33. *Comment:* One commenter questioned whether § 303.11(b)(21) would resolve all of the issues regarding when a State IV-D agency should transfer versus refer a case to a Tribal IV-D agency. Another commenter requested OCSE to define the process for transferring cases from a State IV-D agency to a Tribal IV-D agency.

Response: OCSE encourages State and Tribal IV-D agencies to work together to resolve the various issues around transferring or referring cases that involve Tribal members, particularly when there are arrears owed to the State, and to develop specific procedures for transferring cases based on the case closure requirements found in the regulations at § 303.11. When there are arrears owed to the State, a State IV-D agency may decide to only refer the case to a Tribal IV-D agency for

assistance in securing current support and arrears owed to the family and/or arrears owed to the State. In this circumstance, the State and Tribe would each have an intergovernmental case involving the same participants. When the recipient of services requests that his or her case be transferred to a Tribal IV-D agency and there are State-owed arrears, the State should inform the recipient of the State's discretion to transfer or refer the case when there is a State assignment and of the State's decision. However, if the recipient of services requests that the case be transferred to a Tribal IV-D agency and there are no State arrears, then the State must transfer the case to the Tribe.

34. *Comment:* Several commenters described the problems regarding the notice requirements of § 303.11(b)(21). Some recommended a shorter timeframe for the recipient of services to respond and elimination of the second notice that indicates closure under § 303.11(b)(21)(B).

Response: Notices act as important safeguards that keep the recipient of services informed of case closure actions. They provide the opportunity for the recipient to respond with information and to request that the case be kept open or, after the case is closed, to reopen the case. The 60-calendar day timeframe is consistent with the notice response timeframe that has been required under Federal case closure regulations since the original final rule was promulgated on August 4, 1989. The 60-calendar day timeframe has worked well for over 26 years and it would not be appropriate to change it at this time. However, a State IV-D agency may send the final notice of transfer and closure when, or immediately before, it closes the case, as long as the 60-day timeframe for a response has been met. The final notice should provide the contact information of the Tribal IV-D agency receiving the case.

35. *Comment:* A few commenters described issues related to Public Law 280 and the transfer of legal jurisdiction between State and Tribal courts. They requested the case closure regulation address these jurisdictional issues.

Response: It is inappropriate to address in the Federal case closure regulation the complex issues around jurisdiction and Public Law 280. State and Tribal IV-D programs are in the best position to address and resolve these issues in their State-Tribal agreements.

36. *Comment:* One commenter questioned whether a State IV-D agency could still provide Federal Tax Refund Offset services on a case that has been transferred to a Tribal IV-D agency and closed by the State IV-D agency.

Response: It is OCSE's position that transfer of a case to a Tribal IV-D agency and closure of that case by the State does not preclude the State from submitting that case for Federal Tax Refund Offset when a Tribal IV-D agency submits the case under a State-Tribal agreement for Federal Tax Refund Offset in accordance with OCSE PIQT-07-02.¹⁰⁴

37. *Comment:* One commenter indicated that § 303.11(b)(21) does not specify that a State IV-D agency may transfer a case to a Tribal IV-D agency regardless of whether there are arrears owed to the State.

Response: Section 303.11(b)(21) has been revised to explicitly allow the State IV-D agency to transfer cases that have arrears owed to the State. The State has the discretion to transfer the case to the Tribal IV-D agency when there are state-owed arrears. When such cases are transferred, the Tribe must extend the full range of services under its IV-D plan as required by § 309.120(a) and enforce the state-assigned arrearages.

38. *Comment:* One commenter urged OCSE not to use the word "transfer" since a case cannot be considered transferred until the original State no longer has an open case.

Response: This suggestion was not incorporated into the regulation. However, § 303.11(b)(21) has been revised to include, where appropriate, the word "close" to explicitly indicate the closure of the case with the State. This revision makes it clear that case transfer involves transferring the case to the Tribal IV-D agency and then closing the case with the State.

39. *Comment:* One commenter asked whether § 303.11(c) prohibits a State IV-D agency from providing full services, including medical support, to an Indian Health Service (IHS) Medicaid recipient who requests a full service IV-D case.

Response: Based on the revisions to the Centers for Medicare and Medicaid Services (CMS) regulations, which are also in this final rule, State IV-D agencies should no longer be sent referrals for these cases. Indians may receive health care services without charge from the IHS. To receive State IV-D services, an IHS eligible recipient would need to apply for IV-D services. However, no medical support enforcement services need to be provided to the extent that the individual is receiving all needed care through the IHS. At the time of application, if the State is aware that the applicant is a Medicaid recipient, then

¹⁰⁴ PIQT-07-02 is available at: <http://www.acf.hhs.gov/programs/css/resource/state-automated-systems-costs-service-agreements>.

the State should not charge an application fee per § 302.33(a)(2). The provision of § 303.11(c) would not apply for the custodial parent with IHS-eligible children who applies directly with the State child support agency to receive all child support services.

40. Comment: One commenter suggested that OCSE revise the language in § 303.11(c)(2) to read, “The IV–D case was opened as a non-IV–A Medicaid referral. . . .” This would ensure consistency with the case-type language in § 302.33(a)(1)(ii). Additionally, the same commenter questioned the value added by the following language in the same paragraph and suggested removing it, “. . . health care services, including the Purchased/Referred Care program, provided through an Indian Health Program (as defined at 25 U.S.C. 1603(12))”.

Response: OCSE does not agree with these suggestions to revise the regulatory text. The regulatory text makes it clear that this case closure provision is related to Medicaid referrals based solely upon health care services provided through an Indian Health Program (as defined at 25 U.S.C. 1603(12), including through the Purchased/Referred Care program. However, we would like to clarify that this case type is consistent with the case type language in § 302.33(a)(1)(ii). OCSE retained the language in this paragraph to ensure consistency between the language in § 303.11(c)(2) and the revised Medicaid regulations at 42 CFR 433.152(b)(1)(i).

41. Comment: One commenter suggested that OCSE change the mandatory closure criterion in § 303.11(c) to an optional closure criterion.

Response: We disagree with this suggestion. Section 303.11(c) describes the circumstances under which a State IV–D agency must close a case. This provision makes it clear that State IV–D agencies should not seek medical support when the child is eligible for health care services from IHS and the case is a Medicaid referral based solely upon such health services. In order to better serve Indian families, § 303.11(c) requires a State IV–D agency to close a Medicaid reimbursement referral based solely upon health care services provided through an Indian Health Program, including through the Purchased/Referred Care program.

The IHS is responsible for providing health care to American Indians and Alaska Natives under the Snyder Act. See 25 U.S.C. Section 13 (providing that the Bureau of Indian Affairs (BIA) will expend funds as appropriated for, among other things, the “conservation

of health” of Indians); and 42 U.S.C. Section 2001(a) (transferring the responsibility for Indian health care from BIA to IHS). The IHS provides such care directly through Federal facilities and clinics, and also contracts and compacts with Indian tribes and tribal organizations to provide care pursuant to the Indian Self-Determination and Education Assistance Act (ISDEAA), Public Law 93–638 (25 U.S.C. 450 *et seq.*). In addition, the Snyder Act authorizes IHS to pay for medical care provided to IHS beneficiaries by other public and private providers as the Purchased/Referred Care program. The term “Indian Health Program,” defined at 25 U.S.C. 1603(12), encompasses the different ways health care is provided to American Indians and Alaska Natives.

In light of the IHS’s policy, OCSE and CMS require that State Medicaid agencies not refer such cases and that IV–D agencies that receive Medicaid reimbursement referrals based solely on health care services, including the Purchased/Referred Care program, provided to IHS-eligible children through an Indian Health Program, be required to close such cases, as these cases will have been inappropriately referred. Pursuant to IHS’ policy and CMS’ policy, there would be no medical child support reimbursement obligation to pursue against any custodial or noncustodial parents, and any recovery from insurance policies would be outside the scope of the State IV–D agencies’ authority. It is our understanding that such Medicaid referrals are common. This child support case closure rule makes it clear that State IV–D agencies should not seek medical child support based on such Medicaid referrals.

42. Comment: One commenter asked whether the proposed revision to 42 CFR 433.152(b)(2) requires the Medicaid agency to reimburse 100 percent of State- or county-funded title IV–D expenditures that are not reimbursable by OCSE and are not necessary for the collection of amounts for the Medicaid program.

Response: The proposed changes to 42 CFR 433.152(b)(2) do not change current regulatory requirements for the Medicaid agency regarding reimbursement of the IV–D agency.

43. Comment: One commenter indicated that it was unclear what the following language in 42 CFR 433.152(b)(1)(i) (and repeated in § 303.11) means: Medicaid referral is based solely upon health care services, including contract health services, provided through an Indian Health

Program (as defined at 25 U.S.C. 1603(12)).

Response: CMS regulation 42 CFR 433(b)(1)(i) refers to Medicaid referrals from an Indian Health Program, such as programs operated by the Indian Health Service (IHS) or Tribes and Tribal organizations under Public Law 93–638 (Indian Self-Determination and Education Assistance Act). In that instance, the child would need to be eligible for Medicaid and services from IHS. Medicaid referrals would include referrals made under the IHS/Tribal Purchased/Referred Care program, formerly known as Contract Health Services.¹⁰⁵

44. Comment: One commenter asked whether there are any issues that need to be addressed in the current Medicaid assignment language at 42 CFR 433.145 since there is a prohibition of referral of certain cases.

Response: At this time, the assignment of rights to benefits requirements in 42 CFR 433.145 is not impacted by the language in § 433.152(b)(1)(i). A State plan must still meet all the requirements outlined in § 433.145.

45. Comment: One commenter asked whether the placement of the prohibition of Medicaid referrals in IHS cases in the “requirements for cooperative agreements for third party collections” section (45 CFR 433.152) is appropriate.

Response: Yes, the prohibition against referring a medical support enforcement case when the Medicaid referral is based on services received from an Indian Health Program (§ 433.152(b)(1)(i)) is appropriately placed in § 433.152 because the prohibition directly relates to agreements with title IV–D agencies and third-party collections, such as Indian Health Programs.

46. Comment: All of the comments received on the notification requirements under the proposed §§ 303.11(d)(4) through (d)(6) were either opposed to or expressed concerns regarding the pre- and post-closure notices to the referring agency and the closure notice to the recipient of services. The commenters indicated that they were unnecessary and an inefficient use of limited State resources.

Response: We concur with these recommendations and have removed notification requirements in the proposed §§ 303.11(d)(4) and (d)(5). Additionally, the case closure

¹⁰⁵ For more information about the relationship between IHS and Medicaid, please visit go.cms.gov/AIAN or <https://www.cms.gov/Outreach-and-Education/American-Indian-Alaska-Native/AIAN/index.html>.

requirement in proposed paragraph (d)(6), redesignated as paragraph (d)(4) was retained, but the notice requirement of proposed paragraph (d)(5) was removed. However, if the number of inappropriate referrals begins to increase, the State IV–D agency should work with the referring agency, discuss referral policies, and revise such policies as needed to avoid inappropriate referrals.

47. Comment: One commenter suggested that the notice requirement under proposed § 303.11(d)(6), redesignated as § 303.11(d)(4), include location-only cases closed under § 303.11(b)(11) because such cases could be considered a limited service.

Response: We disagree with this recommendation and have determined that such a change is not warranted. Location-only cases are often used when the initiating State is attempting to verify whether or not the noncustodial parent is living in another State. Often States receiving these requests do not actually open a case, but only use their automated locate sources to determine whether the noncustodial parent lives, works, or has assets in their State.

48. Comment: One commenter indicated that it was unclear what “recipient” is referenced in the proposed § 303.11(d)(6).

Response: The rule revised the language in § 303.11(d)(6), redesignated as § 303.11(d)(4), to clarify the reference to the recipient of services.

49. Comment: One commenter suggested that the closure notice for the proposed § 303.11(d)(6), redesignated as § 303.11(d)(4), be simple, indicating the case has been closed and the recipient of services should go online or contact the State agency for an application or additional information.

Response: We disagree with this suggestion because it does not provide the recipient of services with information regarding reapplication for services and the consequences of receiving IV–D services, such as any State fees for services, cost recovery, and distribution policies. One of the basic responsibilities of a child support agency is to provide timely, accurate, and understandable notice to parents about their child support cases.

50. Comment: One commenter suggested that OCSE consider adding language to the proposed § 303.11(d)(7), redesignated as § 303.11(d)(5), to allow the other parent, as well as the former recipient of services, to request reopening the IV–D case.

Response: We disagree with this suggestion. In this circumstance, the other parent has the option to submit an

application to receive IV–D services at any time.

51. Comment: In response to our request for comments in the NPRM regarding whether a recipient of services should be provided the option to request case closure notices in a record, such as emails, text messaging, or voice mail, some commenters requested the ability to notify the recipient of services by mail or electronic means if the recipient of services has authorized electronic notifications. We received no comments in opposition.

Response: In the final rule, for notices under § 303.11(d)(1) and (4), the State must notify the recipient of services, in writing, 60 calendar days prior to closure of the case of the State’s intent to close the case. However, as discussed under § 303.11 in Topic 2 of the preamble, we considered the commenters’ request and added paragraph (d)(6), which will permit States to issue case closure notifications electronically for the above-mentioned notices if the recipient of services specifically authorizes consent to electronic notifications. The State must keep documentation of the recipient’s consent in the case record.

While an electronic case closure notice may be an appropriate, and even the preferred, method of notification for many custodial parents, it may not be an effective means to notify some parents. Many parents in the child support caseload have limited incomes. They may not have convenient access to a computer, the internet, or mobile communication. We revised § 303.11(d)(6) to reflect this flexibility in issuing electronic notifications.

Section 303.31—Securing and Enforcing Medical Support Obligations

1. Comment: One commenter expressed their understanding that the proposed revisions in § 303.31 eliminate the need for Medicaid referrals to the IV–D program.

Response: We disagree. OCSE’s policy surrounding Medicaid referrals has remained consistent over the years: there is no requirement for State Medicaid agencies to refer all Medicaid cases to the State IV–D agency.¹⁰⁶ State child support and Medicaid agencies will need to continue to work together to refer appropriate cases from Medicaid

to the child support agency for child support services.

2. Comment: While the majority of comments supported our revisions, many commenters noted an apparent discrepancy between language used in the preamble about State flexibility and options concerning the proposed definition of health insurance in § 303.31(a)(2) and the definition language in the regulation. Many of these comments concluded that their reading of both the preamble language and the NPRM suggested that including public health options, such as Medicaid, was optional for States in their efforts to meet the health care needs of children. One commenter specifically recommended that the regulatory text be revised to indicate that it was a State option to consider public coverage as health insurance.

Response: We want to clarify that States do not have an option in distinguishing between private and public forms of health care coverage. Instead of defining “health insurance” as we did in the NPRM, we are defining “health care coverage” since this is the terminology used in the Social Security Act at sections 452(f) and 466(a)(19). The language in the final rule at § 303.31(a)(2) includes in the definition of “health care coverage” both public and private forms of health care coverage either of which is sufficient for meeting health care standards. This approach is consistent with national health care policies as outlined in the ACA. By including public coverage such as Medicaid, CHIP, and other State health programs as part of medical support, this will provide States greater flexibility to ensure that medical support is being provided for all children.

3. Comment: Several States commented about their perceived inconsistency between the five percent reasonable cost standard traditionally used in child support compared to the eight percent affordable standard in the ACA. Most of these commenters suggested that § 303.31(a)(3) be consistent by amending the five percent standard to eight percent.

Response: We disagree that the regulation needs to be changed. The existing language in the regulation at § 303.31(a)(3) allows States to adopt the five percent standard or “a reasonable alternative income-based numeric standard” defined by the State. We encourage States to examine the difference between the reasonable cost standard used in the child support regulations and the affordability measure used in the ACA. Both the percentage and the base are different.

¹⁰⁶ See OCSE–IM–14–01, available at: <http://www.acf.hhs.gov/programs/css/resource/medicaid-referrals-to-the-iv-d-agency>; OCSE–IM–08–03, available at: <http://www.acf.hhs.gov/programs/css/resource/guidance-on-referral-of-medicaid-cases-to-title-iv-d-child-support>; and OCSE–AT–10–10, available at: <http://www.acf.hhs.gov/programs/css/resource/cse-flexibility-to-improve-interoperability-with-medicaid-chip>.

States are encouraged to consider ways to align these two standards to avoid confusion among families. For example, a State could choose to define reasonable cost as 8 percent of a parent's modified adjusted gross income (MAGI) under paragraph(a)(3) to align the two standards. The existing language in the regulation allows States to make these conforming changes to their medical support policies.

4. Comment: One State asked us to clarify how to proceed in situations where private insurance is available at a reasonable cost, but is not accessible to the child.

Response: The final regulations at 303.31(b) stipulate that health care coverage must be both reasonable in cost and accessible to the child. This paragraph further requires the petition to address both the reasonable cost and accessibility standards. If these standards are not met, the ordered parent will not likely meet the requirements of the order. The child support agency should encourage the parent to seek affordable health care coverage options through the Health Insurance Marketplace in the child's State of residence. States are also encouraged to consider how their cash medical support policies might address the health care needs of children in these types of situations.

5. Comment: Several commenters expressed the need for OCSE to further regulate medical provisions in § 303.31(b)(1)(ii) regarding how to allocate medical costs between the parents.

Response: We do not agree that additional regulations are needed regarding the allocation of medical costs. While the commenters' suggestion may work for some States, OCSE has always allowed for States to have flexibility in how they address the allocation of medical support since this is often related to the State's guidelines. However, we have made an editorial revision in § 303.31(b)(1)(ii) to remove "Determine how to" from the regulatory language so that the regulatory provision better reflects OCSE policy.

6. Comment: We received several comments regarding the applicability of cash medical support in § 303.31(b)(2) given the passage of the ACA.

Response: Section 466(a)(19)(A) of the Act establishes medical support requirements including that "all support orders enforced pursuant to this part shall include a provision for medical support for the child to be provided by either or both parents . . ." This section of the child support rule implements IV-D agency responsibility when health care coverage, including both public

health care coverage and private health insurance as defined in § 303.31(a)(2) and described in § 303.31(b)(1) is not available. However, States have flexibility in defining when cash medical support or the cost of health care coverage is considered reasonable in cost under paragraph (a)(3). Some States may choose not to use the five percent of the noncustodial parent's gross income. States may elect to develop a reasonable alternative income-based numeric standard defined in its State law, regulations, or court rule having the force of law or State child support guidelines adopted under § 302.56(c). If they elect this option, they may be able to better align its standard with the ACA.

7. Comment: One comment suggested that proposed § 303.31(b)(3) should be eliminated because paragraph (b)(1) requires these provisions in all new and modified orders.

Response: While we agree that § 303.31(b)(1) requires the health care provision be included in all orders, we recognize the reality that it may not happen in all situations. When those situations arise, paragraph (b)(3) provides the foundation to require States to modify those orders to include the appropriate health care provision.

8. Comment: Some commenters suggested that the proposed definition for health insurance to include public options poses some questions on how courts order health insurance coverage. These comments asked for clarification if courts would be required to compel parents to enroll children in public forms of health care or enter a finding that the children are covered by public form of coverage.

Response: How States choose to address health care provisions in orders will vary from State to State. OCSE has recommended that States implement broadly-defined medical support language in child support orders to maximize the health care options available to parents, children, and families.

9. Comment: Several commenters discussed the issue of data sharing. Some of these commenters requested the promotion of data sharing between IV-D and Medicaid, CHIP, Indian Health Service, and the Federal/State marketplaces. Some noted the need for the exchanges to modify the application process to gather more information regarding the absent parent.

Response: OCSE is aware of the need for improved data sharing between and among the aforementioned programs. We are working to improve data sharing between State child support agencies, CMS, State Medicaid agencies, CHIP,

and other stakeholder partners. While currently States have the authority to share information with State Medicaid and CHIP agencies to assist them in carrying out their responsibilities and for determining eligibility for program benefits, we currently do not have authority for data sharing with the Federal/State marketplaces and the Indian Health Service. This will require some legislative revisions.

10. Comment: We received numerous inquiries regarding whether the final passage of this rule affects OCSE's decision to hold States harmless as outlined in OCSE AT-10-02.

Response: Upon issuance of this rule, OCSE will work with States in developing guidance related to AT-10-02.¹⁰⁷

11. Comment: Several States expressed clarification on whether IV-D agencies would be responsible for issuing a National Medical Support Notice (NMSN) in situations where a child was receiving Medicaid, and the obligated parent has private insurance available to them. Some commenters expressed a workload concern if States were required to issue the NMSN every time private insurance may become available—sometimes for short periods of time—to either of the parents.

Response: The NMSN is an enforcement tool. The child support agency is only required to serve an NMSN on an employer where it is clear that there is no health coverage being provided for the child(ren) and employer-offered health insurance has been ordered. Under § 303.32(b), States are not required to use the NMSN when the child(ren) is covered by a public health care option and there is a court or administrative order that stipulates alternate health care coverage to employer-based coverage. Through our revised definition of health care coverage, if the child is covered through Medicaid, CHIP, or other State coverage plan, then public forms of coverage are an allowable form of health care coverage. Additionally, since the implementation of the ACA, health coverage includes health insurance policies offered through the Federal or State marketplaces that meet the standards for providing essential health benefits. We encourage States to include a provision in child support orders that medical support for the child(ren) be provided by either or both parents, without specifying the source of the coverage. In these situations, the child

¹⁰⁷ AT-10-02 is available at: <http://www.acf.hhs.gov/programs/css/resource/holding-states-harmless-for-failure-to-comply-medical-support-final-rule>.

support agency would have to assess if it is appropriate to send a NMSN notice if employer-based health insurance becomes available.

Although this is not a requirement, nothing within the final rule precludes a State from petitioning for employer-related insurance to be included in the order in accordance with the State's guidelines if it is in the best interest of the child, in cases where the child is receiving public coverage and the employer-related insurance becomes available at a reasonable cost, is accessible to the family, and the parent has the ability to pay. We encourage States to develop medical support policies that fully consider the wide array of health care options that most benefit children and families.

12. Comment: Some comments suggested that the ACA eliminates the need for medical enforcement in the child support program. These commenters requested that child support no longer carry out these functions.

Response: The ACA neither mandates coverage nor requires that the IRS enforce mandatory coverage even for families that have coverage available to them at a reasonable cost. Individuals and families that have health care coverage available at a reasonable cost may choose not to obtain coverage and instead pay the applicable tax penalty. Title IV–D, on the other hand, requires that all child support orders include a provision for medical support for the child(ren), whether through public or private health care coverage available at a reasonable cost, or cash medical support.

13. Comment: Many commenters expressed frustration that the proposed regulations in the NPRM do not align with the requirements of the ACA.

Response: Again, OCSE recognizes tensions between the Social Security Act and provisions in the ACA when it comes to medical support. We have aligned our regulatory requirements as closely as possible with the ACA; however, we acknowledge the need for further statutory and regulatory work to bring these policies together. Until this occurs, this final rule allows States more flexibility to coordinate medical support practices with the requirements of the ACA. In addition, the Administration's FY 2017 Budget proposes a set of changes to help improve coordination between the ACA and medical support.

14. Comment: The NPRM requested specific comments regarding the State child support program's role in carrying out its medical support statutory responsibilities, including the roles of

cost allocation between parents and enrolling children in coverage.

Response: We received numerous comments regarding the issue of child support involvement in medical support activities—many of which were discussed in previous comments in the preamble (for example, see Comment/Response 12 above). In addition, we received four specific comments opposing the idea that child support becomes involved with referring children and families for health care coverage. OCSE encourages States to review their medical support activities to find ways to improve health care coverage among children and families. OCSE–PIQ–12–02 provides information on how child support agencies can collaborate with other programs to achieve these goals.¹⁰⁸

Section 303.72—Requests for Collection of Past-Due Support by Federal Tax Refund Offset

1. Comment: One commenter stated the proposed change did not go far enough because this regulation should specify which State in an interstate case should submit the case for Federal tax refund offset.

Response: Section 303.7(c)(8) establishes requirements for Federal tax refund offset, including identification of the State that must submit a case for such offset. Specifically, “[t]he initiating State IV–D agency must: . . . Submit all past-due support owed in IV–D cases that meet the certification requirements under § 303.72 of this part for Federal tax refund offset.”

Section 303.100—Procedures for Income Withholding

1. Comment: Nearly all State commenters supported the proposed regulatory changes regarding mandatory use of the OMB-approved *Income Withholding for Support* (IWO) form. While these commenters favored changes addressing the inconsistent use of the OMB-approved IWO form and the transmission of payments on non-IV–D orders to the appropriate State Disbursement Unit (SDU), they pointed out that Federal law already requires use of the OMB-approved form.

Response: While we acknowledge that the use of the OMB-approved form is already required by Federal law and previously issued policy and guidance, continued concerns expressed to OCSE by employers necessitated further clarification in the regulations. States are required to have laws to ensure

compliance with the mandated use of the OMB-approved IWO form for both IV–D and non-IV–D orders. Some States work with their State courts' administrative offices, and state bar associations to provide the approved IWO form for use by the judiciary and private attorneys. These States also request that other versions of withholding orders be removed from Web sites and other distribution methods. We encourage all States to collaborate with their judicial branch, state bar associations, chambers of commerce, and Tribal Child Support programs to ensure that all users and employer recipients of the form are aware of the requirements regarding use of the OMB-approved IWO form in all income withholding orders issued to employers.

2. Comment: Several commenters questioned what method of enforcement could be used when private attorneys or courts do not comply with the regulation, and whether employers should be allowed to reject an incorrect IWO.

Response: We direct the commenters to the *Income Withholding for Support—Instructions* document, available at http://www.acf.hhs.gov/sites/default/files/ocse/omb_0970_0154_instructions.pdf, as well as the *Income Withholding for Support* form, available at http://www.acf.hhs.gov/sites/default/files/ocse/omb_0970_0154.pdf. Both of these documents contain language stating that the IWO must be regular on its face, meaning that any reasonable person would think the IWO is valid.

The instructions for the IWO form clarify this term by saying that an IWO is regular on its face when:

- It is payable to the State disbursement unit;
- A copy of the underlying child support order containing an income withholding clause is included, if the IWO is sent by anyone other than a State/Tribal IV–D agency or a court;
- The amount to withhold is a dollar amount;
- The text of the form has not been changed and invalid information has not been entered;
- The order of the text on the OMB-approved IWO form has not been changed, and
- OMB 0970–0154 is listed on the form; and
- It contains all of the necessary information to process the IWO.

The instructions further provide that the employer must reject the IWO and return it to the sender if, among other things, the sender has not used the OMB-approved form, the IWO is altered

¹⁰⁸ PIQ–12–02 is available at: <http://www.acf.hhs.gov/programs/css/resource/partnering-with-other-programs-and-activities>.

or incomplete, or the IWO instructs the employer to send a payment to an entity other than the State's SDU (for example, to the custodial party, the court, or an attorney). Employers are valuable and essential partners to the child support program. OCSE appreciates the challenges employers face when receiving IWOs that do not comply with the regulation or IWO instructions and will continue to provide assistance to States and employers in ensuring compliance with this rule.

3. Comment: One commenter asked that we clarify to States and employers that using the IWO form in a nontraditional manner in order to accommodate a State's own process that requires withholding beyond the monthly child support amount in the underlying order from obligors with bi-weekly payroll schedules may result in the IWO being rejected by employers.

Response: We understand the commenter's concern regarding this practice. However, we disagree that using the IWO form in this manner is a basis for rejection of the IWO. OCSE is working with States to ensure income withholding and distribution practices comply with Federal requirements.

4. Comment: A few commenters requested the inclusion of language in § 303.100(e) and (h) to clarify that the requirements listed apply to all income withholding situations and that the use of the OMB-approved form applies only to withholding to enforce IV-D and non-IV-D child support orders but does not apply to any other type of withholding.

Response: We agree with these commenters and affirm that the requirements listed apply to all IV-D and non-IV-D income withholding orders, and that the use of the OMB-approved form applies only to IV-D and non-IV-D child support orders and does not apply to any other type of withholding, including spousal-only support orders. We are adding § 303.100(h) to expressly state that the OMB-approved form must be used for income withholding in all child support orders.

5. Comment: One commenter requested that requirements listed in § 303.100(e) clarify that income withholding orders are not to include instructions for an employer to implement in the future (for example, step-down or step-up payments).

Response: We agree with this commenter that income withholding orders are not to include instructions for an employer to implement in the future. Changes in the amount of income withholding require an amended IWO be sent to the employer reflecting the new terms for income withholding in

the case. However, the rule does not amend the requirements listed in § 303.100(e).

6. Comment: One commenter suggested the regulation reference more generic title such as "the standard OMB-approved form," rather the current form title "Income Withholding for Support" because of the possibility of a change to the form's title in the future.

Response: We disagree. The language in the regulation regarding the IWO form is sufficiently clear.

7. Comment: One commenter recommended the regulation state that the notice may be electronic and that the e-IWO form is an OMB-approved form.

Response: In accordance with Section 306 of Public Law 113-183, *Preventing Sex Trafficking and Strengthening Families Act*, States must use the OCSE e-IWO process when an employer elects to receive IWOs electronically. Further guidance can be found in OCSE AT-14-12.¹⁰⁹ At this time, we do not think it is necessary to revise the regulations since the statute is clear.

8. Comment: One commenter requested the creation of a standard return document to accompany the IWO, which the employer could return to the sender to indicate any noncompliance with Federal income withholding requirements. The commenter noted that the most recent version of the IWO includes language requiring such action, but that courts, private attorneys, or others may be using prior IWO versions without such language.

Response: We understand the commenter's desire to provide information to those issuing income withholding orders regarding the reason an employer has returned the IWO, especially when an outdated version of the IWO form is being used that may not include the "Return to Sender" language. While we decline to create an additional form for this purpose, we note that some employers have addressed this need by creating a coversheet to accompany any IWO they return, clarifying the reason(s) for their rejection of the IWO. OCSE has previously distributed a template of this coversheet to the American Payroll Association members and to others upon request.

9. Comment: One commenter noted that since Tribal IV-D agencies enforce child support orders for States and are required to use the OMB-approved IWO

form, employers or States may assume that withheld payments must go through a State's SDU instead of through the Tribal IV-D agency.

Response: In accordance with 45 CFR 309.115(d), if there is no TANF assignment of support rights to the Tribe and the Tribal IV-D agency has received a request for assistance in collecting support on behalf of the family from a State or another Tribal IV-D agency under § 309.120, the Tribal IV-D agency must send all support collected to either the State IV-D agency or the other Tribal IV-D agency for distribution, as appropriate, except as provided in paragraph (f) of this section. Paragraph (f) indicates that rather than send collections to a State or another IV-D agency for distribution, the Tribal IV-D agency may contact the requesting State or Tribal IV-D agency to determine appropriate distribution and distribute collections as directed by the other agency.

10. Comment: One commenter suggested that language be included on the IWO stating that: "The order/notice applies to all employers except Indian Tribes, tribally-owned businesses, or Indian-owned businesses on a reservation. If you are a Tribe, tribally-owned business, or Indian-owned business located on a reservation and you choose to honor the support order and withhold as directed in the enclosed order/notice, we appreciate your voluntary compliance." The commenter believes that this would serve as a reminder to States and employers of tribal sovereignty.

Response: We disagree with this comment. Per § 309.90(a)(3) and § 309.110, Tribal employers under the jurisdiction of a Tribe with a IV-D program are required to honor income withholding orders and will be held liable for the accumulated amount the employer should have withheld from the noncustodial parent's income if they fail to comply with these provisions.

11. Comment: One commenter requested that the Child Support Portal process employment terminations for both IV-D and non-IV-D cases. They explained that currently, employers must first determine whether the employee termination is in a IV-D case or a non-IV-D case. If it is a IV-D case, the employer may report the termination electronically. If it is a non-IV-D case, the employer must report the termination manually.

Response: The e-IWO process is currently only available for IV-D cases.

¹⁰⁹ AT-14-12 is available at: <http://www.acf.hhs.gov/programs/css/resource/e-iwo-implementation-and-amendment-of-title-iv-d-State-plan-preprint-page-38-3>.

Section 304.20—Availability and Rate of Federal Financial Participation

1. *Comment:* A few commenters asked that we define “reasonable” as used in § 304.20(a)(1).

Response: The term “reasonable” is addressed in *Subpart E—Cost Principles* found at 45 CFR Part 75—*Uniform Administrative Requirements, Cost Principles, and Audit Requirements for HHS Awards*, and is applicable to grants made to States under this part. Specifically, § 75.404 indicates that a cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person under the circumstances prevailing at the time the decision was made to incur the cost. The question of reasonableness is particularly important when the non-Federal entity is predominantly federally-funded. In determining reasonableness of a given cost, consideration must be given to: (a) Whether the cost is of a type generally recognized as ordinary and necessary for the operation of the non-Federal entity or the proper and efficient performance of the Federal award; (b) the restraints or requirements imposed by such factors as: sound business practices; arm’s-length bargaining; Federal, State, local, tribal, and other laws and regulations; and terms and conditions of the Federal award; (c) market prices for comparable goods or services for the geographic area; (d) whether the individuals concerned acted with prudence in the circumstances considering their responsibilities to the non-Federal entity, its employees, where applicable its students or membership, the public at large, and the Federal Government; (e) whether the non-Federal entity significantly deviates from its established practices and policies regarding the incurrence of costs, which may unjustifiably increase the Federal award’s cost.

2. *Comment:* Several commenters asked that OCSE provide specific services and activities included in § 304.20(a)(1) and (b) for which FFP is available.

Response: This regulation provides for general categories of allowable expenditures consistent with HHS cost principles in 45 CFR part 75, subpart E that allow for matching of expenditures that are necessary and reasonable and can be attributed to the child support enforcement program. More specific examples are found in policy guidance.

3. *Comment:* A few commenters are concerned that the cost principles in 2 CFR part 225 will stymie State’s

flexibility in providing the services and activities allowed in § 304.20.

Response: The OMB *Cost Principles for State, Local, and Indian Tribal Governments* (formerly OMB Circular A–87) are published at 2 CFR part 200. However, HHS has codified the OMB cost principles in subpart E of 45 CFR part 75, which apply to all State and local expenditures in HHS-funded programs. When a State is considering if an expense is reasonable or allowable, the State should cross-reference the child support regulations at 45 CFR part 300 and 45 CFR part 75. Part 75 allows the cognizant agency to restrict or broaden funding for allowable activities or services; therefore, child support regulations take precedence over 45 CFR part 75. Section 75.420 indicates that failure to mention a particular item or cost is not intended to imply that it is either allowable or unallowable; rather, determination as to allowability in each case should be based on the treatment provided for similar or related items of cost, and based on the principles described in §§ 75.402 through 75.411. In case of a discrepancy between the provisions of a specific Federal award and the provisions below, the Federal award governs. Criteria outlined in § 75.403 must be applied in determining allowability of costs.

4. *Comment:* One commenter requested OCSE to consider 90 percent reimbursement for automation projects finalized in the rule.

Response: We appreciate the comment. However, OCSE has no authority to increase the FFP rate through the regulatory process. This would require a statutory change by Congress.

5. *Comment:* A few commenters asked for clarification regarding the intent of the proposed change to § 304.20(b)(1)(viii)(A) and if it suggests the IV–D agency should be helping families determine the need for public assistance.

Response: This change was not intended to suggest that IV–D agencies determine a family’s need for public assistance. However, there may be situations where the State IV–D agency determines that it needs to refer cases to the IV–A or IV–E agency, such as for TANF assistance, emergency assistance, child welfare services, etc. This provision provides flexibility to collaborate with other programs in case the need for a referral arises.

6. *Comment:* One commenter asked that we explain the differences between what is allowed for reimbursement for the Medicaid agreements in § 304.20 and what is not allowed based on § 304.23.

Response: Section 304.20(b)(1)(viii)–(ix) addresses the availability of FFP for the establishment of agreements with other agencies administering the title IV–D, IV–E, XIX, and XXI programs for activities related to cross-program coordination, client referrals, and data sharing when authorized by law. In this final rule, we removed § 304.23(g) that prohibited FFP for the costs of cooperative agreements between IV–D and Medicaid agencies under 45 CFR part 306, which was removed from the regulations years ago. Section 304.23(g) is no longer necessary as a result of the enactment of Personal Responsibility and Work Opportunity Reconciliation Act of 1996, which required States to include a provision for health care coverage in all child support orders established or enforced by the IV–D agency. FFP continues to be available for these medical support activities under § 304.20(b)(11).

7. *Comment:* One commenter was concerned that the elimination of paragraph 304.20(b)(1)(ix)(C) regarding transferring collections from the IV–D agency to the Medicaid agency prohibits the State from requiring this activity in the IV–D interagency agreement. However, because § 302.51 explaining the distribution process was not amended, States will still have to transfer the support, but will no longer be able to get FFP for including how to perform this task in an agreement.

Response: We agree and have retained the former provision regarding the availability of FFP under an agreement for the transfer of collections from the IV–D agency to Medicaid in the final regulatory text at § 304.20(b)(1)(ix)(D).

8. *Comment:* A few commenters asked for clarification on what child support proceedings would qualify for bus fare or other minor transportation expenses as provided in § 304.20(b)(3)(v).

Response: Providing bus passes and gas vouchers are considered allowable as local transportation assistance in support of providing child support services. Providing local transportation vouchers can be a highly cost-effective means to increase participation in child support interviews, genetic testing, and hearings, and decrease no-shows and defaults, which increase staff costs and court time, and reduce compliance.

We also encourage States to consider alternatives to the need to travel to the child support office or court, such as the use of technology, including Web applications, video conferences, or telephonic hearings.

9. *Comment:* OCSE received several comments related to proposed § 304.20(b)(3)(vii), which would have allowed “*de minimis*” costs associated

with the inclusion of parenting time provisions entered as part of a child support order and incidental to a child support enforcement proceeding. The commenters were uncertain about the definition of the term “*de minimis*.”

Response: Black’s Law Dictionary defines *de minimis* as “insignificant” or “not enough to be considered,” and the Oxford dictionary defines *de minimis* as “too trivial or minor to merit consideration.” The *de minimis* parenting time rule provision was not intended to open up Federal matching funds for new parenting time activities. Instead, the rule recognizes current State practice and was intended as a no-cost technical fix to clarify cost allocation and audit issues consistent with generally accepted accounting principles.

Currently, 36 States calculate parenting time credits as part of their child support guidelines, or otherwise provide for standard parenting time at the time the support order is set. In addition, many courts recognize voluntary parenting time agreements during child support hearings when the agreements have been worked out between the parents ahead of time and the parents simply ask the court to add the agreements to the support orders.

Congress has not authorized FFP for parenting time activities. Thus, the proposed provisions regarding parenting time under this provision and under § 302.56(h), *Guidelines for Setting Child Support Orders*, were intended to clarify that States may not charge parenting time activities to title IV–D but may coordinate parenting time and child support activities so long as the IV–D program is not charged additional costs and the State adheres to generally accepted accounting principles.

In light of the comments received on the proposed parenting time provisions and the unintended confusion regarding the proposal, OCSE has deleted the proposed FFP provision in paragraph (b)(3)(vii). See Comment/Response 2 under § 302.56—*Guidelines for Setting Child Support Orders, Parenting Time*: [Proposed § 302.56(h)].

10. Comment: Multiple commenters asked if courts are eligible for FFP for education and outreach activities intended to inform the public about the child support enforcement program as referenced in § 304.20(b)(12).

Response: States may enter into cooperative agreements with courts to provide educational and outreach activities intended to inform the public, parents and family members, and young people who are not yet parents about the Child Support Enforcement program, responsible parenting and co-

parenting, family budgeting, and other financial consequences of raising children when the parents are not married to each other. As such, we have added paragraph (b)(12) to allow these as FFP eligible activities in cooperative arrangements with courts and law enforcement officials as cited in § 304.21(a)(1).

11. Comment: One commenter asked that we consider changing the phrase in § 304.20(b)(12) from “when the parents are not married” to “when the parents do not reside together and share expenses as a married or unmarried couple.”

Response: We believe the language as originally drafted is more flexible; therefore, we did not change the regulatory language.

12. Comment: In the NPRM, OCSE specifically asked for feedback regarding the allowability of FFP for electronic monitoring systems for child support purposes. We received feedback from several States, child support organizations, and community based organizations mostly in support of using electronic monitoring systems as an alternative to incarceration for child support purposes.

Response: At this time, we are not planning to regulate in this area since these costs are incurred as part of the general costs of government, similarly to the costs of incarceration.

Section 304.23—Expenditures for Which Federal Financial Participation Is Not Available

1. Comment: Related to § 304.23(d), one commenter asked if the annual firearms qualifications for deputy sheriffs assigned to county IV–D agencies are considered reasonable and essential short-term training.

Response: No, firearms qualifications are necessary for all deputy sheriffs and are therefore considered a general cost of government. In accordance with 45 CFR 75.444, *General costs of government*, these costs for States, local governments, and Indian Tribes are unallowable for Federal funding.

2. Comment: One commenter asked if reasonable and essential short-term training includes preapproved college courses that would directly improve an individual’s ability to perform his or her current job or another IV–D-related job, even if those college courses are also counted towards credit hours needed to complete the individual’s degree or certificate.

Response: Yes, funding this training has been long-standing OCSE policy.

OCSE Action Transmittal (AT) 81–18¹¹⁰ defines the term short-term training as:

. . . any training that would directly improve any individual’s ability to perform his or her current job or another IV–D related job, does not provide merely a general education for an individual and is not taken for the sole purpose of earning credit hours toward a degree or certificate. FFP is available under the above definition regardless of the source of the training. For example, FFP is available for short term training provided by State and local IV–D agencies, or an agency or individual who provides IV–D services under a cooperative or purchase of service agreement. In addition, FFP is available for short term training conducted by the multi-function agency in which the State IV–D agency is located, or by another State or local agency. Short term training provided by a contractor (e.g., college, university, professional association, etc.) is also eligible for FFP.

3. Comment: Many commenters asked for clarification regarding the deletion of § 304.23(i). They questioned if the jailing of parents in child support cases was no longer considered to be ineligible for FFP.

Response: In the NPRM, existing § 304.23(i) regarding the prohibition of FFP for “any expenditures for jailing of parents in child support enforcement cases” was inadvertently removed. Expenditures for jailing of parents in child support enforcement cases continue to be ineligible for FFP. Therefore, in the final rule, we did not remove former § 304.23(i), and redesignated proposed paragraph (i) as paragraph (j).

Section 307.11—Functional Requirements for Computerized Support Enforcement Systems in Operation by October 1, 2000

1. Comment: We received numerous comments supporting the proposed regulatory changes placing limitations on garnishing accounts of SSI recipients. These comments focused on the limited income SSI recipients have and the detrimental impact inappropriate garnishment poses for these individuals. However, some commenters questioned the need for the regulatory change given that in the preamble to the NPRM, we indicated that these inappropriate garnishments are rare.

Response: While we recognize the rarity of these situations, when inappropriate garnishments occur, they must be remedied quickly. The final regulation helps ensure that States will resolve these situations in a timely manner by promptly refunding

¹¹⁰ AT–81–18 is available at: <http://www.acf.hhs.gov/programs/css/resource/definition-of-short-term-training>.

improperly garnished amounts to noncustodial parents.

2. *Comment:* Several commenters expressed concern that the NPRM would require States to invest resources to upgrade their statewide child support enforcement systems for a small number of cases.

Response: We agree the automated procedures required by the rule will require States to enhance their State systems' ability to identify cases where the noncustodial parent is the recipient of protected Federal benefits. However, system enhancements will help to ensure that low-income noncustodial parents retain the Federal benefits that are exempt from child support enforcement and essential to their livelihood. Regulatory changes by the Department of Treasury require all Federal benefits to be deposited electronically in a bank account. This means that SSI recipients no longer have the option to receive their benefits through a check. This change has increased the risk that SSI benefits will be improperly withheld by child support agencies. OCSE has facilitated efforts by the Social Security Administration (SSA) to share data on recipients of protected Federal benefits with States through the Federal Parent Locator Service (FPLS). In 2013, OCSE enhanced its interface with SSA to allow States to match participants in their caseloads who begin or stop receiving SSI benefits. States were notified of these additions to the FPLS as part of the FPLS 13-02 release. States may elect to match with the State Verification and Exchange System (SVES), which supplies both title II and title XVI data to the States. To date, eighteen States have opted in to receive this information. States that wish to receive this additional data as part of their FPLS data matches should contact the OCSE's Division of Federal Systems for more information.

3. *Comment:* Several commenters expressed opposition to including title II benefits in the regulation.

Response: Many of these commenters misinterpreted the NPRM to apply to noncustodial parent receiving only title II benefits (such as SSDI). The NPRM only applied to noncustodial parents who were either recipient[s] of SSI or recipients receiving concurrent SSI and benefits under title II of the Act. Noncustodial parents meeting these conditions are experiencing extreme financial difficulties and warrant further protection from inappropriate garnishments.

In drafting the NPRM, the Department was urged by several stakeholders to exclude garnishment for "dual

eligibility," or concurrent benefits, such as when the individual is eligible for both SSI and SSDI, meets the income test for SSI benefits, and would have received the same amount in SSI-only funds, but for the fact that the individual qualifies for SSDI benefits as well as SSI benefits. SSDI provides benefits to disabled or blind persons based on the person's previous earnings record and Social Security contributions. The SSI program makes cash assistance payments to aged, blind, and disabled persons who have limited income and resources regardless of work history or contributions to Social Security. SSI is a means-tested program with strict financial limits. SSA uses the term "concurrent" when a person is eligible for benefits from both programs. A person can receive both SSDI and SSI payments, but must meet the requirements of both programs. In order to receive concurrent SSI and SSDI benefits, a person must meet the SSI income and assets limits and is limited to the SSI benefit amount. For example, an individual begins receiving \$733 in SSI monthly benefits. Five months later, he becomes eligible to receive \$550 in SSDI monthly benefits, reducing his SSI payments to \$183. His concurrent benefits are limited to \$733 (\$550 in SSDI and \$183 in SSI, none of which may be garnished due to the concurrent receipt). If he had not qualified for SSDI, his SSI benefits would have remained at \$733.¹¹¹ The rule requires States to develop safeguards for the States to prevent garnishment of exempt benefits. These provisions only relate to excluding SSI benefits, as well as concurrent SSI and SSDI benefits under title II.

In light of the comments, we want to emphasize that the final rule makes no changes to our policy regarding recipients of title II benefits being subject to garnishment as outlined in Section 459(h)(1)(A)(ii)(I) of the Act. OCSE has long held that title II benefits are subject to garnishment (See DCL 13-06; PIQ-09-01; DCL-00-103). Title II benefits, such as SSDI benefits, are considered remuneration from employment, and therefore, State or tribal child support agencies are allowed to continue to garnish the benefits of child support directly from the Federal payor as authorized under 459(h).

This final rule only places limitations on garnishments from financial accounts of concurrent SSI and SSDI beneficiaries. As a result of comments, we added in § 307.11(c)(3)(i) the phrase

"Social Security Disability Insurance (SSDI)" before "benefits under title II of the Act" to clarify that we are only addressing when a noncustodial parent is receiving both SSI and SSDI benefits at the same time. Similarly, in paragraph (c)(3)(ii), we added the word "SSDI" before "benefits under title II of the Act."

4. *Comment:* One commenter asked why OCSE did not rule out any garnishments for SSI recipients and eliminate the complexity of the rule.

Response: Section 459(h) of the Act and OCSE policy guidance does prohibit garnishing financial accounts of SSI beneficiaries. However, we recognize that in rare instances, these accounts may be inappropriately garnished by local IV-D agencies if they have not previously identified that the noncustodial parent is receiving SSI benefits. The final rule mandates that the State resolve these errors by requiring that funds are refunded within 5 business days after determining that the funds were incorrectly garnished.

5. *Comment:* One commenter supported the rule, but questioned whether the proposed case closure provisions [(303.11(b)(9))] allow States to close these types of cases and prevent the need for the proposed garnishment regulation.

Response: We agree that the case closure provisions allow States the option to close these types of cases under § 303.11(b)(9). However, because the closure of these cases using this case closure criterion is optional, the regulatory changes are necessary to ensure that disadvantaged noncustodial parents retain protected Federal benefits.

6. *Comment:* One commenter requested clarification of the term "previously identified" used in § 307.11(c)(3)(i). The commenter also asked whether this determination could only come from a match with SSA.

Response: We disagree that the term warrants further definition. The final rule provides that States proactively identify cases where the noncustodial parent is a recipient of SSI benefits. A State may choose to make this determination based on a match with SSA or through other means determined by the State.

7. *Comment:* One commenter felt that the NPRM imposed strict liability on the IV-D agency, but ignores the responsibility of the financial institution in the garnishment process. Many of the comments suggested that financial institutions are required to determine whether an account meets eligibility standards for garnishment based upon

¹¹¹ Further information is available at: <http://www.ssa.gov/redbook/eng/supportsexample.htm>.

the sources of deposits into those accounts.

Response: We disagree. DCL 13–06 indicated that the Department of the Treasury, in conjunction with other Federal agencies, issued an Interim Final Rule regarding the garnishment of accounts containing Federal benefit payments. Since issuing that guidance, the Department of Treasury has finalized the rule. In both the interim and final versions of the rule, financial institutions are instructed to honor garnishment orders issued by State child support enforcement agencies by following standardized procedures “as if no Federal benefit payment were present”¹¹² since many Federal benefit payments are not protected from garnishment for child support under section 459 of the Act. So long as the IV–D agency uses the proper garnishment form (as outlined in the regulation), financial institutions are not required to conduct a “look back” review to determine if any funds deposited in the account consisted of restricted Federal benefits. Under the regulations, financial institutions do not have any responsibility in determining the source of funds and responding to the requirements as outlined in the child support garnishment order. In the event that funds are garnished inappropriately, the IV–D agency is solely responsible for resolving an inappropriate garnishment under the regulation.

8. Comment: Several commenters expressed their desire for the Federal government to share in the costs associated with refunding any previously disbursed funds.

Response: The Federal regulations at 45 CFR 75.426 expressly prohibits the Federal government from sharing in costs associated with bad debts and losses.

9. Comment: Several commenters expressed concern that the proposed regulation places States in the difficult position of trying to recoup funds disbursed to the custodial parent.

Response: A State is prohibited from garnishing SSI benefits and must make a SSI recipient whole if it inappropriately garnishes the benefits. The final rule will reduce the likelihood that the State will need to recover from

the custodial parent support collections distributed to the family resulting from improper garnishment.

10. Comment: Many States expressed concern with the proposed 2-day timeframe. Suggestions ranged from changing the timeframe anywhere from 7 days to 30 days. In addition, some commenters requested clarification whether the timeframe refers to business or calendar days.

Response: We agree that the proposed 2-day timeframe is too short and that clarification is needed. Based on comments, the final rule extended the timeframe in § 307.11(c)(3)(ii) from 2 days to 5 business days, which begins when the agency determines that SSI or concurrent SSI and title II benefits were incorrectly garnished.

Request for Comments on Undistributed and Abandoned Collections

In the NPRM, we asked for specific comments, including information about States policies and procedures related to undistributed and abandoned child support collections and the efforts that States take, both through their child support agencies and the State treasury offices, to maximize the probability that families receive the collections, or if that result cannot be achieved that the payments are returned to the noncustodial parents.

We received several comments on how States deal with undistributed and abandoned child support payments that indicated that many States have aggressive procedures and processes in place to try to minimize undistributed collections. One commenter suggested the creation of a national work group to study and determine collaboratively policies and procedures related to undistributed and abandoned child support collections. One commenter was hopeful that if OCSE shared information about State practices, States could identify promising practices and ultimately reduce the amount of undistributed and abandoned support payments.

At this time, we are not planning to regulate in this area. We will continue to work with States in providing technical assistance to ensure that States are making diligent efforts to distribute child support collections to the family, whenever locate is an issue.

Topic 2: Updates to Account for Advances in Technology (§§ 301.1, 301.13, 302.33, 302.34, 302.50, 302.65, 302.70, 302.85, 303.2, 303.5, 303.11, 303.31, 304.21, 304.40, 305.64, 305.66, and 307.5)

We received numerous comments supporting the revisions to update the

regulations for electronic communications technology under Topic 2 of the rule. We also received a few comments about specific provisions. We did not receive any comments related to Topic 2 that we needed to address for the following sections:

- § 301.13—Approval of State Plans and Amendments.
- § 302.33—Services to Individuals Not Receiving Title IV–A Assistance
- § 302.34—Cooperative Arrangements
- § 302.50—Assignment of Rights to Support
- § 302.65—Withholding of Unemployment Compensation
- § 302.70—Required State Laws
- § 302.85—Mandatory Computerized Support Enforcement System
- § 303.5—Establishment of Paternity
- § 303.31—Securing and Enforcing Medical Support Obligations
- § 304.21—Federal Financial Participation in the Costs of Cooperative Arrangements with Courts and Law Enforcement Officials
- § 304.40—Repayment of Federal Funds by Installments
- § 305.64—Audit Procedures and State Comments
- § 305.66—Notice, Corrective Action Year, and Imposition of Penalty
- § 307.5—Mandatory Computerized Support Enforcement Systems

Section 301.1—General Definitions

1. Comment: One commenter thought it would be clearer to include “in writing” or “written information if requested” to the definition of “record.”

Response: We do not agree that this clarification is needed. The regulation defines “record” as “information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.” This includes documents that are “in writing.” As noted in the preamble under Topic 2, the Uniform Electronic Transactions Act explains that this definition “includes any method for storing or communicating information, including ‘writings.’”

2. Comment: Besides adding definitions for procedures and records, one commenter suggested we added definitions for low income or subsistence level.

Response: We do not agree that additional definitions are needed. Each State should have the flexibility and discretion to define these terms.

Section 303.2—Establishment of Cases and Maintenance of Case Records

1. Comment: One commenter recommended for consistency with

¹¹² The Final Rule entitled “Garnishment of Accounts Containing Federal Benefit Payments: Final Rule,” *Federal Register*, Volume 78, No 103 (29 May 2013), pp. 32099–3211 is available at: <http://www.gpo.gov/fdsys/pkg/FR-2013-05-29/pdf/2013-12683.pdf> and the Interim Final rule entitled “Garnishment of Accounts Containing Federal Benefit Payments: Interim Final Rule” *Federal Register*, Volume 76, No 36 (23 February 2011), pp. 9939–9962 is available at: <http://www.gpo.gov/fdsys/granule/FR-2011-02-23/2011-3782>.

§ 303.2(a)(3) and for clarity for when the 5 working day timeframe begins, please consider replacing the newly added words “made by” with the word “received” in § 303.2(a)(2).

Response: We agree and have made the requested change.

Section 303.11—Case Closure Criteria

1. Comment: We invited comments on whether a recipient of services should be provided the option to request the case closure notice “in writing” or “in a record,” such as emails, text messaging, voice mails. Three commenters requested the ability to notify the recipient of services by mail or electronic means if the recipient of services has authorized electronic notifications.

Response: At this time, we have decided not to provide the State the flexibility to send case closure notices in a record, such as emails, text messaging and voice mail to all parents since there was not overwhelming support to do so. While an electronic case closure notice may be an appropriate, and even the preferred, method of notification on a case-by-case basis for some custodial parents, it may not be an effective means to notify other parents. Many parents in the child support caseload have limited incomes, and may not have convenient access to a computer, the internet, or mobile communication.

However, we have added a new § 303.11(d)(6) to allow States to issue case closure notices under paragraphs (d)(1) and (4) electronically, on a case-by-case basis, when the recipient of services consents to electronic notifications. The State must keep documentation of the recipient’s authorization of the consent in the case record.

2. Comment: One commenter inquired why the notice in the proposed § 303.11(d)(6) is not required to be in writing.

Response: The notice is required to be in writing and we made this correction in this final rule to § 303.11(d)(4) since the numbering scheme changed as a result of deleting some notice requirements.

Topic 3: Technical Corrections

(§§ 301.15; 302.14; 302.15; 302.32; 302.34; 302.35; 302.65; 302.70; 302.85; 303.3; 303.7; 303.11; 304.10; 304.12; 304.20; 304.21; 304.23; 304.25; 304.26; 305.35; 305.36; 305.63; 308.2; 309.85; 309.115; 309.130; 309.145; and 309.160)

In the response to comments below, we only discuss sections for which we received applicable comments. Overall, 32 commenters mainly supported our

technical revisions, but they had some suggested revisions or needed clarification on some of the issues. We did not receive any comments related to the technical corrections that we needed to address for the following sections:

- § 302.14—Fiscal policies and accountability;
- § 302.15—Reports and maintenance of records;
- § 302.35—State parent locator service;
- § 302.65—Withholding of unemployment compensation;
- § 302.70—Required State laws;
- § 302.85—Mandatory computerized support enforcement system;
- § 303.3—Location of noncustodial parents in IV–D cases;
- § 303.7—Provision of services in intergovernmental IV–D cases;
- § 303.11—Case closure criteria;
- § 304.10—General administrative requirements;
- § 304.12—Incentive payments;
- § 304.20—Availability and rate of Federal financial participation;
- § 304.23—Expenditures for which Federal financial participation is not available;
- § 304.25—Treatment of expenditures; due date;
- § 304.26—Determination of Federal share of collections;
- § 305.63—Standards of determining substantial compliance with IV–D requirements;
- § 309.85—What records must a Tribe or Tribal organization include in a Tribal IV–D plan;
- § 309.130—How will Tribal IV–D programs be funded and what forms are required?;
- § 309.145—What costs are allowable for Tribal IV–D programs carried out under § 309.65(b) of this part?;
- § 309.160—How will OCSE determine whether Tribal IV–D program funds are appropriately expended?

Section 301.15—Grants

1. Comment: Two commenters suggested that the suffix “A” be eliminated from all references to Form OCSE–396A and OCSE–34A to reflect the changes made in the ACF Office of Grants Management (OGM) AT–14–01 and OCSE AT–14–14, *Revised Quarterly Financial Reporting Forms—2014*.¹¹³

Response: We agree. The suffix “A” was deleted to reflect the recent redesignation of these financial forms in accordance with OGM AT–14–01 and OCSE–AT–14–14.

2. Comment: One commenter requested clarification on section

301.15(b). When financial reports are submitted through the On-Line Data Collection system (OLDC), the “signature of the authorized State program official” is an electronic signature. The commenter suggested that the reference to the signature in paragraph (2) be revised so that it is clear that the signature is electronic.

Response: We have clarified in both paragraphs (a)(1) and (2) that the signature of the authorized State program official is a digital signature since both the OCSE–396 and the OCSE–34 will be submitted electronically, as indicated in paragraph (b)(1).

3. Comment: One commenter suggested the last sentence of revised paragraph (a)(2) regarding the data used in the computation of the quarterly grant awards issued to the States appears to be misplaced and believes a more appropriate placement is in paragraph (c) *Grant Award*.

Response: We do not believe this revision is necessary. This sentence summarizes the purposes of the OCSE–34. Paragraph (c) indicates that the quarterly grant award is based on the information submitted by the State on the financial reporting forms and consists of an advance of funds for the next quarter, reconciliation of the advance provided for the current quarter, and access to funds.

4. Comment: One commenter requested clarification that technical correction in 301.15(d)(1) does not reflect 45 CFR part 75 Interim Final Rule for the Uniform Guidance effective December 26, 2014 since 45 CFR parts 74 and 92 were superseded when HHS adopted promulgated 45 CFR part 75 as indicated in 45 CFR 75.104.

Response: We agree. However, the recent HHS Interim Final Rule, effective January 20, 2016 (81 FR 3004),¹¹⁴ contains technical amendments to HHS regulations regarding the Uniform Guidance. The regulatory content updates cross-references within HHS regulations to replace part 74 with part 75. Therefore, it is no longer necessary to make the proposed revisions and we will delete these proposed revisions in the final rule, except as otherwise noted.

Section 302.32—Collection and Disbursement of Support Payments by the IV–D Agency

1. Comment: To be consistent with the definitions in § 303.7 *Provision of Services in Interstate IV–D Cases*, one commenter suggested that § 302.32(b)(1)

¹¹³ Available at: <http://www.acf.hhs.gov/programs/css/resource/revised-quarterly-financial-reporting-forms-2014>.

¹¹⁴ The Uniform Guidance HHS technical corrections are available at: <https://www.gpo.gov/fdsys/pkg/FR-2016-01-20/pdf/2015-32101.pdf>.

be changed to replace “interstate” with “intergovernmental” and “initiating State” with “initiating agency.”

Response: We agree and have made the proposed revisions in the final rule.

Section 302.34—Cooperative Arrangements

1. *Comment:* While many commenters supported our proposed changes, one commenter requested OCSE develop a definition for corrections officials. For instance, the commenter asked if the term “corrections officials” includes sheriff departments. One commenter encouraged us to include community corrections officials.

Response: OCSE is not specifically defining corrections officials to allow flexibility for the State to define it based on how the State is organized. However, we would like to clarify that cooperative arrangements are required for corrections officials at any governmental level, such as Federal, State, Tribal, and local levels. OCSE encourages child support agencies to collaborate with Federal, State, Tribal, and local corrections officials, including community corrections officials (probation and parole agencies), to provide case management services, review and adjust support orders, provide employment services to previously incarcerated noncustodial parents, etc. The National Institutes of Justice notes that community corrections programs “. . . oversee offenders outside of jail or prison and . . . include probation—correctional supervision within the community rather than jail or prison—and parole—a period of conditional, supervised release from prison.”¹¹⁵

Section 304.21—Federal Financial Participation in the Costs of Cooperative Arrangements With Courts and Law Enforcement Officials

1. *Comment:* Commenters requested clarification as to whether the inclusion of corrections officials in the definition of law enforcement officials allows the State to sign a cooperative arrangement with a sheriff to operate a child support warrant task force or to operate a county jail and receive FFP.

Response: OCSE encourages Child Support Enforcement agencies to collaborate with corrections institutions and community corrections officials, such as probation and parole agencies. As noted in our response to comments under § 302.34, OCSE is not specifically defining corrections officials to allow

flexibility for the State to define it based on how the State is organized.

Regarding sheriff’s costs for a child support warrant task force, since these costs would relate to reviewing the warrant process to evaluate the quality, efficiency, effectiveness, and scope of support enforcement services and securing compliance with the requirements of the State plan, these costs would be allowable under 45 CFR 304.20(b)(1). However, the State should execute a purchase of service agreement under § 304.22, rather than a cooperative agreement.

Regarding sheriff’s costs for operating a county jail, since we do not provide FFP related to jailing costs under § 304.23(i), these costs would not qualify for FFP reimbursement. Section 304.23(i) was inadvertently left out of the NPRM and is corrected in this final rule. This is discussed in more detail in Comment/Response 3 in § 304.23, *Expenditures for which Federal Financial Participation Is Not Available*.

2. *Comment:* Another commenter asked if the costs of forming cooperative arrangements with courts and corrections officials to receive notice of incarceration of noncustodial parents triggering state-initiated review under § 303.8 are included as allowable expenditures eligible for Federal financial participation.

Response: Yes, these costs would be allowable expenditures related to improving the State’s establishment and enforcement of support obligations under § 304.20(b)(3).

3. *Comment:* Another commenter indicated that by adding corrections officials, they believed that a State could enter into a cooperative agreement with a community corrections provider, which would enable electronic monitoring to be funded directly through the local agency doing the electronic monitoring.

Response: We do not agree with this interpretation. We do not allow for FFP to be used for electronic monitoring costs since these costs are a general cost of government and are related to the judicial branch under 45 CFR 75.444(a)(3).

4. *Comment:* Multiple commenters asked if courts are eligible for FFP for education and outreach activities intended to inform the public about the child support enforcement program.

Response: States may enter into cooperative agreements with courts to provide educational and outreach activities intended to inform the public, parents and family members, and young people who are not yet parents about the Child Support Enforcement program, responsible parenting and co-

parenting, family budgeting, and other financial consequences of raising children when the parents are not married to each other. As such, we have added to § 304.21(a)(1) a cross-reference to § 304.20(b)(12).

5. *Comment:* One commenter asked for clarification on the inclusion of “corrections officials” in § 304.21 and § 302.34.

Response: Please see our response to this comment under Comment/Response 1 for § 302.34, *Cooperative Arrangements* under Topic 3.

Section 305.35—Reinvestment

1. *Comment:* One commenter thought that the proposed formula for determining State Current Spending Level may not accurately measure a State’s compliance with § 305.35 due to the significant differences in the timing of expenditures reported on the OCSE–396 for each Federal fiscal year because approximately 50 percent of total expenditures reported to OCSE are county-related prior quarter adjustments.

Response: We do not agree that a State’s compliance would not accurately be measured due to expenditure timing differences. As discussed in “Instructions for Completion of Form OCSE–396,” there is no deadline for spending incentive payments. Incentive payments remain available to the State until completely expended. Once expended, however, those expenditures must be reported on Line 1a or 1d, as applicable, within 2 years, in accordance with section 1132 of the Act. Expenditures are considered made on the date the payment occurs, regardless of the date of receipt of the good or performance of the service. For State-administered expenditures, the date of this transaction by the State agency governs; for locally-administered programs, the date of the transaction by the county, city, or other local agency governs.¹¹⁶

2. *Comment:* A few commenters requested clarification regarding the applicability of this section to political subdivisions to which the incentives are provided by the States.

Response: As discussed in both AT–01–01 and AT–01–04,¹¹⁷ OCSE indicated that any payments made to political subdivisions must be used in

¹¹⁶ The Instructions for the OCSE–396 are available at: <http://www.acf.hhs.gov/programs/css/resource/instructions-for-ocse-396-quarterly-financial-report>.

¹¹⁷ Available at: <http://www.acf.hhs.gov/programs/css/resource/final-rule-on-incentives-penalties-and-audit> and <http://www.acf.hhs.gov/programs/css/resource/reinvestment-of-child-support-incentive-payments>, respectively.

¹¹⁵ National Institutes of Justice, Office of Justice Programs, DOJ—<http://www.nij.gov/topics/corrections/community/pages/welcome.aspx>.

accordance with the provisions in § 305.35. States are responsible for ensuring that all components of their child support program must comply with the reinvestment requirements, including local or county programs, other State agencies, vendors or other entities that perform child support services under contract or cooperative agreement with the State.

3. *Comment:* One commenter believed that our regulation should go further into requiring that these funds actually be spent. The commenter thought that localities should not be allowed to “stock-pile incentive dollars,” and should require localities to spend incentives within 2 years of being earned or submit a long-term spending plan for our approval. The commenter added that if a local agency receiving incentive funds does not spend the funds, then these funds should be forfeited to another local agency in the same community that provides an approved spending plan. This would foster intra-county cooperation in the use of funds. It would also allow the agency more directly involved in the daily enforcement of child support services the opportunity for a larger share of incentives.

Response: As discussed in the response to Comment/Response 2, States are responsible for ensuring that all components of their child support program must comply with the reinvestment requirements, including local or county programs, other State agencies, vendors, or other entities that perform child support services under contract or cooperative agreement with the State. Additionally, as discussed in our response to Comment/Response 1, there is no deadline for spending incentive payments. Incentive payments remain available to the State until completely expended. Once expended, however, those expenditures must be reported on Line 1a or 1d of the OCSE-396, as applicable, within 2 years, in accordance with section 1132 of the Act.

4. *Comment:* One commenter asked if § 305.35 allowed the use of State IV-D agency and/or other county component current spending level surpluses to offset State IV-D agency and/or county components with current spending level deficits in Federal fiscal years where the total of all components making up the State current spending levels exceeds the State baseline expenditure level to avoid disallowance of incentive amounts.

Response: No, a State must expend the full amount of incentive payments received to supplement, and not supplant, other funds used by the State to carry out its IV-D program activities

or funds for other activities approved by the Secretary, which may contribute to improving the effectiveness or efficiency of the State's child support program, including cost-effective contracts with local agencies.

5. *Comment:* Several commenters asked questions regarding clarification on the base year amount and whether the base year amount needs to be recalculated annually for States and, if applicable, political subdivisions. One commenter wanted to provide an option to recalculate the base year amount for the few States that had incentives included in their base year amount. Another commenter indicated that the rule needed to be updated to calculate a new base level of funding since the base level had not been updated for over two decades.

Response: As specified in § 305.35(d), a base amount of spending was determined by subtracting the amount of incentive funds received by the State child support program for Fiscal Year 1998 from the total amount expended by the State in the program for the same period. Alternatively, States had an option of using the average amount of the previous three fiscal years (1996, 1997, and 1998) for determining the base amount. The base amount of State spending must be maintained in future years.

OCSE calculated the base amount of spending for each State using 1998 expenditure data unless the State notified OCSE that the State preferred the base amount as an average of the 1996, 1997, and 1998 expenditures. Only five States (Georgia, Mississippi, New Jersey, New York, and South Dakota) requested the use of the three-year average.¹¹⁸ At this time, we have no plans for updating the base level.

On June 23, 2011, OCSE sent letters to all IV-D Directors reminding them of the actual amount of their base level expenditures for incentive reinvestment purposes.

6. *Comment:* One commenter suggested the following as an alternative to our proposed changes in § 305.35(d) in the NPRM: “State expenditures may not be reduced as a result of the receipt and reinvestment of incentive payments, but can be reduced under the baseline as a result of cost savings.”

Response: We do not agree with this proposed change because the baseline spending level cannot be reduced as a result of cost savings. As discussed in the final rule on incentive payments to

States, 65 FR 82178 (December 27, 2000),¹¹⁹ OCSE recognized that “a fixed base year could potentially penalize States that reduce costs as a result of program improvements or cuts in government spending. On the other hand, we also recognized that a fixed base year would not reflect inflation or other increases in the costs of personnel or services. Thus, any negative effects would be lessened over time.”

7. *Comment:* Several commenters suggested that the suffix “A” be eliminated from all references to Form OCSE-396A and OCSE-34A to reflect the changes made in OGM AT-14-01 and OCSE AT-14-14.¹²⁰

Response: We agree. The suffix “A” was deleted in all references to OCSE-396A in paragraph (e) to reflect the recent redesignation of these financial forms in accordance with OGM AT-14-01 and OCSE AT-14-14.

8. *Comment:* One commenter thought that the term “disallowances of incentive amounts” was unclear, and suggested that we replace it with “a reduction in incentives awarded.”

Response: We do not agree with this suggested revision. OCSE has used the disallowance terminology since Federal fiscal year 2001. It is technically correct in terms of grants management. OCSE would be making a disallowance, which may be collected by reducing the State's incentive payments or State's child support grant payments.

9. *Comment:* Another commenter believed that a disallowance for a State not reinvesting the full amount of the incentive payment to supplement, not supplant, other funds used by the State to carry out the child support program or to use the funds for other activities, approved by the Secretary for improving the efficiency and effectiveness of the program, seems like a harsh penalty. The commenter suggested that in cases of non-compliance, OCSE should follow the progressive steps outlined in § 305.66 by providing the State with a corrective action year.

Response: We do not agree with the suggestion. Section 305.66 outlines the steps taken when a State is found by the Secretary to be subject to a penalty as described in § 305.61. This section does not identify incentive funds not being reinvested as a reason that a State would be subject to a financial penalty. Additionally, we do not support this change since the financial penalty would be much harsher. A disallowance

¹¹⁹ Available at: <https://www.gpo.gov/fdsys/pkg/FR-2000-12-27/xml/FR-2000-12-27.xml>.

¹²⁰ Available at: <http://www.acf.hhs.gov/programs/css/resource/revise-quarterly-financial-reporting-forms-2014>.

¹¹⁸ See Dear Colleague Letter (DCL) 01-50, available at: <http://www.acf.hhs.gov/programs/css/resource/base-level-program-expenditures-for-incentive-reinvestment-revised>.

as proposed would result in penalty amounts from one to five percent of the State's title IV-A payments.

10. *Comment:* One commenter believed that our calculation related to the State Share of Expenditure in paragraph (e)(1) was incorrect. The commenter thought that the correct calculation should be "Total Expenditures less expenditures funded with incentives = the base for determining the State share. The base for determining the State share is multiplied by 34% and that result is compared to the required base level spending."

Response: We do not agree with this change in our formula. The formula in

the final rule is the formula that we have been using since 2001. The State Share of Expenditures must deduct the Federal Share of total expenditures claimed for the current quarter and prior quarter adjustments claimed on the OCSE-396 for all four quarters of the fiscal year.

Section 305.36—Incentive Phase-In

1. *Comment:* One commenter requested an additional conforming revision to delete 45 CFR 305.36 since it was an outdated requirement from 2002.

Response: We agree with the commenter and have deleted the outdated provision.

V. Impact Analysis

Paperwork Reduction Act of 1995

Under the Paperwork Reduction Act (Pub. L. 104-13), all Departments are required to submit to OMB for review and approval any reporting or recordkeeping requirements inherent in a proposed or final rule. There are seven new requirements as a result of these regulations. These new regulatory requirements are one-time system enhancements to the statewide child support system. The description and total estimated burden for the changes are described in the chart below.

Section and purpose	Instrument	Number of respondents: 54	Average burden hours per response	Total cost	National federal share	National state share
Added requirement under § 302.33 to generate notices.	Systems Modification.	One-time system enhancement.	300 hours × \$100 per 54 States to modify statewide child support system.	\$1,620,000	\$1,069,200	\$550,800
Added optional requirement under § 302.33 for revised applications for limited services.	Systems Modification.	One-time system enhancement.	5,000 hours × \$100 per 27 States to modify statewide child support system.	13,500,000	8,910,000	4,590,000
Added requirement under § 303.8 for notice of the right to request review and adjustment when parent is incarcerated.	Systems Modification.	One-time system enhancement.	200 hours × \$100 × 54 States	1,080,000	712,800	367,200
Added optional requirement under § 303.11 for notice to recipient when case closed because limited service has been completed.	Systems Modification.	One-time system enhancement.	1,000 hours × \$100 × 27 States.	2,700,000	1,782,000	918,000
Added requirement under § 303.11 for notice because the referring agency does not respond to a notice or does not provide information demonstrating that services are needed.	System Modification.	One-time system enhancement.	500 hours × \$100 × 54 States	2,700,000	1,782,000	918,000
Under § 303.72 discontinued notice requirement for interstate tax refund offset.	Systems Modification.	One-time system enhancement.	500 hours × \$100 × 54 States	2,700,000	1,782,000	918,000
Added requirement under § 307.11 develop automated procedures to identify the recipient of Supplemental Security Income (SSI).	Systems Modification.	One-time system enhancement.	400 hours × \$100 × 54 States	2,160,000	1,425,600	734,400
Added requirement for State plan page amendment under 42 CFR 433.152.	State plan amendment.	One time for 54 State Medicaid programs, (which includes DC and 3 territories).	2 hours × \$54.08 × 54 States	5,840.64	2,920.32	2,920.32
Added requirement for cooperative agreements with IV-D agencies under 42 CFR 433.152.	Cooperative agreement.	One time for 54 State Medicaid programs.	10 hours × \$54.08 × 54 States.	29,203.20	14,601.60	14,601.60
Totals	265,248 hrs	26,495,043.84	17,481,121.92	9,013,921.92

Part 302 contains information collection requirements subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Although States will have to submit revised Child Support State plan pages for §§ 302.33, 302.56, and 302.70, we do not estimate any additional burden on the "State Plan for Child Support Collection and Establishment of Paternity Under Title IV-D of the Social Security Act," and the State Plan Transmittal Form (OMB

0970-0017), which were reauthorized until June 30, 2017. When these forms were submitted for reauthorization, we had estimated that each State would be submitting eight State plan preprint pages annually as a result of changes in regulations, policies, and/or procedures.

None of the forms are new burdens on States. For example § 303.100 clarifies the regulation that States are required to use the Income Withholding Order (IWO) form. Use of the OMB-approved

form is already required. The OMB Control number is 0970-0154, which expires on July 31, 2017. Section 303.35 clarifies that the OCSE-396 is used to calculate the State current spending level. This form is an OMB-approved form, Control number 0970-0181, which expires on May 31, 2017. Finally, there has been an update from use of form SF 269A to SF 425. This is a technical update with no addition burden. SF 425 is an OMB-approved

form, Control number 0348–0061, which expired on February 28, 2015.

With regard to the requirements for cooperative agreements for third party collections under 42 CFR 433.152, Medicaid State plan amendments will be required as well as amendments to State cooperative agreements. The one-time burden associated with the requirements under § 433.152 is the time and effort it will take each of the 54 State Medicaid Programs, which includes the District of Columbia and 3 territories, to submit State plan amendments and amend their cooperative agreements.

Specifically, we estimate that it will take each State 2 hours to amend their State plans and 10 hours to amend their cooperative agreements. We estimate 12 total annual hours at a total estimated cost of \$35,043.84 with a State share of \$17,521.92. The Centers for Medicare and Medicaid Services reimburses States for 50 percent of the administrative costs incurred to administer the Medicaid State plan.

In deriving these figures, we used the hourly rate of \$54.08/hour, which is the mean hourly wage of management officials according to 2014 data from the Bureau of Labor Statistics.¹²¹

Other than what is addressed above, no additional information collection burdens, as described in the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), are imposed by this regulation.

Regulatory Flexibility Analysis

The Secretary certifies, under 5 U.S.C. 605(b), and enacted by the Regulatory Flexibility Act (Pub. L. 96–354), that this regulation will not result in a significant impact on a substantial number of small entities. The primary impact is on State Governments. State Governments are not considered small entities under the Act.

Regulatory Impact Analysis

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if the regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. While there are some costs associated with these

regulations, they are not economically significant as defined under E.O. 12866. However, the regulation is significant and has been reviewed by OMB.

An area with associated Federal costs is modifying the child support statewide automated system for one-time system enhancements to accommodate new requirements such as notices, applications, and identifying noncustodial parents receiving SSI, and CMS State plan changes. This rule has a total cost of approximate \$26,495,044. This includes a total cost of \$26,460,000 to modify statewide IV–D systems for the 54 States or Territories at a cost of \$100 an hour (with an assumption that 27 States will implement the optional requirements), with \$17,463,600 as the Federal share. In addition, there is a cost of \$35,044 is designated to CMS' costs for State plan amendments and cooperative agreements, which includes the Federal share of \$17,522.

These regulations will improve the delivery of child support services, support the efforts of noncustodial parents to provide for their children, and improve the efficiency of operations.

Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 requires that a covered agency prepare a budgetary impact statement before promulgating a rule that includes any Federal mandate that may result in the expenditure by State, Tribal and local Governments, in the aggregate, or by the private sector, of \$100 million or more in any one year. This \$100 million threshold was based on 1995 dollars. The current threshold, adjusted for inflation is \$146 million. This rule would not impose a mandate that will result in the expenditure by State, local, and Tribal Governments, in the aggregate, or by the private sector, of more than \$146 million in any one year.

Congressional Review

This final rule is not a major rule as defined in 5 U.S.C. Chapter 8.

Assessment of Federal Regulations and Policies on Families

Section 654 of the Treasury and General Government Appropriations Act of 1999 requires Federal agencies to determine whether a policy or regulation may negatively affect family well-being. If the agency's determination is affirmative, then the agency must prepare an impact assessment addressing seven criteria specified in the law. The required review of the regulations and policies to determine their effect on family well-

being has been completed, and this rule will have a positive impact on family well-being as defined in the legislation by helping to ensure that parents support their children, even when they reside in separate jurisdictions, and will strengthen personal responsibility and increase disposable family income.

Executive Order 13132

Executive Order 13132 prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial direct compliance costs on State and local governments or is not required by statute, or the rule preempts State law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. This final rule does not have federalism impact as defined in the Executive Order.

List of Subjects

42 CFR Part 433

Administrative practice and procedure, Child support, Claims, Grant programs—health, Medicaid, Reporting and recordkeeping requirements.

45 CFR Part 301

Child support, State plan approval and grant procedures.

45 CFR Part 302

Child support, State plan requirements.

45 CFR Part 303

Child support, Standards for program operations.

45 CFR Part 304

Child support, Federal financial participation.

45 CFR Part 305

Child support, Program performance measures, Standards, Financial incentives, Penalties.

45 CFR Part 307

Child support, Computerized support enforcement systems.

45 CFR Part 308

Child support, Annual State self-assessment review and report.

45 CFR Part 309

Child support, Grant programs—social programs, Indians, Reporting and recordkeeping requirements.

¹²¹ The BLS Occupational Employment Statistics 2014 wage data for management occupations is available at: www.bls.gov/oes/current/oes110000.htm.

(Catalog of Federal Domestic Assistance Programs No. 93.563, Child Support Enforcement Program.)

Mark H. Greenberg,
Acting Assistant Secretary for Children and Families.

Andy Slavitt,
Acting Administrator for the Centers for Medicare & Medicaid Services.

Sylvia M. Burwell,
Secretary.

■ For the reasons discussed above, the Department of Health and Human Services amends 42 CFR part 433 and 45 CFR chapter III as set forth below:

Centers for Medicare and Medicaid Services

42 CFR Chapter IV

PART 433—STATE FISCAL ADMINISTRATION

■ 1. The authority citation for part 433 is revised to read as follows:

Authority: Sec. 1102 of the Social Security Act (42 U.S.C. 1302).

■ 2. Section 433.152 is amended, effective January 20, 2017 by revising paragraph (b) to read as follows:

§ 433.152 Requirements for cooperative agreements for third party collections.

* * * * *

(b) Agreements with title IV–D agencies must specify that:

(1) The Medicaid agency may not refer a case for medical support enforcement when the following criteria have been met:

(i) The Medicaid referral is based solely upon health care services provided through an Indian Health Program (as defined at 25 U.S.C. 1603(12)), including through the Purchased/Referred Care program, to a child who is eligible for health care services from the Indian Health Service (IHS).

(ii) [Reserved]

(2) The Medicaid agency will provide reimbursement to the IV–D agency only for those child support services performed that are not reimbursable by the Office of Child Support Enforcement under title IV–D of the Act and that are necessary for the collection of amounts for the Medicaid program.

Administration for Children and Families

45 CFR Chapter III

PART 301—STATE PLAN APPROVAL AND GRANT PROCEDURES

■ 3. The authority citation for part 301 continues to read as follows:

Authority: 42 U.S.C. 651 through 658, 659a, 660, 664, 666, 667, 1301, and 1302.

■ 4. Amend § 301.1 by revising the first sentence of the definition of “Procedures” and adding the definition of “Record” in alphabetical order to read as follows:

§ 301.1 General definitions.

* * * * *

Procedures means a set of instructions in a record which describe in detail the step by step actions to be taken by child support enforcement personnel in the performance of a specific function under the State’s IV–D plan. * * *

Record means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

* * * * *

■ 5. Amend § 301.13 by revising the first sentence of the introductory text and paragraphs (e) and (f) to read as follows:

§ 301.13 Approval of State plans and amendments.

The State plan consists of records furnished by the State to cover its Child Support Enforcement program under title IV–D of the Act. * * *

* * * * *

(e) *Prompt approval of the State plan.* The determination as to whether the State plan submitted for approval conforms to the requirements for approval under the Act and regulations issued pursuant thereto shall be made promptly and not later than the 90th day following the date on which the plan submittal is received in OCSE Regional Program Office, unless the Regional Office has secured from the IV–D agency an agreement, which is reflected in a record, to extend that period.

(f) *Prompt approval of plan amendments.* Any amendment of an approved State plan may, at the option of the State, be considered as a submission of a new State plan. If the State requests that such amendments be so considered, the determination as to its conformity with the requirements for approval shall be made promptly and not later than the 90th day following the date on which such a request is received in the Regional Office with respect to an amendment that has been received in such office, unless the Regional Office has secured from the State agency an agreement, which is reflected in a record, to extend that period.

* * * * *

■ 6. Amend § 301.15 by revising paragraphs (a), (b), (c), and (d), and by

removing paragraph (e) to read as follows:

§ 301.15 Grants.

* * * * *

(a) *Financial reporting forms—(1) Form OCSE–396: Child Support Enforcement Program Quarterly Financial Report.* States submit this form quarterly to report the actual amount of State and Federal share of title IV–D program expenditures and program income of the current quarter and to report the estimated amount of the State and Federal share of title IV–D program expenditures for the next quarter. This form is completed in accordance with published instructions. The digital signature of the authorized State program official on this document certifies that the reported expenditures and estimates are accurate and that the State has or will have the necessary State share of estimated program expenditures available when needed.

(2) *Form OCSE–34: Child Support Enforcement Program Quarterly Collection Report.* States submit this form quarterly to report the State and Federal share of child support collections received, distributed, disbursed, and remaining undistributed under the title IV–D program. This form is completed in accordance with published instructions. The digital signature of the authorized State program official on this document certifies that the reported amounts are accurate. The Federal share of actual program expenditures and collections and the Federal share of estimated program expenditures reported on Form OCSE–396 and the Federal share of child support collections reported on Form OCSE–34 are used in the computation of quarterly grant awards issued to the State.

(b) *Submission, review, and approval—(1) Manner of submission.* The Administration for Children and Families (ACF) maintains an On-line Data Collection (OLDC) system available to every State. States must use OLDC to submit reporting information electronically. To use OLDC, a State must request access from the ACF Office of Grants Management and use an approved digital signature.

(2) *Schedule of submission.* Forms OCSE–396 and OCSE–34 must be electronically submitted no later than 45 days following the end of the each fiscal quarter. No submission, revisions, or adjustments of the financial reports submitted for any quarter of a fiscal year will be accepted by OCSE later than December 31, which is 3 months after the end of the fiscal year.

(3) *Review and approval.* The data submitted on Forms OCSE-396 and OCSE-34 are subject to analysis and review by the Regional Grants Officer in the appropriate ACF Regional Office and approval by the Director, Office of Grants Management, in the ACF central office. In the course of this analysis, review, and approval process, any reported program expenditures that cannot be determined to be allowable are subject to the deferral procedures found at 45 CFR 201.15 or the disallowance process found at 45 CFR 304.29 and 201.14 and 45 CFR part 16.

(c) *Grant award*—(1) *Award documents.* The grant award consists of a signed award letter and an accompanying “Computation of Grant Award” to detail the award calculation.

(2) *Award calculation.* The quarterly grant award is based on the information submitted by the State on the financial reporting forms and consists of:

(i) An advance of funds for the next quarter, based on the State’s approved estimate; and

(ii) The reconciliation of the advance provided for the current quarter, based on the State’s approved expenditures.

(3) *Access to funds.* A copy of the grant documents are provided to the HHS Program Support Center’s Division of Payment Management, which maintains the Payment Management System (PMS). The State is able to request a drawdown of funds from PMS through a commercial bank and the Federal Reserve System against a continuing letter of credit. The letter of credit system for payment of advances of Federal funds was established pursuant to Treasury Department regulations. (Circular No. 1075).

(d) *General administrative requirements.* The provisions of part 95 of this title, establishing general administrative requirements for grant programs and part 75 of this title, establishing uniform administrative requirements and cost principles, shall apply to all grants made to the States under this part, with the following exceptions:

(1) 45 CFR 75.306, *Cost sharing or matching* and

(2) 45 CFR 75.341, *Financial reporting.*

* * * * *

PART 302—STATE PLAN REQUIREMENTS

■ 7. The authority citation for part 302 continues to read as follows:

Authority: 42 U.S.C. 651 through 658, 659a, 660, 664, 666, 667, 1302, 1396a(a)(25), 1396b(d)(2), 1396b(o), 1396b(p), and 1396(k).

■ 8. Revise § 302.14 to read as follows:

§ 302.14 Fiscal policies and accountability.

The State plan shall provide that the IV–D agency, in discharging its fiscal accountability, will maintain an accounting system and supporting fiscal records adequate to assure that claims for Federal funds are in accord with applicable Federal requirements. The retention and custodial requirements for these records are prescribed in 45 CFR 75.361 through 75.370.

■ 9. Amend § 302.15 by removing “and” at the end of paragraph (a)(6), revising paragraph (a)(7), and adding paragraph (a)(8) to read as follows:

§ 302.15 Reports and Maintenance of Records.

* * * * *

(a) * * *

(7) Statistical, fiscal, and other records necessary for reporting and accountability required by the Secretary; and

(8) The retention and custodial requirements for the records in this section are prescribed in 45 CFR 75.361 through 75.370

* * * * *

■ 10. Amend § 302.32 by revising the section heading, introductory text, and paragraphs (a), (b) introductory text, and (b)(1) to read as follows:

§ 302.32 Collection and disbursement of support payments by the IV–D agency.

The State plan shall provide that:

(a) The IV–D agency must establish and operate a State Disbursement Unit (SDU) for the collection and disbursement of payments under support orders—

(1) In all cases being enforced under the State IV–D plan; and

(2) In all cases not being enforced under the State IV–D plan in which the support order is initially issued in the State on or after January 1, 1994, and in which the income of the noncustodial parent is subject to withholding in accordance with section 466(a)(8)(B) of the Act.

(b) Timeframes for disbursement of support payments by SDUs under section 454B of the Act.

(1) In intergovernmental IV–D cases, amounts collected by the responding State on behalf of the initiating agency must be forwarded to the initiating agency within 2 business days of the date of receipt by the SDU in the responding State, in accordance with § 303.7(d)(6)(v) of this chapter.

* * * * *

■ 11. Amend § 302.33 by revising paragraph (a)(4), adding paragraph (a)(6), and revising the first sentence of paragraph (d)(2) to read as follows:

§ 302.33 Services to individuals not receiving title IV–A assistance.

(a) * * *

(4) Whenever a family is no longer eligible for assistance under the State’s title IV–A and Medicaid programs, the IV–D agency must notify the family, within 5 working days of the notification of ineligibility, that IV–D services will be continued unless the family notifies the IV–D agency that it no longer wants services but instead wants to close the case. This notice must inform the family of the benefits and consequences of continuing to receive IV–D services, including the available services and the State’s fees, cost recovery, and distribution policies. This requirement to notify the family that services will be continued, unless the family notifies the IV–D agency to the contrary, also applies when a child is no longer eligible for IV–E foster care, but only in those cases that the IV–D agency determines that such services and notice would be appropriate.

* * * * *

(6) The State may elect in its State plan to allow an individual under paragraph (a)(1)(i) of this section who files an application to request paternity-only limited services in an intrastate case. If the State chooses this option, the State must define how this process will be implemented and must establish and use procedures, including domestic violence safeguards, which are reflected in a record, that specify when paternity-only limited services will be available. An application will be considered full-service unless the parent specifically applies for paternity-only limited services in accordance with the State’s procedures. If one parent specifically requests paternity-only limited services and the other parent requests full services, the case will automatically receive full services. The State will be required to charge the application and service fees required under paragraphs (c) and (e) of this section for paternity-only limited services, and may recover costs in accordance with paragraph (d) of this section if the State has chosen this option in its State plan. The State must provide the applicant an application form with information on the availability of paternity-only limited services, consequences of selecting this limited service, and an explanation that the case will be closed when the limited service is completed.

* * * * *

(d) * * *

(2) A State that recovers standardized costs under paragraph (d)(1) of this section shall develop a methodology, which is reflected in a record, to

determine standardized costs which are as close to actual costs as is possible.

* * *
* * * * *

■ 12. Amend § 302.34 by revising the first sentence to read as follows:

§ 302.34 Cooperative arrangements.

The State plan shall provide that the State will enter into agreements, which are reflected in a record, for cooperative arrangements under § 303.107 of this chapter with appropriate courts; law enforcement officials, such as district attorneys, attorneys general, and similar public attorneys and prosecutors; corrections officials; and Indian Tribes or Tribal organizations. * * *

■ 13. Revise § 302.38 to read as follows:

§ 302.38 Payments to the family.

The State plan shall provide that any payment required to be made under §§ 302.32 and 302.51 to a family will be made directly to the resident parent, legal guardian, caretaker relative having custody of or responsibility for the child or children, judicially-appointed conservator with a legal and fiduciary duty to the custodial parent and the child, or alternate caretaker designated in a record by the custodial parent. An alternate caretaker is a nonrelative caretaker who is designated in a record by the custodial parent to take care of the children for a temporary time period.

■ 14. Amend § 302.50 by revising paragraph (b)(2) to read as follows:

§ 302.50 Assignment of rights to support.

* * * * *

(b) * * *

(2) If there is no court or administrative order, an amount determined in a record by the IV-D agency as part of the legal process referred to in paragraph (a)(2) of this section in accordance with the requirements of § 302.56.

* * * * *

■ 15. Revise § 302.56 to read as follows:

§ 302.56 Guidelines for setting child support orders.

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

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

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

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

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

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

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

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

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

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

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

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

guidelines, and the date of the next quadrennial review.

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

(g) A written finding or specific finding on the record of a judicial or administrative proceeding for the establishment or modification of a child support order that the application of the child support guidelines established under paragraph (a) of this section would be unjust or inappropriate in a particular case will be sufficient to rebut the presumption in that case, as determined under criteria established by the State. Such criteria must take into consideration the best interests of the child. Findings that rebut the child support guidelines shall state the amount of support that would have been required under the guidelines and include a justification of why the order varies from the guidelines.

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

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

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

criteria established by the State under paragraph (g); and

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

■ 16. Amend § 302.65 by:

■ a. In paragraph (a), removing the definition of “State employment security agency”;

■ b. In paragraph (a), adding the definition of “State workforce agency” in alphabetical order;

■ c. Revising paragraph (b);

■ d. Removing the term “SESA” wherever it appears and adding in its place the term “SWA” in paragraphs (c)(1), (2), and (5) through (7); and

■ e. Revising paragraph (c)(3).

The revisions and addition read as follows.

§ 302.65 Withholding of unemployment compensation.

* * * * *

(a) * * *

State workforce agency or *SWA* means the State agency charged with the administration of the State unemployment compensation laws in accordance with title III of the Act.

* * * * *

(b) *Agreement*. The State IV–D agency shall enter into an agreement, which is reflected in a record, with the SWA in its State for the purpose of withholding unemployment compensation from individuals with unmet support obligations being enforced by the IV–D agency. The IV–D agency shall agree only to a withholding program that it expects to be cost effective and to reimbursement for the SWA’s actual, incremental costs of providing services to the IV–D agency.

(c) * * *

(3) Establish and use criteria, which are reflected in a record, for selecting cases to pursue via the withholding of unemployment compensation for support purposes. These criteria must be designed to ensure maximum case selection and minimal discretion in the selection process.

* * * * *

■ 17. Amend § 302.70, by revising paragraphs (a)(5)(v), (a)(8), and the first sentence of paragraph (d)(2) to read as follows:

§ 302.70 Required State laws.

(a) * * *

(5) * * *

(v) Procedures which provide that any objection to genetic testing results must be made in writing within a specified

number of days before any hearing at which such results may be introduced into evidence; and if no objection is made, a report of the test results, which is reflected in a record, is admissible as evidence of paternity without the need for foundation testimony or other proof of authenticity or accuracy;

* * * * *

(8) Procedures under which all child support orders which are issued or modified in the State will include provision for withholding from income, in order to assure that withholding as a means of collecting child support is available if arrearages occur without the necessity of filing an application for services under § 302.33, in accordance with § 303.100(g) of this chapter.

* * * * *

(d) * * *

(2) *Basis for granting exemption*. The Secretary will grant a State, or political subdivision in the case of section 466(a)(2) of the Act, an exemption from any of the requirements of paragraph (a) of this section for a period not to exceed 5 years if the State demonstrates that compliance would not increase the effectiveness and efficiency of its Child Support Enforcement program. * * *

* * * * *

■ 18. Amend § 302.85 by revising paragraphs (a)(1) and (b)(2)(ii) to read as follows:

§ 302.85 Mandatory computerized support enforcement system.

(a) * * *

(1) * * * This guide is available on the OCSE Web site; and

(b) * * *

(2) * * *

(ii) The State provides assurances, which are reflected in a record, that steps will be taken to otherwise improve the State’s Child Support Enforcement program.

PART 303—STANDARDS FOR PROGRAM OPERATIONS

■ 19. The authority citation for part 303 is revised to read as follows:

Authority: 42 U.S.C. 651 through 658, 659a, 660, 663, 664, 666, 667, 1302, 1396a(a)(25), 1396b(d)(2), 1396b(o), 1396b(p), 1396(k), and 25 U.S.C. 1603(12) and 1621e.

■ 20. Amend § 303.2 by revising the first sentence of paragraph (a)(2) and revising paragraph (a)(3) to read as follows:

§ 303.2 Establishment of cases and maintenance of case records.

(a) * * *

(2) When an individual requests an application for IV–D services, provide an application to the individual on the day the individual makes a request in

person, or send an application to the individual within no more than 5 working days of a request received by telephone or in a record. * * *

(3) Accept an application as filed on the day it and the application fee are received. An application is a record that is provided or used by the State which indicates that the individual is applying for child support enforcement services under the State’s title IV–D program and is signed, electronically or otherwise, by the individual applying for IV–D services.

* * * * *

■ 21. Amend § 303.3 by:

■ a. Revising paragraph (b)(1); and

■ b. In paragraph (b)(5), removing the term “State employment security” and adding the term “State workforce” in its place.

The revision reads as follows:

§ 303.3 Location of noncustodial parents in IV–D cases.

* * * * *

(b) * * *

(1) Use appropriate location sources such as the Federal PLS; interstate location networks; local officials and employees administering public assistance, general assistance, medical assistance, Supplemental Nutrition Assistance Program (SNAP) and social services (whether such individuals are employed by the State or a political subdivision); relatives and friends of the noncustodial parent; current or past employers; electronic communications and internet service providers; utility companies; the U.S. Postal Service; financial institutions; unions; corrections institutions; fraternal organizations; police, parole, and probation records if appropriate; and State agencies and departments, as authorized by State law, including those departments which maintain records of public assistance, wages and employment, unemployment insurance, income taxation, driver’s licenses, vehicle registration, and criminal records and other sources;

* * * * *

■ 22. Amend § 303.4 by revising paragraph (b) to read as follows:

§ 303.4 Establishment of support obligations.

* * * * *

(b) Use appropriate State statutes, procedures, and legal processes in establishing and modifying support obligations in accordance with § 302.56 of this chapter, which must include, at a minimum:

(1) Taking reasonable steps to develop a sufficient factual basis for the support obligation, through such means as

investigations, case conferencing, interviews with both parties, appear and disclose procedures, parent questionnaires, testimony, and electronic data sources;

(2) Gathering information regarding the earnings and income of the noncustodial parent and, when earnings and income information is unavailable or insufficient in a case gathering available information about the specific circumstances of the noncustodial parent, including such factors as those listed under § 302.56(c)(1)(iii) of this chapter;

(3) Basing the support obligation or recommended support obligation amount on the earnings and income of the noncustodial parent whenever available. If evidence of earnings and income is unavailable or insufficient to use as the measure of the noncustodial parent's ability to pay, then the support obligation or recommended support obligation amount should be based on available information about the specific circumstances of the noncustodial parent, including such factors as those listed in § 302.56(c)(1)(iii) of this chapter.

(4) Documenting the factual basis for the support obligation or the recommended support obligation in the case record.

* * * * *

■ 23. Amend § 303.5 by revising paragraph (g)(6) to read as follows:

§ 303.5 Establishment of paternity.

* * * * *

(g) * * *

(6) The State must provide training, guidance, and instructions, which are reflected in a record, regarding voluntary acknowledgment of paternity, as necessary to operate the voluntary paternity establishment services in the hospitals, State birth record agencies, and other entities designated by the State and participating in the State's voluntary paternity establishment program.

* * * * *

■ 24. Amend § 303.6 by:

- a. Removing "and" at the end of paragraph (c)(3);
- b. Redesignating paragraph (c)(4) as paragraph (c)(5); and
- c. Adding new paragraph (c)(4).

The addition reads as follows:

§ 303.6 Enforcement of support obligations.

* * * * *

(c) * * *

(4) Establishing guidelines for the use of civil contempt citations in IV-D cases. The guidelines must include requirements that the IV-D agency:

(i) Screen the case for information regarding the noncustodial parent's ability to pay or otherwise comply with the order;

(ii) Provide the court with such information regarding the noncustodial parent's ability to pay, or otherwise comply with the order, which may assist the court in making a factual determination regarding the noncustodial parent's ability to pay the purge amount or comply with the purge conditions; and

(iii) Provide clear notice to the noncustodial parent that his or her ability to pay constitutes the critical question in the civil contempt action; and

* * * * *

■ 25. Amend § 303.7 by revising paragraphs (c)(10) and (d)(10) and adding paragraph (f) to read as follows:

§ 303.7 Provision of services in intergovernmental IV-D cases.

* * * * *

(c) * * *

(10) Distribute and disburse any support collections received in accordance with this section and §§ 302.32, 302.38, 302.51, and 302.52 of this chapter, sections 454(5), 454B, 457, and 1912 of the Act, and instructions issued by the Office;

(d) * * *

(10) Notify the initiating agency when a case is closed pursuant to §§ 303.11(b)(17) through (19) and 303.7(d)(9).

* * * * *

(f) *Imposition and reporting of annual \$25 fee in interstate cases.* The title IV-D agency in the initiating State must impose and report the annual \$25 fee in accordance with § 302.33(e) of this chapter.

■ 26. Amend § 303.8 by:

- a. Redesignating paragraphs (b)(2) through (6) as paragraphs (b)(3) through (7), respectively;
- b. Adding new paragraph (b)(2);
- c. Revising newly redesignated paragraph (b)(7);
- d. Adding a sentence at the end of paragraph (c); and
- e. Revising paragraph (d).

The additions and revisions read as follows:

§ 303.8 Review and adjustment of child support orders.

* * * * *

(b) * * *

(2) The State may elect in its State plan to initiate review of an order, after learning that a noncustodial parent will be incarcerated for more than 180 calendar days, without the need for a specific request and, upon notice to

both parents, review and, if appropriate, adjust the order, in accordance with paragraph (b)(1)(i) of this section.

* * * * *

(7) The State must provide notice—

(i) Not less than once every 3 years to both parents subject to an order informing the parents of their right to request the State to review and, if appropriate, adjust the order consistent with this section. The notice must specify the place and manner in which the request should be made. The initial notice may be included in the order.

(ii) If the State has not elected paragraph (b)(2) of this section, within 15 business days of when the IV-D agency learns that a noncustodial parent will be incarcerated for more than 180 calendar days, to both parents informing them of the right to request the State to review and, if appropriate, adjust the order, consistent with this section. The notice must specify, at a minimum, the place and manner in which the request should be made. Neither the notice nor a review is required under this paragraph if the State has a comparable law or rule that modifies a child support obligation upon incarceration by operation of State law.

(c) * * * Such reasonable quantitative standard must not exclude incarceration as a basis for determining whether an inconsistency between the existing child support order amount and the amount of support determined as a result of a review is adequate grounds for petitioning for adjustment of the order.

(d) *Health care needs must be an adequate basis.* The need to provide for the child's health care needs in the order, through health insurance or other means, must be an adequate basis under State law to initiate an adjustment of an order, regardless of whether an adjustment in the amount of child support is necessary.

* * * * *

■ 27. Revise § 303.11 to read as follows:

§ 303.11 Case closure criteria.

(a) The IV-D agency shall establish a system for case closure.

(b) The IV-D agency may elect to close a case if the case meets at least one of the following criteria and supporting documentation for the case closure decision is maintained in the case record:

- (1) There is no longer a current support order and arrearages are under \$500 or unenforceable under State law;
- (2) There is no longer a current support order and all arrearages in the case are assigned to the State;
- (3) There is no longer a current support order, the children have

reached the age of majority, the noncustodial parent is entering or has entered long-term care arrangements (such as a residential care facility or home health care), and the noncustodial parent has no income or assets available above the subsistence level that could be levied or attached for support;

(4) The noncustodial parent or alleged father is deceased and no further action, including a levy against the estate, can be taken;

(5) The noncustodial parent is living with the minor child (as the primary caregiver or in an intact two parent household), and the IV-D agency has determined that services are not appropriate or are no longer appropriate;

(6) Paternity cannot be established because:

(i) The child is at least 18 years old and an action to establish paternity is barred by a statute of limitations that meets the requirements of § 302.70(a)(5) of this chapter;

(ii) A genetic test or a court or an administrative process has excluded the alleged father and no other alleged father can be identified;

(iii) In accordance with § 303.5(b), the IV-D agency has determined that it would not be in the best interests of the child to establish paternity in a case involving incest or rape, or in any case where legal proceedings for adoption are pending; or

(iv) The identity of the biological father is unknown and cannot be identified after diligent efforts, including at least one interview by the IV-D agency with the recipient of services;

(7) The noncustodial parent's location is unknown, and the State has made diligent efforts using multiple sources, in accordance with § 303.3, all of which have been unsuccessful, to locate the noncustodial parent:

(i) Over a 2-year period when there is sufficient information to initiate an automated locate effort; or

(ii) Over a 6-month period when there is not sufficient information to initiate an automated locate effort; or

(iii) After a 1-year period when there is sufficient information to initiate an automated locate effort, but locate interfaces are unable to verify a Social Security Number;

(8) The IV-D agency has determined that throughout the duration of the child's minority (or after the child has reached the age of majority), the noncustodial parent cannot pay support and shows no evidence of support potential because the parent has been institutionalized in a psychiatric facility, is incarcerated, or has a

medically-verified total and permanent disability. The State must also determine that the noncustodial parent has no income or assets available above the subsistence level that could be levied or attached for support;

(9) The noncustodial parent's sole income is from:

(i) Supplemental Security Income (SSI) payments made in accordance with sections 1601 *et seq.*, of title XVI of the Act, 42 U.S.C. 1381 *et seq.*; or

(ii) Both SSI payments and Social Security Disability Insurance (SSDI) benefits under title II of the Act.

(10) The noncustodial parent is a citizen of, and lives in, a foreign country, does not work for the Federal government or a company with headquarters or offices in the United States, and has no reachable domestic income or assets; and there is no Federal or State treaty or reciprocity with the country;

(11) The IV-D agency has provided location-only services as requested under § 302.35(c)(3) of this chapter;

(12) The non-IV-A recipient of services requests closure of a case and there is no assignment to the State of medical support under 42 CFR 433.146 or of arrearages which accrued under a support order;

(13) The IV-D agency has completed a limited service under § 302.33(a)(6) of this chapter;

(14) There has been a finding by the IV-D agency, or at the option of the State, by the responsible State agency of good cause or other exceptions to cooperation with the IV-D agency and the State or local assistance program, such as IV-A, IV-E, Supplemental Nutrition Assistance Program (SNAP), and Medicaid, has determined that support enforcement may not proceed without risk of harm to the child or caretaker relative;

(15) In a non-IV-A case receiving services under § 302.33(a)(1)(i) or (iii) of this chapter, or under § 302.33(a)(1)(ii) when cooperation with the IV-D agency is not required of the recipient of services, the IV-D agency is unable to contact the recipient of services despite a good faith effort to contact the recipient through at least two different methods;

(16) In a non-IV-A case receiving services under § 302.33(a)(1)(i) or (iii) of this chapter, or under § 302.33(a)(1)(ii) when cooperation with the IV-D agency is not required of the recipient of services, the IV-D agency documents the circumstances of the recipient's noncooperation and an action by the recipient of services is essential for the next step in providing IV-D services;

(17) The responding agency documents failure by the initiating agency to take an action that is essential for the next step in providing services;

(18) The initiating agency has notified the responding State that the initiating State has closed its case under § 303.7(c)(11);

(19) The initiating agency has notified the responding State that its intergovernmental services are no longer needed;

(20) Another assistance program, including IV-A, IV-E, SNAP, and Medicaid, has referred a case to the IV-D agency that is inappropriate to establish, enforce, or continue to enforce a child support order and the custodial or noncustodial parent has not applied for services; or

(21) The IV-D case, including a case with arrears assigned to the State, has been transferred to a Tribal IV-D agency and the State IV-D agency has complied with the following procedures:

(i) Before transferring the State IV-D case to a Tribal IV-D agency and closing the IV-D case with the State:

(A) The recipient of services requested the State to transfer the case to the Tribal IV-D agency and close the case with the State; or

(B) The State IV-D agency notified the recipient of services of its intent to transfer the case to the Tribal IV-D agency and close the case with the State and the recipient did not respond to the notice to transfer the case within 60 calendar days from the date notice was provided;

(ii) The State IV-D agency completely and fully transferred and closed the case; and

(iii) The State IV-D agency notified the recipient of services that the case has been transferred to the Tribal IV-D agency and closed; or

(iv) The Tribal IV-D agency has a State-Tribal agreement approved by OCSE to transfer and close cases. The State-Tribal agreement must include a provision for obtaining the consent from the recipient of services to transfer and close the case.

(c) The IV-D agency must close a case and maintain supporting documentation for the case closure decision when the following criteria have been met:

(1) The child is eligible for health care services from the Indian Health Service (IHS); and

(2) The IV-D case was opened because of a Medicaid referral based solely upon health care services, including the Purchased/Referred Care program, provided through an Indian Health Program (as defined at 25 U.S.C. 1603(12)).

(d) The IV–D agency must have the following requirements for case closure notification and case reopening:

(1) In cases meeting the criteria in paragraphs (b)(1) through (10) and (b)(15) and (16) of this section, the State must notify the recipient of services in writing 60 calendar days prior to closure of the case of the State’s intent to close the case.

(2) In an intergovernmental case meeting the criteria for closure under paragraph (b)(17) of this section, the responding State must notify the initiating agency, in a record, 60 calendar days prior to closure of the case of the State’s intent to close the case.

(3) The case must be kept open if the recipient of services or the initiating agency supplies information in response to the notice provided under paragraph (d)(1) or (2) of this section that could lead to the establishment of paternity or a support order or enforcement of an order, or, in the instance of paragraph (b)(15) of this section, if contact is reestablished with the recipient of services.

(4) For cases to be closed in accordance with paragraph (b)(13) of this section, the State must notify the recipient of services, in writing, 60 calendar days prior to closure of the case of the State’s intent to close the case. This notice must also provide information regarding reapplying for child support services and the consequences of receiving services, including any State fees, cost recovery, and distribution policies. If the recipient reapplies for child support services in a case that was closed in accordance with paragraph (b)(13) of this section, the recipient must complete a new application for IV–D services and pay any applicable fee.

(5) If the case is closed, the former recipient of services may request at a later date that the case be reopened if there is a change in circumstances that could lead to the establishment of paternity or a support order or enforcement of an order by completing a new application for IV–D services and paying any applicable fee.

(6) For notices under paragraphs (d)(1) and (4) of this section, if the recipient of services specifically authorizes consent for electronic notifications, the IV–D agency may elect to notify the recipient of services electronically of the State’s intent to close the case. The IV–D agency must maintain documentation of the recipient’s consent in the case record.

(e) The IV–D agency must retain all records for cases closed in accordance with this section for a minimum of 3

years, in accordance with 45 CFR 75.361.

■ 28. Amend § 303.31 by revising paragraphs (a)(2) and (3), (b)(1) and (2), (b)(3) introductory text, (b)(3)(i), and (b)(4) to read as follows:

§ 303.31 Securing and enforcing medical support obligations.

(a) * * *

(2) Health care coverage includes fee for service, health maintenance organization, preferred provider organization, and other types of private health insurance and public health care coverage under which medical services could be provided to the dependent child(ren).

(3) Cash medical support or the cost of health insurance is considered reasonable in cost if the cost to the parent responsible for providing medical support does not exceed five percent of his or her gross income or, at State option, a reasonable alternative income-based numeric standard defined in State law, regulations, or court rule having the force of law or State child support guidelines adopted in accordance with § 302.56(c) of this chapter.

(b) * * *

(1) Petition the court or administrative authority to—

(i) Include health care coverage that is accessible to the child(ren), as defined by the State, and is available to the parent responsible for providing medical support and can be obtained for the child at reasonable cost, as defined under paragraph (a)(3) of this section, in new or modified court or administrative orders for support; and

(ii) Allocate the cost of coverage between the parents.

(2) If health care coverage described in paragraph (b)(1) of this section is not available at the time the order is entered or modified, petition to include cash medical support in new or modified orders until such time as health care coverage, that is accessible and reasonable in cost as defined under paragraph (a)(3) of this section, becomes available. In appropriate cases, as defined by the State, cash medical support may be sought in addition to health care coverage.

(3) Establish criteria, which are reflected in a record, to identify orders that do not address the health care needs of children based on—

(i) Evidence that health care coverage may be available to either parent at reasonable cost, as defined under paragraph (a)(3) of this section; and

* * * * *

(4) Petition the court or administrative authority to modify support orders, in

accordance with State child support guidelines, for cases identified in paragraph (b)(3) of this section to include health care coverage and/or cash medical support in accordance with paragraphs (b)(1) and (2) of this section.

* * * * *

■ 29. Amend § 303.72 by revising paragraph (d)(1) to read as follows:

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

* * * * *

(d) * * *

(1) The State referring past-due support for offset must, in interstate situations, notify any other State involved in enforcing the support order when it receives the offset amount from the Secretary of the U.S. Treasury.

* * * * *

■ 30. Amend § 303.100 by revising paragraph (e)(1) introductory text and adding paragraphs (h) and (i) to read as follows:

§ 303.100 Procedures for income withholding.

* * * * *

(e) * * *

(1) To initiate withholding, the State must send the noncustodial parent’s employer a notice using the required OMB-approved *Income Withholding for Support* form that includes the following:

* * * * *

(h) *Notice to employer in all child support orders.* The notice to employers in all child support orders must be on an OMB-approved *Income Withholding for Support* form.

(i) *Payments sent to the SDU in child support order not enforced under the State IV–D plan.* Income withholding payments made under child support orders initially issued in the State on or after January 1, 1994 that are not being enforced under the State IV–D plan must be sent to the State Disbursement Unit for disbursement to the family in accordance with sections 454B and 466(a)(8) and (b)(5) of the Act and § 302.32(a) of this chapter.

PART 304—FEDERAL FINANCIAL PARTICIPATION

■ 31. The authority for part 304 continues to read as follows:

Authority: 42 U.S.C. 651 through 655, 657, 1302, 1396a(a)(25), 1396b(d)(2), 1396b(o), 1396b(p), and 1396(k).

■ 32. Revise § 304.10 to read as follows:

§ 304.10 General administrative requirements.

As a condition for Federal financial participation, the provisions of 45 CFR

part 75 (with the exception of 45 CFR 75.306, *Cost sharing or matching* and 45 CFR 75.341, *Financial reporting*) establishing uniform administrative requirements and cost principles shall apply to all grants made to States under this part.

§ 304.12 [Amended]

- 33. Amend § 304.12 by removing paragraphs (c)(4) and (5).
- 34. Amend § 304.20 by:
 - a. Revising paragraphs (a)(1), (b) introductory text, (b)(1)(iii) introductory text, (b)(1)(viii) introductory text, and (b)(1)(viii)(A);
 - b. Removing the “.” at the end of paragraph (b)(1)(viii)(C) and adding a “;” in its place;
 - c. Adding paragraphs (b)(1)(viii)(D) and (E);
 - d. Revising paragraphs (b)(1)(ix), (b)(2) introductory text, (b)(2)(vii), and (b)(3) introductory text;
 - e. Redesignating paragraph (b)(3)(v) as paragraph (b)(3)(vii);
 - f. Adding paragraphs (b)(3)(v) and (vi);
 - g. Removing the semicolon at the end of the paragraph (b)(5)(v) and adding a period in its place;
 - h. Removing “; and” at the end of paragraph (b)(9) and adding a period in its place;
 - i. Revising paragraph (b)(11);
 - j. Adding paragraph (b)(12); and
 - k. Removing paragraphs (c) and (d).

The additions and revisions read as follows:

§ 304.20 Availability and rate of Federal financial participation.

- (a) * * *
 - (1) Necessary and reasonable expenditures for child support services and activities to carry out the State title IV–D plan;
 - * * * * *
 - (b) Services and activities for which Federal financial participation will be available will be those made to carry out the State title IV–D plan, including obtaining child support, locating noncustodial parents, and establishing paternity, that are determined by the Secretary to be necessary and reasonable expenditures properly attributed to the Child Support Enforcement program including, but not limited to the following:
 - (1) * * *
 - (iii) The establishment of all necessary agreements with other Federal, State, and local agencies or private providers to carry out Child Support Enforcement program activities in accordance with Procurement Standards, 45 CFR 75.326 through 75.340. These agreements may include:
 - * * * * *

(viii) The establishment of agreements with agencies administering the State’s title IV–A and IV–E plans including criteria for:

(A) Referring cases to and from the IV–D agency;

* * * * *

(D) The procedures to be used to coordinate services; and

(E) Agreements to exchange data as authorized by law.

(ix) The establishment of agreements with State agencies administering Medicaid or CHIP, including appropriate criteria for:

(A) Referring cases to and from the IV–D agency;

(B) The procedures to be used to coordinate services;

(C) Agreements to exchange data as authorized by law; and

(D) Transferring collections from the IV–D agency to the Medicaid agency in accordance with § 302.51(c) of this chapter.

(2) The establishment of paternity including, but not limited to:

* * * * *

(vii) Developing and providing to parents and family members, hospitals, State birth records agencies, and other entities designated by the State and participating in the State’s voluntary paternity establishment program, under § 303.5(g) of this chapter, educational and outreach activities, written and audiovisual materials about paternity establishment and forms necessary to voluntarily acknowledge paternity; and

* * * * *

(3) The establishment and enforcement of support obligations including, but not limited to:

* * * * *

(v) Bus fare or other minor transportation expenses to enable custodial or noncustodial parties to participate in child support proceedings and related activities;

(vi) Services to increase *pro se* access to adjudicative and alternative dispute resolution processes in IV–D cases related to providing child support services; and

* * * * *

(11) Medical support activities as specified in §§ 303.30, 303.31, and 303.32 of this chapter.

(12) Educational and outreach activities intended to inform the public, parents and family members, and young people who are not yet parents about the Child Support Enforcement program, responsible parenting and co-parenting, family budgeting, and other financial consequences of raising children when the parents are not married to each other.

■ 35. Amend § 304.21 by revising paragraphs (a) introductory text and (a)(1) to read as follows:

§ 304.21 Federal financial participation in the costs of cooperative arrangements with courts and law enforcement officials.

(a) *General.* Subject to the conditions and limitations specified in this part, Federal financial participation (FFP) at the applicable matching rate is available in the costs of cooperative agreements with appropriate courts and law enforcement officials in accordance with the requirements of § 302.34 of this chapter. *Law enforcement officials* mean district attorneys, attorneys general, similar public attorneys and prosecutors and their staff, and corrections officials. When performed under agreement, which is reflected in a record, costs of the following activities are subject to reimbursement:

(1) The activities, including administration of such activities, specified in § 304.20(b)(2) through (8), (11), and (12);

* * * * *

■ 36. Revise § 304.23 to read as follows:

§ 304.23 Expenditures for which Federal financial participation is not available.

Federal financial participation at the applicable matching rate is not available for:

(a) Activities related to administering titles I, IV–A, IV–B, IV–E, X, XIV, XVI, XIX, XX, or XXI of the Act or 7 U.S.C. Chapter 51.

(b) Purchased support enforcement services which are not secured in accordance with § 304.22.

(c) Construction and major renovations.

(d) Education and training programs and educational services for State and county employees and court personnel except direct cost of short-term training provided to IV–D agency staff in accordance with §§ 304.20(b)(2)(viii) and 304.21.

(e) Any expenditures which have been reimbursed by fees collected as required by this chapter.

(f) Any costs of those caseworkers described in § 303.20(e) of this chapter.

(g) Any expenditures made to carry out an agreement under § 303.15 of this chapter.

(h) The costs of counsel for indigent defendants in IV–D actions.

(i) Any expenditures for jailing of parents in child support enforcement cases.

(j) The costs of *guardians ad litem* in IV–D actions.

§ 304.25 [Amended]

■ 37. Amend § 304.25(b) by removing “30 days” and adding “45 days” in its place.

■ 38. Amend § 304.26 by revising paragraph (a)(1), removing and reserving paragraph (b), and removing paragraph (c).

The revision reads as follows:

§ 304.26 Determination of Federal share of collections.

(a) * * *

(1) 75 percent for Puerto Rico, the Virgin Islands, Guam, and American Samoa for the distribution of retained IV-A collections; 55 percent for Puerto Rico, the Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa for the distribution of retained IV-E collections; 70 percent for the District of Columbia for the distribution of retained IV-E collections; and

* * * * *

■ 39. Amend § 304.40 by revising paragraph (a)(2) to read as follows:

§ 304.40 Repayment of Federal funds by installments.

(a) * * *

(2) The State has notified the OCSE Regional Office in a record of its intent to make installment repayments. Such notice must be given prior to the time repayment of the total was otherwise due.

* * * * *

PART 305—PROGRAM PERFORMANCE MEASURES, STANDARDS, FINANCIAL INCENTIVES, AND PENALTIES

■ 40. The authority for part 305 is revised to read as follows:

Authority: 42 U.S.C. 609(a)(8), 652(a)(4) and (g), 658a, and 1302.

■ 41. Amend § 305.35 by:

■ a. Adding a sentence to the end of paragraph (d);

■ b. Redesignating paragraph (e) as paragraph (f); and

■ c. Adding new paragraph (e).

The additions read as follows:

§ 305.35 Reinvestment.

* * * * *

(d) * * * Non-compliance will result in disallowances of incentive amounts equal to the amount of funds supplanted.

(e) Using the Form OCSE-396, “Child Support Enforcement Program Quarterly Financial Report,” the State Current Spending Level will be calculated by determining the State Share of Total Expenditures Claimed for all four quarters of the fiscal year minus State

Share of IV-D Administrative Expenditures Made Using Funds Received as Incentive Payments for all four quarters of the fiscal year, plus the Federal Parent Locator Service (FPLS) fees for all four quarters of the fiscal year.

(1) The State Share of Expenditures Claimed is: Total Expenditures Claimed for the Current Quarter and the Prior Quarter Adjustments minus the Federal Share of Total Expenditures Claimed for the Current Quarter and Prior Quarter Adjustments claimed on the Form OCSE-396 for all four quarters of the fiscal year.

(2) The State Share of IV-D Administrative Expenditures Made Using Funds Received as Incentive Payments is: IV-D Administrative Expenditures Made Using Funds Received as Incentive Payments for the Current Quarter and the Prior Quarter Adjustments minus the Federal Share of IV-D Administrative Expenditures Made Using Funds Received as Incentive Payments for the Current Quarter and Prior Quarter Adjustments claimed on the Form OCSE-396 for all four quarters of the fiscal year.

(3) The Fees for the Use of the Federal Parent Locator Service (FPLS) can be computed by adding the FPLS fees claimed on the Form OCSE-396 for all four quarters of the fiscal year.

* * * * *

§ 305.36 [Removed]

■ 42. Remove § 305.36.

■ 43. Amend § 305.63 by revising paragraph (d) introductory text to read as follows:

§ 305.63 Standards for determining substantial compliance with IV-D requirements.

* * * * *

(d) With respect to the 75 percent standard in paragraph (c) of this section:

* * * * *

■ 44. Amend § 305.64 by revising the second sentence of paragraph (c) to read as follows:

§ 305.64 Audit procedures and State comments.

* * * * *

(c) * * * Within a specified timeframe from the date the report was sent, the IV-D agency may submit comments, which are reflected in a record, on any part of the report which the IV-D agency believes is in error.

* * *

■ 45. Amend § 305.66 by revising paragraph (a) to read as follows:

§ 305.66 Notice, corrective action year, and imposition of penalty.

(a) If a State is found by the Secretary to be subject to a penalty as described in § 305.61, the OCSE will notify the State, in a record, of such finding.

* * * * *

PART 307—COMPUTERIZED SUPPORT ENFORCEMENT SYSTEMS

■ 46. The authority for part 307 continues to read as follows:

Authority: 42 U.S.C. 652 through 658, 664, 666 through 669A, and 1302.

■ 47. Amend § 307.5 by revising paragraph (c)(3) to read as follows:

§ 307.5 Mandatory computerized support enforcement systems.

* * * * *

(c) * * *

(3) The State provides assurance, which is reflected in a record, that steps will be taken to otherwise improve the State’s Child Support Enforcement program.

* * * * *

■ 48. Amend § 307.11 by revising paragraph (c)(3) to read as follows:

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

* * * * *

(c) * * *

(3) Automatic use of enforcement procedures, including those under section 466(c) of the Act if payments are not timely, and the following procedures:

(i) Identify cases which have been previously identified as involving a noncustodial parent who is a recipient of SSI payments or concurrent SSI payments and Social Security Disability Insurance (SSDI) benefits under title II of the Act, to prevent garnishment of these funds from the noncustodial parent’s financial account; and

(ii) Return funds to a noncustodial parent, within 5 business days after the agency determines that SSI payments or concurrent SSI payments and SSDI benefits under title II of the Act, in the noncustodial parent’s financial account have been incorrectly garnished.

* * * * *

PART 308—ANNUAL STATE SELF-ASSESSMENT REVIEW AND REPORT

■ 49. The authority for part 308 continues to read as follows:

Authority: 42 U.S.C. 654(15)(A) and 1302.

■ 50. Amend § 308.2 by revising paragraphs (b)(2)(ii), (c)(3)(i), and (f)(2)(i) to read as follows:

§ 308.2 Required program compliance criteria.

* * * * *

(b) * * *

(2) * * *

(ii) If location activities are necessary, using all appropriate sources within 75 days according to § 303.3(b)(3) of this chapter. This includes all the following locate sources as appropriate: custodial parent, Federal and State Parent Locator Services, U.S. Postal Service, State workforce agency, employment data, Department of Motor Vehicles, and credit bureaus;

* * * * *

(c) * * *

(3) * * *

(i) If location activities are necessary, using all appropriate location sources within 75 days according to § 303.3(b)(3) of this chapter. Location sources include: custodial parent, Federal and State Parent Locator Services, U.S. Postal Service, State workforce agency, Department of Motor Vehicles, and credit bureaus;

* * * * *

(f) * * *

(2) * * *

(i) If location is necessary to conduct a review, using all appropriate location sources within 75 days of opening the case pursuant to § 303.3(b)(3) of this chapter. Location sources include: custodial parent, Federal and State Parent Locator Services, U.S. Postal Service, State workforce agency,

unemployment data, Department of Motor Vehicles, and credit bureaus;
* * * * *

PART 309—TRIBAL CHILD SUPPORT ENFORCEMENT (IV-D) PROGRAM

■ 51. The authority for part 309 is revised to read as follows:

Authority: 42 U.S.C. 655(f) and 1302.

§ 309.115 [Amended]

■ 52. Amend § 309.115 by:

■ a. Removing reference to “§ 9.120 of this part” and adding in its place “§ 309.120” in paragraph (b)(2); and

■ b. Removing the reference to “303.52” and adding in its place “302.52” in paragraph (c)(2).

■ 53. Amend § 309.130 by revising paragraphs (b)(3) and (4) to read as follows:

§ 309.130 How will Tribal IV-D programs be funded and what forms are required?

* * * * *

(b) * * *

(3) SF 425, “Federal Financial Report,” to be submitted quarterly within 30 days after the end of each of the first three quarters of the funding period and within 30 days after the end of each of the first three quarters of the liquidation period. The final report for each period is due within 90 days after the end of the fourth quarter of both the funding and the liquidation period; and

(4) Form OCSE-34, “Child Support Enforcement Program Quarterly

Collection Report” must be submitted no later than 45 days following the end of each fiscal quarter. No revisions or adjustments of the financial reports submitted for any quarter of the fiscal year will be accepted by OCSE later than December 31, which is 3 months after the end of the fiscal year.

* * * * *

■ 54. Amend § 309.145 by revising paragraph (a)(3) introductory text to read as follows:

§ 309.145 What costs are allowable for Tribal IV-D programs carried out under § 309.65(a) of this part?

* * *

(a) * * *

(3) Establishment of all necessary agreements with other Tribal, State, and local agencies or private providers for the provision of child support enforcement services in accordance with Procurement Standards found in 45 CFR 75.326 through 75.340. These agreements may include:

* * * * *

■ 55. Amend § 309.160 by revising the first sentence to read as follows:

§ 309.160 How will OCSE determine if Tribal IV-D program funds are appropriately expended?

OCSE will rely on audits conducted under 45 CFR part 75, *Subpart F—Audit Requirements*. * * *

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