Guidance from the Federal Government on Implementation of the Child Support Related Provisions of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 as Amended by The Balanced Budget Act of 1997

and

The Child Support Performance and Incentive Act of 1998

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Revised July 1999

Center for Law and Social Policy
CLASP

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Introduction

In August of 1996, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) became law. PRWORA required states to make substantial changes in their child support enforcement (IVD) programs. It also abolished the Aid to Families with Dependent Children (AFDC) program and replaced it with a new program called Temporary Assistance for Needy Families (TANF). As was true in AFDC, TANF families are required to assign their child support rights to the state and to cooperate with the state in pursuing those rights unless they have "good cause" for refusing to do so. However, PRWORA made major changes in the way child support collections are distributed.

Because some of the PRWORA changes needed modification, in the Balanced Budget Act of 1997 (BBA), Congress made a number of "technical amendments" to the statute. A major difficulty with both PRWORA and the BBA was that these statutes made many changes inconsistent with federal regulations. Thus, there was a need for guidance from the Administration for Children and Families (ACF) within the Department of Health and Human Services (HHS). Throughout 1997, most of this guidance took the form of Action Transmittals. In late 1997 and in 1998, however, some proposed and final regulations also began to appear. By mid-1999, there were final regulations implementing the TANF program, final regulations on the voluntary paternity establishment program mandated by PRWORA, a number of revised child support regulations and a plethora of Action Transmittals and Information Memorandum.

To further complicate matters, during the Summer of 1998, Congress again amended Title IVD. In addition to revising the requirements related to medical support enforcement, the Child Support Performance and Incentive Act of 1988 (CSPIA) establishes a new incentive payment system to encourage better program performance, and provides an alternative penalty system for states which fail to meet their child support systems automation requirements. In the fall of 1998, Action Transmittals addressing some of these changes were also issued.

This monograph describes most of the Action Transmittals and proposed/final regulations which have been issued through June 30, 1999 which are relevant to the child support sections of the PRWORA, BBA and CSPIA.[1] It is an update of three earlier versions of this publication, which were issued in January, April and December of 1998. Some of this will change again as more guidance is issued, and proposed regulations are promulgated in final form. Advocates and state officials will need to periodically update this information to be sure they have the latest guidance. A good way to do this is by accessing the HHS web site which posts new Action Transmittals, Information Memorandum and regulations. That site is http://www.acf.dhhs.gov/programs/cse/poldoc.htm.

[1] Not covered are instructions for completing OCSE Form 157, cooperative agreements with Indian tribes, and the state self-assessment process. Also not covered are the Action Transmittal relating to new ADP requirements as these are beyond the scope of this document.

Requirement That States Operate a Child Support Enforcement Program and the Financial Consequences for Failing to Do So

Overview of the Law: Under PRWORA, a state's TANF plan must contain an assurance that the state will operate a child support enforcement program pursuant to an *approved* IV-D plan. 42 USC Section 602(a)(2). Failure to have such an approved plan jeopardizes both the state's child support program funding and the state's TANF funding. 42 USC Sections 603(a) and 655(a)(1)(A).

What a state has to do to have an approved IV-D plan is described at 42 USC Section 654. One requirement is that the state has adopted all of the *laws and procedures* enumerated at 42 USC Section 666(a).[1] PRWORA increased and changed a number of these requirements, necessitating that most states alter one or more of their state laws or procedures.[2] (These will be referred to as the "laws and procedures requirements.") These requirements are phased in, beginning on October 1, 1996 and extending through October 1, 2000. The exact date by which a state must have the new laws or procedures in place varies from state to state, depending on when the legislature meets, how long it is in session and whether a law or constitutional amendment is necessary to implement the federal requirements. PRWORA Section 395.

Another prerequisite to an approved state IV-D plan is that the state has an automated child support system as described at 42 USC Sections 654(16) and 654(24). (These will be referred to as the "automation requirements.") One set of automation requirements had to be met by October 1, 1997. Another set must be met by October 1, 2000. See, also 45 CFR Section 302.85(a).

When several states failed to meet the October 1, 1997 deadline for the first phase of automation requirements, HHS had no choice but to begin the process for withdrawing IVD (and possibly TANF) monies from those states. Realizing that this created a perilous situation, Congress, in the CSPIA, amended the statute. 42 USC Section 655(a)(4). Under this change, the states which missed the October 1, 1997 deadline but were certified (or certifiable)[3] by August 1, 1998 face no fiscal penalties

[2] There is a procedure which states can use to obtain an exemption from one or more of the federally mandated laws or procedures. OCSE Action Transmittals 97-02 AND 97-07 provide information on this.

[3] If a state requested a certification review by August 1, 1998 and was subsequently certified pursuant to that request (even if the actual certification was issued after August 1), then it faced no penalty. To take advantage of this, an uncertified state had to submit a request to OCSE along with a completed Certification Questionnaire and Financial Distribution Test Deck results. OCSE reviewed this material and schedule an on-site review and made a decision. Action Transmittal 98-22. By April 1999, fourteen states were uncertified; three had reviews pending (which might lead to penalty forgiveness) and the other eleven (California, Indiana, Kansas, Michigan, North Dakota, Nevada, Ohio, South Carolina and the Virgin Islands) were facing fiscal penalties.

for failure to automate. Those states which were not certifiable on that date are subject to a loss of child support --but not TANF-- funds. For an initial failure to meet an automation deadline, the state loses 4 percent of its basic IVD funds[4]; if the failure is not corrected, in the second year, the applicable percentage is 8 percent; if the failure persists, in the third year, the percentage rises to 16 percent; in the fourth year, it is 25 percent; and in each subsequent year it is 30 percent. Id. Section 655(a)(4)(B)(i). States can mitigate these penalties by achieving automation. The penalties can also be reduced if the state achieves a high level of performance.[5]

For the alternative penalty provision to apply, the Secretary of HHS has to find that 1) the state has not met one or more of the automation requirements; 2) the state has made and is continuing to make a good faith effort to meet the requirements; and 3) the state has submitted (and HHS has approved) a corrective compliance plan which describes how, when, and at what cost the state will achieve compliance. When these conditions are met, the Secretary will not disapprove the state IVD plan but will reduce the state's IVD funding by a prescribed amount. 42 USC Section 655(a)(4)(A)(i). This same penalty scheme will apply to states failing to meet the automation requirements which must be in place by October 1, 2000.

Federal Guidance on the Laws and Procedures Requirements: States inform OCSE that they have adopted all of the prescribed statutes and procedures by submitting a state plan amendment. Generally, this is done during the quarter following the date on which the required change was made. Failure to submit such an amendment (or submitting an amendment which shows that the state did not meet the requirements) means the state IV-D plan is no longer approvable.

OCSE Action Transmittal 97-09 contains one set of IV-D plan preprint pages related to the laws and procedures requirements. OCSE Action Transmittal 98-16 contains another set. In addition, OCSE Action Transmittal 97-05 indicates that OCSE is tracking each state's progress in enacting the required laws and procedures. According to the chart attached to the document, plan amendments certifying that the state had enacted the provisions required to be in place in 1996 and 1997 should have been submitted by most states in the third or fourth quarter of 1997 or the first quarter of 1998. According to the Action Transmittal, if a state fails to submit the necessary plan amendments, OCSE will have to determine that the state no longer has an approvable state plan. The result will be a suspension of all IV-D funds until the plan is approvable.

Actual implementation of the fiscal penalty will take some time. Action Transmittal 97-05 indicates that OCSE will wait until the end of the quarter in which the state should certify that it has met the statutory requirements. If no plan amendment is submitted by that date, it will send the state a Notice of Intent to Disapprove a previously approved state plan. At that point the state has two options. It can:

[4] Attachment B to Action Transmittal 98-22 provides the penalty base for FY 1998. Thereafter, the penalty base will be adjusted each year to reflect actual IVD expenditures reimbursed at the 66% rate.

[5] Pub. L. 105-306, The Noncitizen Benefit Clarification Act of 1998 added this provision to the statute.

- within 60 days, request a hearing. OCSE will schedule a hearing, the time and place for which will be published in the Federal Register. The hearing will be conducted pursuant to 45 CFR Part 213. While the appeal is pending, the state will continue to get federal IV-D funding. However, if a state chooses this route, it gives up its later appeal rights under 45 CFR Section 301.14.

  If it is determined that the state has not met the requirements of federal law--and therefore does not have an approvable state plan-- then OCSE will notify the state that IV-D funds will be withheld until a new IV-D plan is approved. The withholding can commence on the date of the decision or the first day of the next calendar quarter. Because states draw down their federal funds on a quarterly basis, unless the decision is rendered just before the beginning of a new calendar quarter, this means that, in most instances, the penalty will be operational months after the decision is rendered.

- accept the finding. After the passage of 60 days, OCSE will issue a formal notice of plan disapproval and will inform the state that IV-D funds will be withheld until an acceptable state plan is submitted and approved. Again, the withholding can begin on the date of the decision or at the beginning of the next calendar quarter. A state choosing this route can ask for a hearing under 45 CFR Section 301.14. However, it will not receive funding while its appeal is pending.

Once there has been official notification to the state that it no longer has an approved IV-D plan, then some action on the TANF side is required. However, no federal guidance has been issued on the standards that will be used in imposing the TANF-IVD penalty.[6]

Federal Guidance on the Automation Requirements: As noted above, the CSPIA provides a different penalty scheme for failures to meet automation requirements. Action Transmittal 98-22 implements this new scheme. According to the Action Transmittal:

- until such time as the state requests that it be subject to the alternative penalty, OCSE will proceed with the state plan disapproval process. Therefore, states which do not have certified basic automation systems which wish to avoid the loss of their IVA and IVD funds need to file a request with OCSE.

- to qualify for the alternative penalty, a state must submit both a "corrective compliance plan" and a letter from the State's Chief Executive Officer or his/her designee requesting that the state be subject to the alternative penalty rather than the state plan disapproval process.

- the "corrective compliance plan" must explain how, when and at what cost the state will achieve automation. Both time frames and cost estimates for achieving compliance must be included.

[6] The Preamble to the final TANF regulations indicates that OCSE will promulgate standards in a separate rule making. 64 *Fed. Reg*. 17798 (April 12, 1999). Once this is done, the procedures described at 45 CFR Part 262 for assessing penalties and state appeals of such assessment's will apply. *Id*.

- for states which are going to implement (or complete implementation of) a system for which they already have an approved Advance Planning Document (APD), the "corrective compliance plan" must be in the form of an Advanced Planning Document Update (APDU) which meets the requirements of 45 CFR Section 307.10[7]. For states which are planning to develop a different system than the one previously approved, the "corrective compliance plan" must include a closeout APDU (for the old system) and a new APD for the planned system.

- the "corrective compliance plan" must be approved by OCSE for the state to qualify for the alternative penalty.

- if a state fails to make a good faith effort to meet its automation obligations (presumably by failing to implement its corrective compliance plan) the state plan disapproval process may be reinstated and the full IVA/IVD penalties imposed.

To provide an incentive to states to come into compliance with the automation requirements, the new law also contains a *partial forgiveness* provision. If a state is penalized for failure to meet its automation requirements, but later achieves compliance, 90 percent of the penalty imposed during the year before compliance was achieved will be forgiven. 42 USC Section 655(a)(4)(C)(ii). According to Action Transmittal 98-22, partial forgiveness will be available to a state which meets the requirements for *conditional* certification in the relevant fiscal year even if additional modifications are needed for the state to achieve full, unconditional certification.[8] However, if modifications are required before a state achieves even conditional certification, then the forgiveness will not be available unless the state makes those modifications within the given fiscal year and OCSE subsequently determines that the state's system was certifiable within that fiscal year.

Another way for states to mitigate the penalty is to improve program performance despite the inability to automate, Pub. Law 105-306 provided further penalty forgiveness to states which meet certain performance goals. These are the goals laid out in the CSPIA for judging whether or not a state has earned incentive payments in each of five categories: paternity establishment, support orders established, collection of current support, collection of arrears, and cost effectiveness. (For more on this see the chapter on FINANCIAL ISSUES below). For each performance measure on which a state receives a maximum score, the failure-to-automate penalty will be reduced by 20%. An example of how the two penalty forgiveness provisions interact is provided in Action Transmittal 99-08 (June 2, 1999):

> A state's alternative penalty is $4 million. The state receives a maximum score on 3 of the 5 incentive payment criteria in FY 2000. The state's penalty is reduced by 60% so

[7] This regulation was revised in August 1998. See 63 *Fed. Reg*. 44795-44817. (August 21, 1998). The revised regulation were also contained in Action Transmittal 98-26.

[8] This is important to states since , of the 35 certified systems, 22 are only conditionally certified.

that it is only $1.6 million. If the state meets the automation requirement by the end of the fiscal year, 90% of the $1.6 million penalty ($1.44 million)will be forgiven. As a result the state's penalty will actually be $160 thousand.

Finally, the CSPIA contains two provisions relating to multiple automation failures. *First,* it makes clear that all failures to meet the basic automation requirements are to be treated as a single failure. Likewise all failures to meet the new automation requirements are to be treated as a single failure. 42 USC Section 655(a)(4)(A)(ii). *Second,* the legislation makes clear that if a state is being penalized for meeting its basic automation requirements it cannot simultaneously be penalized for meeting the new automation requirements. 42 USC Section 655(a)(4)(D). According to Action Transmittal 98-22:

- if a state fails to meet both basic and new requirements, the progressively larger penalty for failure to meet basic requirements will be imposed until the state achieves compliance with the basic requirements.

- if the state also achieves compliance with the new automation requirements in the same fiscal year as it meets the old requirements, there will be no further penalties. If, however, compliance with the new requirements is not achieved in that same year, penalties will then be assessed for the failure to meet the new requirements. The penalty amount will be calculated by determining how long the failure to meet the new requirements has existed and applying the penalty percentage for that year.

Note on State Disbursement Units: PRWORA required each state to establish a State Disbursement Unit (SDU) to process child support collections. Such units were to be in place by October 1, 1998 or, in states where collections were being processed by the courts, October 1, 1999. 42 USC Section 654(27). Since this requirement is found in the state plan section of the statute, failure to implement this provision of the law can lead to loss of both IVD and TANF funds, in accordance with the law described above.[9]

However, there has been some debate that the SDU-- because it is more like an automation requirement than a state law requirement-- should be considered to be part of the automation process. This would mean that states which fail to set up their SDU in a timely manner should be subject to the lesser automation penalty. CSPIA rejected this argument. However, legislation has now been introduced which would change this, at least for states which have yet to achieve compliance with the 1988 automation requirements.[10] This issue bears watching during 1999.

[9] As of May 17, 1999,the following states did not have certified SDUs: Alaska, California, District of Columbia, Illinois, Indiana, Kansas, Maryland, Michigan, Nebraska, Nevada, North Dakota, Ohio, South Carolina, Virgin Islands).

[10] S. 1033, 106th Cong., 1st Sess., May 13, 1999.

Child Support Assignment

Overview of the Law: As was true in the AFDC program, if a family receives assistance, "a member of the family must assign to the State any rights the family member may have (on behalf of the family member or of any other persons for whom the family member has applied for or is receiving such assistance) to support from any other person . . . " 42 USC Section 608(a)(3)(A). Once the family ceases receiving TANF-funded assistance, the assignment ends. Id. Section 608(a)(3)(B). Essentially this means that if a parent, grandparent or other relative taking care of a child applies for/receives TANF-funded assistance, any spousal or child support rights that a member of the assistance unit has must be assigned to the state for so long as the family receives assistance.

Federal Guidance: HHS has issued an Interim Final regulation which makes minor changes in the definitions of "assigned support obligation" and "assignment" to reflect the change from AFDC to TANF. 45 CFR Section 301.1 (64 *Fed. Reg*. 6247, February 9, 1999). The Interim Final regulations also slightly modify 45 CFR Section 302.50 (64 *Fed. Reg*. 6248 (February 9, 1999). These modifications include 1) a change in the title of the section from *Support obligations* to *Assignment of rights*; 2) expanded recognition of the use of administrative process in establishing support awards; and 3) deletion of reference to old AFDC regulations. Under these regulations:

- an assignment of support rights creates an obligation to the state by the individual responsible for providing support.

- the amount of the obligation can be set by a court or an administrative process. In lieu of that, if allowed by state law, the parties can enter into a binding, written legal agreement for an amount of support calculated by the state IVD agency using the state's child support guidelines.

- once established, the obligation can be enforced under all applicable state laws and procedures. The amount collected reduces the noncustodial parent's support obligation dollar-for-dollar.

OCSE Action Transmittal 97-10 (July 30, 1997) also provides the following clarification on who must assign their support rights:

- families which no longer receive TANF-funded assistance because they have exceeded their TANF time limit but which continue to receive assistance through vouchers funded through Title XX. (the Social Services block grant) are not required to assign their child support rights to the state.

- the child support owed to children who are excluded from TANF by virtue of a state's family cap provision but who receive assistance in the form of vouchers funded through Title XX is also exempt from the assignment obligation.

Federal Guidance has also been issued on the extent of the assignment. By statute, the amount assigned is limited in two ways. *First*, the amount assigned can never exceed the amount actually paid out in unreimbursed assistance. "Assistance" is defined in the final federal TANF regulations to include "cash, payments, vouchers and other forms of benefits designed to meet a family's ongoing basic needs" as well as "supportive services such as transportation and child care to families who are not employed" 45 CFR Section 260.31(a), 64 *Fed. Reg*. 17880 (April 12, 1999). Specifically **not included** in the definition of assistance are short-term nonrecurring benefits; work subsidies; child care, transportation and other services provided to working families; refundable earned income tax credits; contributions to and disbursements from Individual Development Accounts; counseling, peer support and job-related support services; and certain transportation benefits provided to persons receiving no other benefits. This has important implications for both the amount of arrears (if any) which accrue under the assignment and how collected support will be distributed. A set of examples illustrates the point:

> *Example 1:* Mr. A was several thousand dollars behind in his child support payments. His ex-wife Mrs. A was destitute and applied for TANF for herself and their two children. Mrs. A is not working. For the last twelve months she has received $300 in TANF-funded cash assistance and $300 worth of TANF-funded child care each month. During this time, Mr. A has paid no child support although he is under a court order to do so. Thus, unreimbursed assistance is $7,200 ($600/month x 12 months)
>
> The state seizes Mr. A's bank account and collects $5,000 in child support arrears. Since the support collected is less than the amount of unreimbursed assistance, the entire $5,000 is split between the state and federal governments to reimburse them for their respective shares of assistance paid to the family.
>
> *Example 2*. Ms. B is working. For the last 12 months she has received $300 in supplemental TANF-funded cash assistance and $300 worth of TANF-funded child care. During this time, Mr. C (the father of her children) who is several thousand dollars in arrears on his child support obligation has paid no child support although he is under a court order to do so. Because her child care does not qualify as "assistance," unreimbursed assistance in this case is $3,600 ($300/month in cash x 12 months).
>
> The state seizes Mr. B's bank account and collects $5,000 in child support arrears. The state and federal governments split $3,600 and the remaining $1,400 goes to Mrs. B.

Second, the amount assigned depends on when the child support assignment was executed. In the AFDC program, when a family received assistance, its assignment covered all support arrears which had accrued before the family received assistance ("pre-assistance arrears") as well as any amount due while the family received assistance ("during assistance payments /arrears"). Families which assigned their support rights while receiving AFDC, remain bound by these rules. Their pre- and during-AFDC arrears are assigned to the state in an amount up to the amount of assistance paid out.

Families assigning their rights under the TANF program continue to assign to the state their right to any

support collected (or arrears which accumulate) while they are receiving TANF-funded assistance (as defined above). However, with one exception,[11] different rules apply as to pre-assistance arrears.

- if the assignment is executed between October 1, 1997 and October 1, 2000 and the state has not collected the pre-assistance arrears by September 30, 2000, then the assignment of those pre-assistance arrears to the state terminates when the family leaves assistance.

- if the assignment is executed on or after October 1, 2000, the assignment of pre-assistance arrears terminates on the date the family ceases to receive assistance.

- if the assignment is executed on or after October 1, 1998 and the state elects to provide post-assistance arrears to the family before claiming during assistance arrears owed to the state, the assignment terminates when the family leaves assistance.

Action Transmittal 97-17 (October 21, 1997) further elaborates on this scheme and defines various types of assignments, depending on the time the assignment was entered into and how collections are made.

C families that entered into a IV-A assignment before October 1, 1997, have "permanently assigned" their pre-assistance arrears and those that accumulate during the time the family receives assistance. The only limitation on this is that the amount assigned cannot exceed the cumulative amount of unreimbursed assistance paid to the family.

C families that enter into an assignment after October 1, 1997, also "permanently assign" arrears which accumulate during the time the family receives assistance. This assignment is also capped at the amount of unreimbursed assistance paid to the family. (p.10, p.12) They "temporarily assign" their pre-assistance arrears. This assignment ends when the family leaves assistance or on October 1, 2000 whichever is later. Again the amount of the assignment is limited by the amount of assistance paid .

C when a "temporary assignment" ends, the amount becomes "conditionally assigned" .[12]

C regardless of the date the assignment is entered, those arrears that accrue after a family receives assistance are "never-assigned" arrears (p.12). The state cannot require an assignment of these arrears as a condition of providing assistance to the family.

C arrears which accumulate while a family receives assistance and which exceed the total amount

[11] If pre-assistance arrears are collected through a federal tax intercept, the state can keep those funds as reimbursement for assistance provided to the family.

[12] This distinction affects distribution. If a "conditionally assigned" arrearage is collected through federal income tax intercept, the collection can be kept by the government up to the amount of assistance paid to the family. If collection is made through any other mechanism, the money must go to the family.

of assistance paid to the family are "unassigned during assistance arrearages." Arrears which accumulated before the family received assistance and which exceed the total amount of assistance paid to a family are "unassigned pre-assistance arrears."

As discussed below in the section on CHILD SUPPORT DISTRIBUTION, these definitions are important when determining how a support collection is to be distributed.

Cooperation Rules and Related State Fiscal Penalties

Overview of the Law: Unless they can establish "good cause" or some "other exception," recipients of TANF-funded assistance must cooperate with the state IVD agency in establishing paternity and obtaining support for their children. 42 USC Section 654(29)(A)-(D).

Within limited federal statutory constraints, states define "cooperation." Further, federal law now says that State child support (IVD) agencies must make the cooperation determination. 42 USC Section 654(29)(A)(1). When a IVD agency determines that non-cooperation has occurred, it is to notify the IVA agency. That agency is required to impose a sanction on the family. States have some flexibility in determining what the sanction will be, but, at a minimum, they must reduce the family's grant by 25%. 42 USC Section 608(a)(2). If an audit reveals that the IV-A agency is not imposing sanctions when requested to do so, the state can lose up to 5 percent of its TANF funds. 42 USC Section 609(a)(5).

"Good cause" and "other exceptions "to the cooperation are also largely defined by the states. The state has a choice to delegate responsibility for making this determination to the child support agency or the agency of the program from which the family is receiving assistance (IVA, Medicaid, Food Stamps).42 USC Section 654(29).

Federal Guidance on Cooperation Obligations and Good Cause/Other Exceptions: To date federal guidance on this issue is scant. No regulations have been issued providing guidance on the definitions of "cooperation," "good cause" or "other exceptions" to the cooperation requirement. No guidance has been issued imposing a requirement that states actually notify TANF applicants/recipients about the child support cooperation requirement or the exceptions to it. Nor has anything been said about notice and hearing rights. In fact, HHS has taken the position that "the statute does not give us the authority to require specific notice and procedural criteria from the States." 64 *Fed. Reg*. 17850 (April 12, 1999). In the absence of more detailed guidance, many states have adopted the approach found in the now-repealed AFDC regulations on these issues. 45 CFR Part 232. HHS mentions this with approval in the final TANF regulations. *Id*. Thus, if a state is looking for *substantive* guidance on definitions and forms in this area, the old AFDC regulations provide it.

There is some *procedural* guidance in the final federal TANF regulations at 45 CFR Section 264.30, and in the comments promulgated with the regulations at 64 *Fed. Reg*. 17850 (April 12, 1999[13]). This consists of the following:

[13]. There is also a statement in a note in OCSE AT 97-10 (p. 25) relating to the paternity establishment obligations of lesbians receiving TANF-funded assistance who have nonmarital children. If a lesbian couple has 1) adopted a child; or 2) conceived a child through artificial insemination and the identity of the sperm donor is unknown, cooperation with paternity establishment would not be required. However, if the mother knows who the father is, then she should be required to cooperate in establishing paternity.

- the state TANF (IV-A) agency must refer all *appropriate individuals* to the child support (IV-D) agency. This means that not all IVA applicants/recipients must be referred. For example, if the IVA agency is responsible for granting waivers of program requirements for victims of domestic violence, then it may grant a waiver and never refer the case to IVD. Likewise, if the IVA agency screens cases for good cause /other exceptions, it may determine that those cases are not appropriate for referral to IVD. Similarly, IVA might develop a policy under which it refers parents to the IVD agency but not other caretaker relatives.

- referred individuals must cooperate in establishing paternity and in establishing, modifying, or enforcing support orders. If a state chooses to refer caretaker relatives to the IVD system, it should recognize that these individuals would not ordinarily have the same level of information that a parent would have. HHS expects that states would "develop procedures that recognize this difference and apply a different standard in determining cooperation by non-parents."

- for referred individuals, exceptions to the cooperation requirement can be made if there is a domestic violence waiver granted pursuant to the Family Violence Option (see next chapter for more on this), or the grounds for good cause/other exceptions have been established. It is up to the state to decide who can grant waivers/exceptions. The IVD agency could be the entity responsible for making such determinations or the IVD agency could delegate the task to the IVA agency or the Medicaid agency.

- if the IV-D agency determines that an individual is not cooperating and a domestic violence waiver or a good cause/ other exception to the cooperation requirement has not been granted, then it must promptly notify the IV-A agency. The IV-A agency must then impose the applicable sanction.

- the sanction must be a loss of at least 25% of the assistance that would otherwise be provided to the family. The state may go so far as to deny all assistance to the family.

Minor changes have also been made in 45 CFR Section 302.31 (64 *Fed. Reg*. 6247, February 9, 1999) to reflect the fact that states can decide who makes the "good cause' determination.

A Special Note on the Relationship Between Cooperation and Case Closure. As is detailed in the chapter of this monograph titled CASE CLOSURE, state agencies now have greater ability to close child support cases than they have had in the past.[14] Of particular importance, states will be able to close paternity cases when the father's name is unknown. This includes cases in which the family is receiving public assistance. However, as also noted above, parents receiving such assistance have a statutory obligation to cooperate with the IVD agency in establishing paternity and can be sanctioned if

[14] Final regulations governing case closure were issued at 64 *Fed. Reg* 11,810-11,818 (March 10, 1999). The Federal Register citations in this section are to that document.

they fail to do so.[15] This cooperation requirement includes making a good faith effort to provide the name of the father. 42 USC Section 654(29). What happens to the family's child support cooperation requirement if the IVD agency closes the case because the father's identity is unknown?

This important concern is not addressed in the case closure regulation itself. However, the Response to Comments does recognize that this is an issue and provides some limited guidance. It begins by saying: "Clearly, not every TANF recipient will be able to provide the IVD agency with sufficient information about the biological father to allow the IVD agency to proceed with an action to establish paternity."64 *Fed. Reg*. 11814 (1st col., middle). In other words, inability to provide the father's name which leads to case closure is not non-cooperation *per se*.

This being so "should the state close a IVD case in accordance with paragraph (b)(3) [the section allowing closure when the father's identity is unknown] *IVD case closure alone may not be used to determine non-cooperation*." *Id*.(emphasis added) Presumably, then, if the state chooses to close a case because the father's identity is unknown, and it has no independent reason for concluding that the mother knows who the father is, she has fulfilled her cooperation obligation.

Under the new case closure criteria, states can now also close cases where the person seeking services lacks an address and SSN for the noncustodial parent. Since public assistance recipients also have an obligation to cooperate with the state in establishing and enforcing support obligations, case closure has implications here as well. If the state chooses to close a case, how can the public assistance recipient cooperate?

Once again there is nothing in the regulations which is helpful, but the Response to Comments does state that "should the State close a IVD case . . . because the location of the individual being sought is unknown, IVD case closure alone may not be used to determine non-cooperation by a TANF recipient." 64 *Fed. Reg*. 11814.

***Federal Guidance Relative to When the Federal Government Will Impose Fiscal Sanctions on States for Failure to Implement the Cooperation Requirements*:** There are a number of situations in which HHS can impose fiscal penalties on states for failure to enforce the basic provisions of TANF. 42 USC Section 609. As noted above, one of those situations is where the IVA agency fails to sanction families containing individuals whom the IVD agency has determined are not cooperating with child support enforcement efforts. The maximum penalty for a state's failure to sanction such families is a 5 percent reduction in the state's TANF funds. 42 USC Section 609(a)(5). Part 262 of the final TANF regulations describes the general scheme HHS will use for detecting such failures, and the process it will use in assessing penalties. In addition, 45 CFR Section 264.31 describes the specific penalty amounts applicable once the Part 262 process is over.

[15] For TANF, see 42 USC Section 608(a)(2); for Medicaid, see 42 USC Section 1396k(a)(1)(B)(i); for Food Stamps, see 7 USC Section 2015(l)(1)(A).

New 45 CFR Section 262.1(a)(6) makes it clear that the general penalty scheme applies when a state fails to sanction families for non-cooperation with child support efforts. Accountability for such failure will commence on the later of July 1, 1997 or six months after the state began operating its TANF program. 45 CFR Section 262.2(b). HHS will generally detect such errors through the use of the single state audit. 45 CFR Section 262.3.

If HHS determines that the state is failing to sanction families which are not cooperating with the IVD agency, then it will notify the state in writing. The state will then have 60 days to either 1) dispute the finding; 2) admit the error but claim reasonable cause[16]; or 3) admit the error and submit a corrective action plan. 45 CFR Section 262.5. If HHS accepts the state's corrective action plan and the state follows through and begins properly imposing sanctions, no penalty will be assessed. 45 CFR Section 262.6(i). See, also 45 CFR Section 264.31(b)(2). Even limited compliance can bring partial penalty relief. 45 CFR Section 262.6(j). In short, states will be given ample opportunity to address any problems before a fiscal sanction will actually be imposed.

Moreover, even when a state does not manage to prove reasonable cause or correct the problem, the penalty assessed will be small at first (1%) and will only reach the maximum allowable level (5%) only after repeated failures. 45 CFR Section 264.31(a).

Taken as a whole, this scheme suggests that IVA agencies which provide due process protections to families before imposing sanctions on them need not fear immediate, draconian fiscal consequences. A IVA agency receiving a sanction recommendation from IVD which does not seem to meet minimum due process requirements could and should provide the family with notice and an opportunity to be heard. Even if HHS later questions this decision, the state can avoid a penalty by claiming reasonable cause. If HHS is still not satisfied, a corrective action plan could be put in place. The plan could design a IVD/IVA interface which assures due process to TANF families. So long as the plan is implemented, there will be no federal fiscal penalty.

[16] If accepted, a reasonable cause claim results in complete penalty forgiveness 45 CFR Section 264.31(b)(1). Moreover, if a reasonable cause claim is turned down, the state can then submit a corrective action plan.45 CFR Section 262.6(c).

Domestic Violence

Overview of the Law: All states must provide a "good cause" exemption from the child support cooperation requirement if it is in the "best interests" of the children in the family that support not be pursued. 42 USC Section 654(29)(A)(1).

Under a separate provision of the law states which wish to do so *may* also provide a "good cause" exception to any TANF requirement-- including time limits, residency, family cap, and child support cooperation requirements-- to victims of domestic violence. The portion of the federal statute which addresses this latter provision is called the Family Violence Option (FVO). States which choose this option will so indicate in their TANF state plan and will certify that they have procedures to screen and identify recipients with a history of domestic violence, refer them for services, and, if "good cause" exists, waive program requirements. 42 USC Section 602 (a)(7).

Independently of these provisions, the federal statute also provides some latitude for states which wish to provide assistance for longer than sixty months to those who qualify for a hardship exemption *and* those who have been victims of domestic violence. 42 USC Section 608(a)(7)(C)(i). However, this exception can only apply to 20 percent of the caseload. 42 USC Section 608(a)(7)(C)(ii). If a state uses federal funds for benefits for more than sixty months for more than 20 percent of its caseload, it faces a federal sanction equal to 5 percent of its TANF funds. 42 USC Section 609(a)(9).

Finally, of significance to domestic violence advocates are provisions in the BBA which require states to have protocols in place to prevent disclosure of information about victims of domestic violence if there is a protective order in place or if the state has reason to believe that release of information could result in physical or emotional harm to a parent or child. 42 USC Sections 654(8) and 654(26). In addition, the Federal Parent Locate Service is now forbidden to disclose information if it has been informed by a state that there is reasonable evidence of domestic violence and that disclosure of information could be harmful to a custodial parent or a child. 42 USC Section 653(b)(2). The BBA also protects domestic violence victims who pursue medical support for their children through an ERISA-covered plan. The ERISA plan is required to accept the name and address of a local or state official in lieu of the name and address of the custodial parent as the"alternate recipient" of benefits from the plan. Moreover, the

ERISA plan can pay benefits to the designated official who can then give them to the custodial parent. 29 USC Section 1169(a)(3)(A).

Federal Guidance on Domestic Violence Waivers: On April 12, 1999, HHS issued final regulations for the TANF program. 64 *Fed. Reg.* 17720-17931. Among the many issues addressed in these regulations are the provisions which allow waivers of program requirements for domestic violence victims. The regulations (Part 260, Subpart B) are clearly designed to encourage states to opt to implement the FVO. They lay out exactly what policies and procedures states must follow if they are to be FVO states. They then say that states which follow these procedures are eligible for forgiveness of the penalties which apply when a state fails to meet the TANF requirement to 1) have a certain percentage of cases participating in work activities (42 USC Section 607) and/or 2) time limit benefits (42 USC Section 608(a)(7)).
See, 45 CFR Sections 260.58 and 260.59.States which do not opt to implement the FVO are not eligible for penalty forgiveness.

Under the regulations (45 CFR Sections 260.52 and 260.55), to be an FVO jurisdiction**,** a state must commit to:

- screen and identify individuals receiving TANF and MOE assistance to identify those with a history of domestic violence.

- maintain confidentiality.

- refer affected individuals to counseling and supportive services. These referrals must be made pursuant to an individualized plan developed by a person trained in domestic Violence issues. When appropriate, the plan should be designed to lead to work.

- provide waivers of normal program requirements for "good cause." These waivers are not time-limited: they can last "as long as necessary" in cases where compliance would make it more difficult for the individual to escape domestic violence or would unfairly penalize someone who has been a victim of domestic violence. For example, if a TANF recipient has been unable to hold a job because she has been stalked by her abuser, she may still need benefits after 60 months. Even if she is no longer being stalked, she can be granted a waiver (and continue to receive benefits) because not to do so would unfairly penalize her for having once been victimized.

- review waivers every six months. The idea here is to prevent cases from being put aside and forgotten. Periodic review will allow for adjustments when the time is appropriate. For example, a child support cooperation requirement might be waived pending development of a plan under which support can be safely pursued. When the plan is implemented, the cooperation requirement would no longer be waived and support would be pursued so that the family would have additional income.

- design waivers which identify the program requirement or requirements being waived.

A state can waive more than one program requirement and can establish different time periods for each waived requirement. Good cause for granting a waiver must be based on an individualized assessment conducted by a person trained in domestic violence issues.

- report to HHS on its strategies and procedures and include the number of waivers granted.

Federal Guidance on the Disclosure of Information: Early guidance indicated that a protective order does not need to be obtained in order for the state to refuse to disclose confidential information. Moreover, confidential information cannot be freely released simply because no protective order exits. OCSE AT 97-10 (pp.22-23).
Recent federal regulations address other privacy issues.[17] 45 CFR Section 307.13 (63 *Fed. Reg*. 44795, August 21, 1998). These regulations are also available in Action Transmittal 98-26. Under these regulations, states must:

C have written policies concerning access to data by IVD personnel as well as *written* policies as to sharing of data with the TANF and Medicaid

C routinely monitor access to and use of the data in their automated system. Audit trails and feed back mechanisms must be in place to both guard against and promptly identify unauthorized access to/use of the data.

C train all state and local employees and contractors who have access to the data on what the confidentiality policies and procedures are, and what penalties apply to unauthorized access to or disclosure/ use of confidential data.

C enact administrative penalties (including dismissal from employment) for unauthorized access to and disclosure/use of confidential information.

In addition, for a state to have a certifiable ADP system, it must have in place controls such as passwords and blocking fields to ensure strict compliance with the privacy policies.

Federal Guidance on Placement of the Family Violence Indicator: Each state has (or will soon have) a State Case Registry (SCR). The SCR will contain information about all IVD cases as well as all non-IVD cases in which an order has been entered or modified on or after October 1, 1998. 42 USC Section 654A (e)(1). Abstracts from the SCR will be sent to the Federal Case Registry (FCR) which has been established within the Federal Parent Locate Service (FPLS). 42 USC Section 653(h). In some cases, it would be inappropriate to disclose information regarding the

[17]Another federal regulation (45 CFR Section 303.21) designed to safeguard information was recently repealed. 64 *Fed. Reg*. 6250, February 9,1999.HHS indicates that it is planning to develop comprehensive guidance consistent with PRWORA's provisions concerning safeguarding information. In the interim, the provisions of the law govern. 64 *Fed. Reg*. 6242 (February 9, 1999).

location of a parent or child because the case poses domestic violence or child abuse issues. In recognition of this, federal law requires each state to have safeguards to prevent the release of information on the whereabouts of a parent or a child who is or has been the subject of a protective order. 42 USC Section 654(26)(B). In addition, the state must have safeguards which prevent the release of location information if the state "has reason to believe that release of the information . . . may result in physical or emotional harm to the parent or child." Id. Section 654(26)(C). Once a state determines that there is a domestic violence/child abuse issue which makes disclosure of locate information unwise, it puts a Family Violence Indicator flag on the case. This alerts anyone handling a request for information on the case that locate information should not be disclosed.

Since information about cases in the state's system is shared with the FPLS, states also have to have protocols for informing the federal government when they have determined location information should not be disclosed. 42 USC Section 654(26)(D). When the FPLS receives such a notification, it too must refuse to divulge locate information. 42 USC Section 653(b)(2). If a request is made for the information, the FPLS must inform the requestor that the information cannot be disclosed. The requestor can then seek disclosure by following a statutorily described protocol. This protocol requires the requestor to go to court. 42 USC Section 653(b)(2)(B). This process requires close coordination between the state and the federal governments. Action Transmittal 98-27 provides some guidance in this area:

- all cases in which there is a protective order should be flagged. Where there is no protective order, each state may decide for itself what criteria to use to determine when the release of information about an adult or child may result in physical or emotional harm.

- once a decision is made, the family violence indicator flag must be placed in the SCR. The state must attach the indicator to any person who is at risk and should consider attaching the indicator to any other person residing in the household because disclosure of information about that other person might lead to location of the at-risk person.

- states must have standards for determining how long to keep a flag on the case. This can be a finite time period (e.g., the life of the protective order); until the at-risk party requests removal; or until a court orders removal of the flag. If case status changes (e.g., a domestic violence indicator is placed on or removed from a case), the state must inform the FCR within 5 business days.

- once the FCR is notified that the case is flagged, the FPLS will refuse to release locate information. Its system will generate a notice to the requestor that the case is flagged and will inform the requesting person or entity of the procedure for overriding the flag. (p.5) That procedure involves finding an authorized person who then makes a request to an appropriate court. (An "appropriate court" is one empowered to issue a support order or make/enforce a custody or visitation determination.)

- if an override request is filed, an agent of the court or the court itself can request that the State Parent Locate Service (SPLS) contact the FPLS and request release of the

information. Direct requests from the court to the FPLS will not be honored.

- an SPLS which receives an override request from a court must review the documentation to make sure that it comes from an appropriate court acting at the behest of an authorized person. This must be a manual, paper process and be based on an individualized determination. If the request is legitimate the SPLS will forward it to the FPLS.

- the FPLS will then review the request to insure that it is regular on its face and is accompanied by the proper documentation. This will be done by a staff person on a case-by-case basis. If the staff person determines that the request meets the criterion, then a manual override of the flag, on a one-time basis will be conducted. In addition, the FPLS will provide the requesting court with the name of the state which placed the indicator on the case. THE FPLS will also inform the state which placed the domestic violence indicator on the case that the court of another state has requested an override.

- the FPLS will release the information to the SPLS which will in turn provide it to the authorized court. That court must then hold a hearing to determine whether or not the information should be released to the requesting person or entity. It is the responsibility of the state to make sure that such a hearing is held and that disclosure occurs only upon a proper finding.

- the state IVD agency which placed the indicator should also be ready to assist the court in making a decision as to whether information obtained from the FPLS should be disclosed.

Additional guidance can be found in Chapter 5 of the FCR Implementation Guide. Chapter 5 was added to the Guide and sent to the state IVD Directors in Dear Colleague Letter 98-108 (Nov. 13, 1998).

Noncustodial Parent Provisions

Overview of the Law: An underlying premise of PRWORA is that states should encourage both non-custodial and custodial parents to take responsibility for their children. In the case of non-custodial parents whose children receive TANF- funded assistance and who owe arrears on their support obligations, PRWORA requires states to have authority to seek imposition of a work requirement. 42 USC Section 666(a)(15)(B). States may use their TANF funds to assist noncustodial parents in their efforts to obtain employment.

Under the BBA, states also have access to $3 billion of federal funds in fiscal years 1998 and 1999 which could be used to provide employment and training services to the most disadvantaged custodial and non-custodial parents of children receiving TANF-funded assistance. 42 USC Section 603(a)(5)(C)(ii). This program is called Welfare-to-Work (WtW). This money could be used to assist those non-custodial parents who are unable to pay support and those who are paying but struggling to meet their support obligations to TANF- assisted children.

In addition, grants are available to every state to establish programs which facilitate access and visitation by non-custodial parents. 42 USC Section 669b.

Federal Guidance on Providing Assistance to Non-Custodial Parents with TANF funds: The final federal TANF regulations define "noncustodial parents to be those who are the parents of minor children *receiving assistance* who live in the same state (but not the same household) as their children. 45 CFR Section 260.20.[18] States are free to include noncustodial parents in their definition of "family":

> ... a State may choose to include the noncustodial parent as a member of the child's eligible family. It may also choose not to. Further, a State may choose the circumstances under which a noncustodial parent would be a member of the child's eligible family. We leave this to state discretion. 64 *Fed. Reg*. 17823 (April 12, 1999).

If noncustodial parents are included in the state's definition of "family," then the state can use both TANF funds and their state maintenance of effort (MOE) money to serve such parents. See, 64 *Fed. Reg*. pp.17817 and 17823-17824. (April 12, 1999). As noted above in the chapter on ASSIGNMENT, help can be provided as "assistance" or as "non-assistance." It is also up to the

[18] Note that this means that a noncustodial parent whose child is not receiving assistance cannot be helped with TANF funds even if he/she is very poor. In other words, "...a noncustodial parent cannot apply for or receive TANF assistance independent of the child and custodial parent or caretaker relative.64 *Fed Reg*. 17823 (April 12, 1999).

state to decide what form of help to give non-custodial parents. It can focus on "non-assistance" such as counseling, job readiness, employment placement, and post-employment services. 64 *Fed. Reg*. 17824. As explained in HHS's HELPING FAMILIES ACHIEVE SELF-SUFFICIENCY: A GUIDE ON FUNDING SERVICES FOR CHILDREN AND FAMILIES THROUGH THE TANF PROGRAM other possible forms of "non-assistance" include job or career advancement activities, premarital and marriage counseling, parenting skills training, mediation services, activities to promote access and visitation, initiatives to promote responsible fatherhood and increase the capacity of fathers to provide emotional and financial support for their children.

States may also provide "assistance" (e.g., cash). However, if a state chooses this approach, there are consequences for the noncustodial parent, the custodial parent and the state. For example, if the noncustodial parent receives cash, he/she may be required to participate in work activities and the state's work participation rate would also be affected. Moreover, if the noncustodial parent refused to engage in work activity as required, the state would have to reduce/terminate the custodial parent/children's TANF assistance. 64 *Fed. Reg*. 17824.

If a state does serve noncustodial parents, it must make quarterly reports to HHS.45 CFR Section 265.3(f).

Federal Guidance on Providing Employment and Training to Noncustodial Parents with Welfare-to Work Funds: States can also use WtW funds to provide employment services to non-custodial parents. This will require coordination with the local Private Industry Council (PIC), however, since the bulk of the funds will be administered by local PIC agencies. On November 18, 1997, the Department of Labor issued Interim Final Regulations on the Welfare-to-Work program. 62 *Fed. Reg.* 62196. Under 20 CFR Section 645.212(b), Welfare-to-Work money can be used to serve non-custodial parents of minor children who are receiving TANF and whose custodial parent is "hard-to-employ." To be considered "hard-to-employ" the custodial parent must:

- be a current recipient of TANF assistance or be eligible for TANF but reached the applicable state or federal time limit on receipt of benefits; and

- have at least two of three specified barriers to employment. These barriers are that he/she has not completed high school or obtained a GED and has low skills in reading and mathematics;[19] has a poor work history;[20] or needs substance abuse treatment before he/she can be employed; and

[19] The Interim Final regulations indicate that 90 percent of the mothers in this group must have skills below the 9th grade level. 20 CFR Section 645.212(a)(2)(I).

[20] The Interim Final Rules indicate that 90 percent of the mothers in this category must have worked no more than 3 consecutive months in the prior 12 months. 20 CFR Section 645.212 (a)(2)(iii).

- be a long term recipient [21]or be within twelve months of reaching the time limit for TANF assistance.

The other 30 percent of the funds must be spent on individuals described as *long-term welfare dependent*.[22] As explained in Interim Final Rules, this can include non-custodial parents of minor children whose mother is receiving TANF assistance if such fathers have dropped out of school, become parents as teenagers or have poor work histories.[23] In other words, to be eligible for WtW assistance as long-term welfare dependent, the father's characteristics--not the mothers-- are looked at.

In short, the bulk of the Welfare-to-Work money will be going to local Private Industry Councils to provide services to the hard-to-employ and those with the characteristics of long term welfare recipients. While there is no requirement that noncustodial parents be served in the Welfare-to-Work program, *if the PIC chooses to do so* it can serve some such parents. It may be easier to provide assistance to noncustodial with the "long-term recipient" money because these funds are allocated for service to non-custodial parents who have dropped out of school or had difficulty holding a job. The characteristics of the noncustodial parent--not those of the custodial parent-- are what determines eligibility for services provided with these funds. Thus, less information has to be gathered about the custodial parent, easing the administrative burden on the PIC.

Finally, Action Transmittal 97-10 makes clear that whether Welfare-to-Work funds are used or some other approach is taken, the work requirement for those in arrears on their obligation to their children who are receiving TANF assistance can be administered by the IV-A agency or any other entity the state chooses. (p. 23)

Federal Guidance on the Access on and Visitation Issues: Action Transmittal 97-10 answered some questions about the basic access and visitation program. According to this Action Transmittal, funding is available under the formula described in the statute to every state. State matching funds are not required. Foundation grants may be used to supplement the federal funds. Funds may be used for mediation, counseling, education, development of parenting plans, visitation enforcement and the development of guidelines for visitation and alternative custody arrangements.

Supplementing this guidance, on March 31, 1998, HHS issued proposed regulations regarding the reporting of information about the projects being operated in the state, as well as the monitoring

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[21] The Interim Final Regulation defines "long term" receipt of assistance to be receipt of AFDC or TANF for at least 30 (not necessarily consecutive) months. 20 CFR Section 645.212(a)(3)(I).

[22] 42 USC Section 603(a)(5)(C)(iii).

[23] 20 CFR Section 645.213(b), Interim Final Regulation promulgated at 62 *Fed. Reg.* 61605 (Nov. 18, 1997). In addition to those characteristics, states can develop a list of other factors associated with or predictive of long-term welfare dependence and use these factors in deciding who to serve.

and evaluation of those projects. 63 *Fed. Reg*. 15351-15353. These regulations were finalized on March 30, 1999. 64 *Fed. Reg.* 15132-15136. The final regulations add a new section to the Code of Federal Regulations, 45 CFR 303.109. Under this regulation, states will have to:

- monitor all programs funded through the Grants to States for Access and Visitation Program to ensure that the programs are providing authorized services, operating in an efficient and effective manner, and complying with federal evaluation and reporting requirements. Of note, as a result of public comments about the need to screen cases for domestic violence issues, a provision was added to the final regulations requiring that states also monitor to ensure that the programs contain safeguards to protect the safety of participating parents and children. In its Response to Comments, HHS also discusses the need for sensitivity to domestic violence issues and "encourages all access and visitation grantees to hold consultations with experts in the field of domestic violence."

- file an annual report which provides a detailed description of each funded program. At a minimum, the report will have to include the names of the service providers and administrators, the service delivery area (rural/urban), the population served (income, race, marital status), and the program goals. It will have to describe the types of activities offered and the length and features of a complete program. The report will also have to detail the application or referral process used, include the number of applicants/referrals to the program, as well as the number of individuals and families who actually participated, and the number of participants/graduates who participated in each program activity Finally, it will have to state whether the program is voluntary or mandatory and describe the guidelines for visitation and alternate custody arrangements.

- assist in evaluating programs which HHS has deemed to be particularly promising. The state may evaluate other programs, but is not required to do so.

Child Support Distribution

Overview of the Law: As detailed below, PRWORA establishes new rules for child support distribution.

1. Distribution of ***Current Support*** *Collections:* Under PRWORA, current support collected for families *receiving assistance*, is first divided into a "federal share" and a "state share." These shares are calculated based on the state's federal medical assistance percentage (FMAP).[24] The one limitation on this is that in no event can the amount of child support retained by the state and federal governments as their "shares" exceed the total amount of assistance paid to the family. 42 USC Section 657(a)(1).

From its share, the state can (but is not required to), give the family some or all of the support collected. 42 USC Section 657(a)(1)(B). It also can (but is not required to) disregard this amount in calculating the family's TANF eligibility and grant amount.[25] Under the BBA, states are given a fiscal incentive to provide child support pass-throughs/disregards to TANF families from the state share. States can count support payments passed-through to these families and disregarded in determining their eligibility and grant amount toward the state's maintenance of effort (MOE) requirement. 42 USC Section 609(a)(7)(B)(i)(I)(aa).

PRWORA also provides a current support distribution scheme for *post-assistance* families and those families which *never received assistance*. Current support collected for a *post-assistance* family goes to the family, 42 USC Section 657(a)(2)(A), as does current support for a family which *never received assistance*, 42 USC Section 657(a)(3).

2. Distribution of ***Arrearage*** *Collections Made Through Methods* ***Other than Federal Tax Intercept.*** Under PRWORA, until the state and federal governments have been reimbursed for the total amount of assistance provided to the family, arrears collected for families *currently receiving assistance* are divided into a "state share" and a "federal share." The "federal share" goes to the federal government and the state share may be kept by the state, given to the family, or shared between the state and the family. 42 USC Section 657(a)(1). If the state and federal governments

[24] For example, if the FMAP is 50 percent and a $100 collection is made, $50 is the "federal share" and $50 is the "state share". There is an exception for states that used fill-the-gap budgeting under Section 602(a)(28) of the old law. Those states can continue making gap payments out of the support collected without first calculating a federal share. 42 USC Section 657 (e). The nuances of gap payments are explored at pp. 28-30 of Action Transmittal 97-17.

[25] The federal requirement that up to the first $50 of current child support collected each month be passed-through to the family and disregarded in calculating the family's eligibility and grant amount was repealed by PRWORA.

have been reimbursed for the total amount of assistance provided to the family, then the money goes to the family. Id.

For *post-TANF* families, PRWORA and the BBA provide a phased-in system for "family first" distribution. The **first** phase applies to collections made on or after October 1, 1997. When arrears are collected, the state is to first pay any post-assistance arrears owed to the family to that family. 42 USC Section 657(a)(2)(B(i)(II)(aa). Any remaining arrearage collection can then be retained by the state (up to the amount of assistance paid to the family). The state must divide this into a federal share and a state share and give the federal share to the federal government. Section 657(a)(2)(B)(i)(II)(bb).[26] Any remaining funds go to the family. 42 USC Section 657(a)(2)(B)(i)(II)(cc).

The **second** phase begins on October 1, 2000. At that point, any arrears collected are treated as accruing first to the post-assistance period, then to the pre-assistance period, and, lastly, to the period during which the family received assistance. 42 USC Section 657(a)(2)(B)(v). At that point also, arrearages collected first go to the family to pay post-assistance arrears, then to the family to pay pre-assistance arrears, and then to the state to pay any arrears owed to it and the federal government for assistance provided to the family. 42 USC Section 657(a)(2)(B)(ii)(II). If anything is left, it goes to the family. 42 USC Section 657(a)(2)(B)(ii)(II)(cc).[27]

However, the BBA clarified that states could decide to phase in the new distribution scheme for post-TANF families before October 1, 2000. States which took this option were allowed to continue their pre-PRWORA distribution policies (except the $50 pass-through/disregard which they had the option of continuing) until October 1, 1998. Then--from collections made on or after that date-- they began distributing pre-and post-assistance arrears to the post-TANF family before making any claim for arrears owed to the state. 42 USC Section 657(a)(6).

Families which *never received assistance* are entitled to all arrearages collected on their behalf. 42 USC Section 657(a)(3).

*3. Distribution of **Arrears** Collections Made **Through Federal Tax Intercept:*** A major exception to the distribution rules for post-TANF families described above occurs when the arrears are collected through federal tax intercept. As in the past, child support arrears collected through a federal income tax intercept are to be used first to pay off unreimbursed public assistance. 42 USC Section 657(a)(iv). So, if there is unreimbursed assistance owed on behalf of a *TANF or post-*

[26] The state could give its share to the family if it wished to do so.42 USC Section 657(a)(2)(B)(iii).

[27] PRWORA authorized a study to determine if the new distribution scheme for families leaving assistance was effective in moving people from welfare to work. This report is due to Congress by October 1, 1999. 42 USC Sections 657(a)(5)(A) &(B). The report is to include any recommendations for change the Secretary of HHS would make to the distribution scheme. 42 USC Section 657(a)(5)(D). As a result there is a caveat in the statute about the provision which requires distribution of pre-assistance arrears to families. This provision will be effective unless, as recommended by HHS, Congress determines that a different scheme should be put in place. 42 USC Section 657(a)(2)(B)(ii)(II).

TANF family, the federal tax offset will first be used to pay that debt. Families which never received assistance will be entitled to the funds collected on their behalf.

Federal Guidance Applicable in All IVD Cases: On February 9, 1999, HHS issued Interim Final regulations which establish a number of important principles applicable to the distribution of support in all IVD cases.64 *Fed. Reg*. 6248-6249. Pursuant to revised 45 CFR Section 302.51:

- with the exception of funds collected through a federal tax intercept-- all collections are to be treated first as payment of current support. Once current support has been satisfied, any remainder can be attributed to arrears.

- amounts collected through federal tax intercept are always be treated as arrears.

- collected amounts may be attributed to future support payments. However, in the case of TANF and post-TANF families, amounts cannot be allocated to the future until all assigned support obligations (current support and/or arrears) have been satisfied.

- for distribution purposes, the date of collection is the date the money is received in the state's Support Disbursement Unit (SDU). An exception can be made when the collection is via income withholding. If current support is withheld in the month when due but received by the SDU in a subsequent month, the date of withholding may be deemed the date of collection. If the state chooses this option and the employer does not supply the actual date of withholding, the state must reconstruct the date either by contacting the employer or by comparing the amounts withheld with the pay schedule specified in the order.

Federal Guidance on Distribution for Families Receiving TANF-Funded Cash Assistance:[28]

1. Determining the State and Federal Shares: Early guidance addressed the issue of calculating and paying the "federal share" of child support collected. Action Transmittal 96-06 . This was superceded by Interim Final regulations issued February 9, 1999 at 64 *Fed. Reg*. 6252-6253. The revised 45 CFR Section 304.26 mirrors the language of the statute: in calculating the federal share, the Federal Medical Assistance Percentage (FMAP) is to be used. In American Samoa, Guam, Puerto Rico and the Virgin Islands, this is deemed to be 75%. In all other cases it is rate as defined at section 1396d(b) of the Social Security Act as in effect on September 30, 1995.
As per the statute, the calculation of the federal share is to be made at the time the payment is distributed.

2. General Principles to Apply: Action Transmittal 97-17 outlines a number of important points about the relationship between TANF and child support and the proper distribution of collections for families currently receiving TANF. Among the points made are:

[28] Further guidance on distribution issues is found at Action Transmittal 98-15. This Action Transmittal contains the Distribution Test Deck which has 25 different scenarios of how the policies apply to actual case situations.

- the date on which an assignment was entered matters a good deal. If the assignment was entered on or before September 30, 1997, then pre-assistance and during-assistance arrearages are "permanently assigned" to the state up to the amount of unreimbursed assistance provided to the family. If the assignment was entered on or after October 1, 1997, then only the arrears which accumulate while the family receives assistance (up to the amount of unreimbursed assistance provided) are "permanently assigned." The family's pre-assistance arrears are "temporarily assigned" and (with one exception discussed below) the right to those arrears goes back to the family when it leaves assistance or on October 1, 2000 whichever is later.

- before any distribution of support occurs, the state must first determine what the current monthly support obligation is. This generally is the amount specified in the support order. If the amount is not calculated on a monthly basis, then the state must convert it to a monthly obligation . Once converted, the amount can be rounded to a whole dollar amount.[29]

- the IV-D agency must inform the IV-A agency of the amount of monthly support collected for a family within 10 working days of the end of the month in which the support is received. How to do this is up to the IV-D agency.

In addition, revised 45 CFR Section 302.32 (64 *Fed. Reg*. 6247-48, February 9, 1999) makes clear that support payable for TANF-recipient families which are subject to an assignment must be made to the State Disbursement Unit and cannot be paid directly to the family.

3. Considerations Concerning Pass-Throughs and Disregards: Initial federal guidance to the states came in the form of a letter from Olivia Golden, the Acting Assistant Secretary at ACF, dated October 9, 1996. Among a number of questions, this letter addressed the timing of implementing the new pass-through and disregard rules.[30] ACF took the position that:

- the federal mandate that states pass-through up to the first $50 of current support to the family ended September 30, 1996. If a state law change was needed in order to end the pass-through, the pass-through had to continue but the funding for the pass-through to families had to come from the state share of collections.

- states are free to have a pass-through of any amount they chose so long as the funding comes from the state share. So long as a state continued to operate an AFDC program, the AFDC disregard rule remained in effect. So, if the state passed-through child support out of its state share, it was required to disregard up to the first $50. Only when it implemented TANF did the disregard requirement end. At that point it was up to the state whether or not to continue the disregard.

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[29] This point is now codified in the Interim Final regulations at 45 CFR Section 302.51(a)(2). 64 *Fed. Reg*. 6249 (February 9, 1999).

[30] The same positions were reiterated in Action Transmittal 97-17 at pp. 19-24.

Action Transmittal 97-17 provided further instruction. It indicates that:

- in addition to providing a pass-through/disregard out of current support, states can opt to provide a child support pass-through and disregard of **arrears** using the state share of the arrearage collection.

- once arrears owed to the government for a family receiving assistance are paid off, any excess must go to the family.

- the total amount of unreimbursed assistance that the state can collect through the child support system is limited by the total amount of the child support obligation. So, for example, if a family has unreimbursed assistance of $5,000 and has assigned child support of $2,500, once the state collects $2,500, it must begin paying collections to the family even though the state still has a claim for $2,500 worth of unreimbursed assistance.

Federal Guidance on Distribution of Support To Families Receiving TANF-Funded Non-cash Assistance. As noted above, families receiving any form of TANF-funded assistance must assign their child support rights to the state. The only limit on this assignment is that the state cannot use it to claim an amount "exceeding the total amount of assistance *provided* to the family." 42 USC Section 608(a)(3)(A). When distributing support to a family receiving TANF-funded assistance, however, a slightly different concept applies. For distribution purposes, a state may not use the assignment to retain an amount in excess of "the total of the amounts that have been *paid to the family* as assistance." 42 USC Section 657(a)(1).

Based on the statutory distinction between assistance *provided* and assistance *paid to the family*, Action Transmittal 98-24 explained that when the TANF-funded assistance consists of indirect benefits (e.g., a voucher given to a child care provider, a wage subsidy given to the employer), then the assistance is not being *paid to the family* and any child support collected must be given to the family. Specifically, the Action Transmittal (pp 10-11) provides:

- for Title IVD purposes, not all "assistance" is "assistance paid to the family." "Assistance" is *any* assistance paid to the family under the state's TANF-funded program or under the approved TANF state plan. However, "assistance paid to the family" for child support distribution purposes means *money* payments in cash, checks or warrants immediately redeemable at par *to a family* pursuant to the state's approved TANF plan. (Emphasis added)

- if funds for transportation or child care payments are included in the family's cash grant, then these amounts are "assistance paid to the family" and any child support collected for the family can be used to reimburse the state and federal governments for their share of the grant which includes funds for these supports. If, however such supports are funded by direct payment to the service provider or by voucher made out to that provider, then the value of the support does not count as "assistance paid to the family" and therefore the

current child support collected cannot be used to reimburse the state and federal governments for the cost of these services.

- likewise, if a state sets up a community jobs program and routes TANF money to an employer who pays it in salary to the recipient, that does not count as "assistance paid to the family" and is therefore not to be reimbursed from current child support collections.

- when current support is paid, any amounts in excess of the family's cash assistance (i.e., the amount of "assistance paid to the family") must be provided to the family.

For example, if a family receives $300 in cash assistance and a $300 child care voucher is paid to a service provider from TANF funds, the family will have received $600 in TANF-funded assistance. If the noncustodial parent pays $400 in current support, only $300 can be retained by the state. The other $100 must go to the family. If the family's only assistance is the $300 worth of child care, then the full $400 should go to the family.

Following this Action Transmittal, HHS issued the final TANF regulations. As noted in the section on ASSIGNMENT above, these regulations define "assistance" in a way that excludes a variety of forms of help from being considered "assistance." Excluded are short term non-recurring benefits; work subsidies; child care and transportation services provided to working families; refundable earned income tax credits; contributions to and disbursements from Individual Development Accounts; counseling, peer support and job-related support services; and certain transportation benefits to persons receiving no other forms of assistance. 45 CFR Sectin 260.31, 64 *Fed. Reg*. 17880 (April 12, 1999).

Thus, in addition to the limitation based on the distinction between assistance *provided* to the family and assistance *paid* to the family discussed above, there is a need to determine whether the particular form of help meets the definition of "assistance." While it is not entirely clear how these distinctions interact with one another, it is clear that many families receiving TANF-funded assistance should be given the child support collected on their behalf. OCSE plans to issue additional guidance in this area in the Fall of 1999.

Federal Guidance for Post-Assistance Families:

1. Defining "Federal Tax Intercept": As noted above, there is a big difference in distribution of child support arrears for post-TANF families which is collected through a federal tax intercept and that which is collected through other means. Because of this, it is very important to know the scope of the term "federal tax intercept." In Action Transmittal 97-17, it is made quite clear that "federal tax intercept" is narrowly defined. It does **not include** collections made through state income tax intercept or collections made through the Treasury Department's administrative offset process under the Debt Collection Improvement Act of 1996. (p.26) This point was reiterated and reinforced in the Interim Final regulations issued February 9, 1999. See 64 *Fed. Reg*. 6239 (last col. Bottom) and revised 45 CFR Section 302.51(a)(3).

2. Distribution of Collections Made Through Methods Other Than Federal Tax Intercept: Action Transmittal 97-17 also says that, unless the state opts for early implementation of the "family first" distribution policy, collections made between October 1, 1997 and September 30, 2000 must first be attributed to current month's support and then to never-assigned (post-assistance) arrears. Then the state can decide to pay arrears owed to the family or arrears owed to the government.[31] If it chooses to pay government-owed arrears, then it must give the federal government its share. It must also retain the state share (rather than giving it to the family) if the arrearage accrued before October 1, 1996. (p.16)

Collections made on or after October 1, 2000 (or an earlier date if the state opts for early implementation of "family first" distribution), the state must first pay the current month's support, then post-assistance arrears, then pre-assistance arrears (both unassigned and conditionally assigned), and then permanently assigned arrears owed to the state. The amount retained by the state must be deducted from the total amount of unreimbursed assistance attributable to the family. Once the amount of unreimbursed assistance equals zero, any further arrearage collections should be attributed to during-assistance arrears still owed to the family and paid to the family (p.17).

Note:. Recall that federal law allowed states to delay implementation of family-first distribution of post-assistance arrears until October 1, 1998 if they simultaneously implemented family-first distribution of pre-assistance arrears.42 USC Section 657(a)(6). Action Transmittal 98-24 provides guidance to states which took this option. Under this guidance (pp.4-7), the rules described above (with the exception of the time frames) are made applicable to those states.

3. Distribution of Collections Obtained Through a Federal Tax Intercept. Action Transmittal 97-17 also contains specific rules in regard to the distribution of collections made through a federal tax intercept. Under these rules:

- for families *currently receiving assistance*, the state keeps the collection (giving the federal government its share) up to the total amount of unreimbursed assistance paid to the family. The state can attribute the arrears to any period it chooses but it must have procedures which specify the order of allocation. Once all unreimbursed assistance has been paid off, the money goes to the family.

- for *post-assistance* families, the collection first goes to pay off unreimbursed assistance (i.e., to pay "conditionally assigned" arrears). Once these are all paid off, the "conditional assignment" ceases and any future arrearage collections made through a federal tax intercept go to the family.

- for *never-assistance* families, all collections go to the family.

[31] States that charge interest on arrears should also consult Action Transmittal 98-24(p.18). Under this guidance, if a state charges interest and state law considers such interest to be "child support", then the ownership and distribution of the interest payments are governed by federal law and Action Transmittal 97-17.

Federal Guidance on Distribution of Collections Made in Foster Care Cases.

According to Action Transmittal 98-24 (pp. 16-17), states must distribute support collected in Title IVE foster care cases in accordance with 45 CFR Section 302.52.[32] In former foster care cases, the provisions of 45 CFR Section 302.52(c) still apply. If, in a former Title IVE case, there are both IVA and IVE arrearages, the state must first provide the family with current support: then it must pay off never assigned support. Then it may pay off unreimbursed IVA or IVE assistance in any order it chooses.

Federal Guidance on Distribution of Medical Support.

Also in accordance with Action Transmittal 98-24 (pp. 18-19), when a specific dollar amount for medical support is contained in an order, and the state collects this amount, then the provisions of 45 CFR Section 302.51 apply. This regulation was amended and re-promulgated at 64 *Fed. Reg*. 6248-6249, February 9, 1999. As in the past, if the IVD agency collects specific dollar amounts of medical child support for a family which has assigned its medical support rights to the state under the Medicaid program, those amounts are to be forwarded to the Medicaid agency for distribution under 42 CFR Section 433.154.

Action Transmittal 98-24 also specifies that, in all IVD cases, if an amount is collected which is less than the combined value of the cash and medical support due for the month, then the collection must be proportionately allocated between cash and medical support. Once this is done, the money must be distributed per the instructions in Action Transmittal 97-17.

[32] Interim Final regulations issued February 9, 1999 make slight modifications to this regulation to reflect changes in the statutory language. 64 *Fed. Reg*. 6249.

Child Support Disbursement

Overview of the Law: Once child support collections are allocated (distributed) they must be sent to the proper party (disbursed). PRWORA requires states to set up an automated process for disbursing support collections. Specifically, PRWORA requires every state to establish and operate a State Disbursement Unit (SDU) to collect and disburse support in all IVD cases and in all non-IVD cases in which the order was issued on or after January 1, 1994 which are subject to enforcement by income withholding, 42 USC Section 654B(a)(1). SDUs can be operated by the state IVD agency or a consortium of IVD agencies or by a private contractor. 42 USC Section 654b(a)(2)(A). They may also be established by linking local disbursement units within the state under certain circumstances. However, if this option is chosen, employers engaged in income withholding can only be required to send payments to one place. 42 USC Sections 654B(a)(3).

SDUs are to use automated procedures to the maximum extent feasible, 42 USC Section 654B(b), and (for IVD cases) to link with the states other automated child support systems, 42 USC Section 654B(a)(2)(B). These units are to receive payments from non-custodial parents and employers, identify them properly, and disburse them (as appropriate) to custodial parents and the state. They are also to respond to requests from custodial and non-custodial parents for information about payment status. 42 USC Section 654B(b)(4).

Moreover, SDUs are to disburse payments within 2 business days of receipt if sufficient information about the payee is provided. The one exception to this is in the disbursement of disputed arrears. The unit may delay distribution of these arrears until the resolution of any timely appeal. 42 USC Section 654B(c).

Federal Guidance on the Collection and Disbursement Unit: Initial federal guidance provided instructions to states wishing to link local units rather than creating a central payment and disbursement unit. Action Transmittal 97-07 issued May 15, 1997. Requests to create a linked local system had to be submitted to the ACF Regional Office by April 1, 1998. The Regional office then reviewed such requests, asked for more information (if necessary) and made a recommendation to the deputy Director of OCSE. OCSE then made the determination and notified the state whether its request had been approved or disapproved and why. The decision is not subject to administrative appeal. Moreover, approval can be rescinded if circumstances change or, in practice, the system turns out to be more costly or less efficient than claimed.

Perhaps the most interesting part of the Action Transmittal is HHS's explicit recognition of the import of the statute's requirement that employers responsible for income withholding can only be asked to make payments to one place. HHS reads this to mean that-- even if a state chooses to have a linked collection and disbursement unit for collections made through means other than income withholding -- there must be a central unit for processing all payments made through income withholding. In submitting a request to create a linked rather than a central collection and disbursement system, a state must demonstrate that the developmental and operating costs as well

as the staffing needs of a system with a centralized unit for wage withholding and linked local units for all other payments is not greater than the cost of a unitary system for all collections and disbursements. The state must also demonstrate that in a linked system disbursements can be made within the two-day time frame required by the statute.

Additional guidance on linked units is contained in Action Transmittal 97-13 issued September 15, 1997. In addition to reiterating much of the earlier action transmittal, this document contains some additional important pieces of information. Of particular importance are:

- all employers are to send their income withholding collections to the *same place*. Linked county units cannot accept wage withholding payments and employers cannot be given the option to send their payments to a local linked disbursement unit.

- employers processing income withholding orders could be given the option of writing multiple checks--one to each local disbursement unit-- so long as all the checks were sent to one central place. However, once the payments reached the central place, they would have to be disbursed within the statutory framework (two business days). As a practical matter, this means the individual checks couldn't then be sent to the linked units for endorsement, deposit and disbursement and still be sent out on time. In other words, employers could be given the option, but it would be pointless to do so because it would put the state in a position where it would be violating the law governing the time frame for distribution.

- if clerks of court currently have a cooperative agreement with IV-D to do collection and disbursement, and this is their only IV-D function, and the state intends to move to a centralized collection and disbursement system, the state may be able to obtain conditional certification of its automated CSE system even if the system is not implemented in the clerk of courts offices. This is so the state does not have to provide the clerks with hardware and software for the period before October 1, 1998.

Action Transmittal 97-13 also covers a number of other disbursement unit issues. Of particular importance are the following:

- the collection and disbursement unit can be a single outside agency including a centralized court system or a single bank (but not a network of banks). It could also be a multi-faceted with one entity receiving payments and another doing the disbursement.

- if the state chooses a structure which incorporates the collection and disbursement unit into its statewide CSE automated system, then the costs associated with that unit are eligible for eighty percent FFP. If the state selects another public or private entity, those costs are reimbursable at the sixty-six percent FFP rate.

- for a non-IV-D case to be *required* to be in the collection and disbursement unit there must be a child support order issued on after January 1, 1994 and collection must actually be

coming through wage withholding. Cases in which an income withholding order has been issued but not implemented and those where the order requires wage withholding upon default but default has not occurred are not required to be handled through the unit.

C states need to have procedures for accepting occasional voluntary payments at local child support offices and for dealing with payments made in court at contempt hearings and the like. Such payments should then be sent to the collection and disbursement unit. However, use of these procedures should be rare

C in non-IV-D cases, the state can process both wage withholding and non-wage withholding payments through its collection and disbursement unit. FFP is available for the cost of processing payments made through wage withholding,[33] but is not available to offset the cost of processing other forms of payment.

C if a non-IV-D case processed through the collection and disbursement unit goes into default, the state need not provide enforcement services. If the custodial parent wants such service, she/he must apply to the IV-D agency for them.

C a state can decide whether or not the collection and disbursement unit should accept personal checks. If the unit does accept such checks, it must disburse payments to the family within two days even if the check has not cleared. If a check is later dishonored, the state cannot claim FFP for the loss. Nor can the state recoup the money from subsequent support payments unless the custodial parent agrees that the state may do so.

C the collection and disbursement unit must be able to provide parents with payment information. States which have a Hotline or Voice Response System may also provide the information over that system as long as the disbursement unit also does so. States wishing to avoid duplication of effort might put their collection and disbursement unit into their automated system and use the existing automated response system.

C "distribution" is the determination of how a collection should be allocated. "Disbursement" is sending the money to the proper party. *In IV-D cases*, it is the responsibility of the IV-D agency to distribute collections pursuant to 42 USC Section 657. Once that agency has determined the proper distribution, it is the responsibility of the collection and disbursement unit to disburse it accordingly. *In non-IV-D cases*, the collection and disbursement unit can be responsible for both distribution and disbursement.

C allocation of collections in cases with multiple payees which are handled by the collection and disbursement unit is to be done by the IV-D agency in accordance with 42 USC Section 657 and state law. This means current support must be paid to all families: if this is not possible within the CCPA limits, then each must get something.

[33] Action Transmittal 97-10 indicates that FFP for this purpose is available to states which implement centralized collection and disbursement units before they are required by PRWORA to be in place (i.e. before October 1, 1998).

In addition, regulations issued in August 1998, at 63 *Fed. Reg*. 44795-44817, provide reference to the interface between the collection and disbursement unit and the states other automated systems. This guidance makes it clear that the state's automated data processing (ADP) system will be required to interface with the collection and disbursement unit. 45 CFR Section 307.11(c).

Federal Guidance on Time Frames for Distribution of Support by the SDU: Regulations issued February 9, 1999, establish time frames for disbursement by the SDU.
Under the revised 45 CFR Section 302.32(b)(3), for non-TANF and post-TANF families:

- except for amounts collected through federal tax intercept, amounts collected must be disbursed within 2 business days of initial receipt in the state.

- amounts collected through federal income tax intercept which are due to the family must be disbursed to the family within 30 calendar days of receipt by the IVD agency. There are two exceptions: 1) if state law provides a post-offset appeal and an appeal is timely filed, then the funds must be disbursed within 15 days of resolution of the appeal; and 2) if the refund is based on a joint return, the SDU may wait until notified that the unobligated spouse's share of the return has been paid or the passage of six months, whichever is earlier.

Amounts collected for TANF recipient families who are subject to an assignment are to be disbursed under the rules set out at 45 CFR Section 302.32(b)(2). Under these rules:

- if the state passes-thru child support to the family out of the state share, the money must be sent to the family within 2 days of initial receipt in the state.

- except for funds collected through federal tax offset, any other support payments owed to the family under the distribution rules described in the CHILD SUPPORT DISTRIBUTION above, must be sent to the family within 2 business days of the end of the month in which the payment was received by the SDU.

- amounts collected through federal income tax intercept which are due to the family must be disbursed to the family within 30 calendar days of receipt by the IVD agency. There is one exception: if state law provides a post-offset appeal and an appeal is timely filed, then the funds must be disbursed within 15 days of resolution of the appeal.

When a family becomes ineligible for TANF, payments must be redirected to the family. Under 45 CFR Section 302.32(b)(2)(ii):

- except for collections made through federal tax offset, for the month after the month in which a family becomes ineligible for TANF, the SDU must send support owed to the family within 2 business days of initial receipt in the state.

These regulations also require that –in interstate cases-- amounts collected by the responding state must be sent to the initiating state within 2 days of receipt by the responding state SDU. 45 CFR Section 302.32(b)(1), 64 *Fed. Reg*. 6248 (February 9, 1999).

Federal and State Case Registries

Overview of the Law: Under PRWORA, as amended by the Taxpayer Relief Act of 1997, as part of their automated systems, states are required to set up a central State Case Registry (SCR). This registry had to be in place no later than October 1, 1998 and contain information about all the state's IVD cases as well as any other (non-IVD) orders established or modified in the state on or after October 1, 1998. 42 USC Section 654A(e)(1). This registry can be a single entity or it can be created by linking local case registries of support orders. Id. Section 654A(e)(2).Whichever option is chosen, standardized data elements must be used to maintain the records. Id. Section 654A(e)(3).

For IVD cases with a support order, the registry must maintain certain specified information. This includes the birth date of any child for whom support has been ordered, the amount of periodic support owed; the amount of any fees, interests arrears or penalties due; the amount collected; a description of how the amount was distributed; and the amount of any lien which has been imposed. 42 USC Sections 654A(e)(4)(A)-(C). No later than October 1, 1999, the name and social security number of any child for whom support has been ordered must also be included.42 USC Section 654A(e)(4)(D). In addition, the state agency operating the system must regularly maintain, update and monitor the case records for all IVD cases in the registry. Id. Section 654A(e)(5).

PRWORA also required that the federal government set up a Federal Case Registry (FCR) by October 1, 1998. 42 USC Section 653(h). The states must send abstracts of the cases in their SCRs to the FCR beginning October 1, 1998. 42 USC Section 654A(f)(1).

To safeguard information-- and in particular to protect victims of domestic violence from inadvertent disclosure of their location-- both the SCRs and the FCR are to have protocols in place. 42 USC Section 654A(d) and 653(b).

Federal Guidance on State Case Registries: Original guidance was promulgated in Action Transmittal 98-08 (March 5, 1998). In addition to restating the federal statute, that Action Transmittal states that:

- the SCR must contain information abstracted from the records and orders (if any) of all IVD cases and the orders in non-IVD cases which are established or modified after

October 1, 1998. In interstate IVD cases, an SCR entry must be made only if the receiving state actually opens a case file. Thus, interstate cases in which direct income withholding or automated administrative enforcement are being done need not be opened in the receiving states SCR.

- the SCR for IVD cases must be operated at the state level and by the state agency responsible for the state's automated system. For non-IVD orders, the state may link local case registries of support orders through an automated information network.

- the state is obliged to keep the records updated and accurate. It should do this through regularly updating SCR information with information obtained from other data bases within the state, the data bases of other states, and the FCR. It should also do this by enforcing the requirement found at 42 USC Section 666(c)(2)(A)(I) that state law require parents to periodically update their case information and entering this updated information into the SCR.

- information in the SCR is to be shared and compared with the information in other state and federal data bases. In particular, SCR information **must be** matched with the State registry of birth records (to identify cases in which paternity has now been established), the State Directory of New Hires, the State Collection and Disbursement Unit. SCR data **may** also be matched with financial institution data, real and personal property records, and occupational and professional license records. It may also be used as part of the state's assets seizure program and in improving medical support enforcement. SCR data is also to be used in generating income withholding orders.

- the SCR must build in protocols to protect the privacy rights of the parties. Particular attention has to be paid to developing protocols for handling cases in which 1) there is reasonable evidence of domestic violence or child abuse or that disclosure of information could be harmful to a child[34]; and 2) where information has been obtained from the IRS and is subject to 6103 of the Internal Revenue Code.

This guidance was supplemented by a revised federal regulation (45 CFR Section 307.11) issued August 21, 1998 at 63 *Fed. Reg.* 44,795- 44,817 and sent to the states in Action Transmittal 98-26 (August 26, 1998). The final regulations provide:

- definitions of terms and a reiteration of which cases must be in the directory.

- a list of the standard data elements for *all cases* in the SCR. The data elements include the name, social security number, date of birth, case identification number, and other uniform identification number of each participant in the case (custodian, non-custodial parent, putative father, or child).[35] Also to be included are the data elements required by the federal case registry, the name of the state which issued the order (if there is one) and any other information the Secretary of HHS may require.

[34] For more on this see pp.15-19, *supra*.

[35] There appears to be a discrepancy between this regulation and 45 CFR Section 307.11(e)(4)(v). The latter says that, in IVD cases with orders, the name and social security number of any child need not be provided until October 1, 1999.

- a list of additional information which must be contained in the files of *IVD cases with child support orders*. They include amount of current support owed under the order, other amounts due or overdue under the order (including arrears, fees, late payment penalties and interest), amount collected, how the collection was distributed and the amount of any lien imposed. These are the same elements described by the statute.

- a requirement that the state describe how it will update, maintain and regularly monitor IVD cases in the case registry. Periodic updating includes amending information on a case to reflect 1) any administrative or judicial actions taken relating to paternity and support; 2) additional information obtained from federal, state or local sources; 3) changes in information on support collections and distributions: and 4) any other relevant information.

- a requirement that the SCR send to the FCR an abstract of all cases in the registry beginning October 1, 1998. The abstract must contain 11 basic elements. Four additional elements are requested but not required. The required elements are the FIPS code; state case identification number; state identification number; case type (IVD or non-IVD); social security number (and any alternate numbers); first, middle, and last name (and any aliases); date of birth; participant type (custodial parent, child, putative father, noncustodial parent); family violence indicator(if applicable); indication of whether there is an order; and any other information the Secretary requests. The optional elements are county code, sex, locate request type, and locate source.

- a requirement that the state request and exchange information with the FPLS.

- a requirement that state exchange information with the other state agencies, interstate information networks ,and the TANF and Medicaid agencies of its own state and of other states.

- requirements that states have protocols in place to protect the privacy of the information contained in their ADP systems (which includes the SCR). It also includes having *written* policies concerning access to data by state agency personnel, *written* policies as to sharing of data with other persons, *routine monitoring* of access to and use of the automated system to guard against unauthorized access to or use of the data, *training* of all state and local employees and contractors who have access to the data on what the confidentiality policies and procedures are, and *administrative penalties* for unauthorized access to or disclosure or use of confidential data.

***Federal Guidance on the Federal Case* Registry**: The FCR became operational on October 1, 1998. It is located within the Federal Parent Locator Service (FPLS)[36] and contains abstracts of

[36] It should be noted that the FPLS is housed in the Social Security Administrations National Computer Center. This site was chosen as the most cost-effective and efficient as well as a site with strong standards protecting privacy and confidentiality. 63 *Fed. Reg.* 38,186.

cases from the states' SCRs. It interfaces with the National Directory of New Hires and will direct individuals and agencies requesting information through the FPLS to sources that may be able to provide information. Action Transmittal 98-08 (March 5, 1998) contains some additional information about the FCR:

- the FCR will provide information which will facilitate the location of individuals who owe support or against whom a support order is being sought, individuals to whom a child support obligation is owed, and individuals who have or may have parental rights. The FCR will also provide income, health insurance and asset information.

- if notified by a state that domestic violence or child abuse is an issue or that disclosing information would not be in the child's best interest, an indicator will be placed on the file which will prevent release of the information . This indicator will remain in place until such time as a court or agent of the court determines otherwise. See also Preamble to proposed federal regulations on automation, 63 *Fed. Reg*. 14406, col.3.

Federal and State New Hire Directories

Overview of the Law: Under PRWORA**,** states are required to establish an automated directory of new hires. These directories are to gather information from employers about all of their newly hired employees. States which had not previously authorized such directories were required to have a directory which met specific federal standards in place by October 1, 1997. States which already had a state law creating a new hire reporting system were given to October 1, 1998, to conform that system to the federal requirements. 42 USC Sections 654(28) and 653A(a)(1).

In addition to new hire information, the State Directory of New Hires is--on a quarterly basis-- to obtain wage and unemployment compensation information. The timing, content and format of these wage and unemployment claims reports were left to the Secretary of HHS to determine. 42 USC Section 653a(g)(2)(B).

Finally, PRWORA requires states to report all of this information to the newly created National Directory of New Hires (NDNH) within the Federal Parent Locate Service (FPLS). 42 USC Section 653 (i). In addition to this state-generated information, the NDNH will also contain new hire reports submitted to it by federal agencies as required under 42 USC Section 453A(b)(1)(C) and quarterly wage and unemployment compensation information about federal employees as required by 42 USC Section 653(n).

Federal Guidance on the State New Hire Directory: OCSE Action Transmittal 97-04 (March 12, 1997) provided initial guidance to the states on the State New Hire Directory. This was followed by OCSE Action Transmittal 98-06 (March 2, 1998) which provided additional substantive guidance and OCSE Action Transmittal 97-12 (September 9, 1997) which provided a new state plan preprint page for use by states to certify that they had met the federal requirements. This guidance was consolidated and amplified in OCSE Action Transmittal 99-05 (March 24, 1999). According to OCSE AT 99-05:

- all states were required to have their State Directory of New Hires (SDNH) up and running by October 1, 1998.

- the SDNH may be located wherever the state wishes to locate it. Options include the IV-D agency, the employment service, the revenue department and a private vendor under contract with the state. If the state chooses to locate the SDNH within the IV-D agency as part of its automated system, then 80 percent federal funding is available for system development costs. If the SDNH is located elsewhere, 66 percent federal reimbursement is available to defray the development costs. and 80 percent funds are available to defray the cost of setting up the interface between the outside SDNH and the IV-D automated system.

- in determining who must be reported to the SDNH, the definition of "employee" is that found in Chapter 24 of the Internal Revenue Code of 1986. This definition includes probationary employees and trainees as well as employees who were previously employed by the employer and have been rehired. It includes work experience participants in a program funded by the Job Training Partnership Act (JTPA). Employees' also include domestic and agricultural workers (including those who do not meet the threshold for income tax withholding), students in work/study programs (including international students) and aliens if the meet the definition of employee. However, independent contractors or subcontractors do not have to reported because they are not "employees" as so defined.[37]

- even if an individual meets the definition of “employee”, he/she need not be reported if hired and working in a foreign country. However, if the individual is on temporary assignment outside the United States, then a new hire report must be filed. employees hired and working in foreign counties

- the definition of "employer" is that found at Section 3401(d) of the Internal Revenue Code and includes government entities. Temporary agencies which pay wages to the people they place in jobs are “employers” for purposes of this definition and therefore must file new hire reports. In some situations, labor organizations and union hiring halls also qualify as employers; when this is the case, the too must report new hires. Placement agencies-- which receive a one-time fee for placing an individual with a company but do not pay the individual’s wages-- are not employers within this definition and are not subject to new hire reporting.

- even if they meet the definition of “employer”, employers on Native American reservations and lands are not subject to new hire reporting. A tribe could change this by entering into a new hire reporting agreement with the State, but it is not obligated to do so.

- an employees “date of hire” is the day on which he/she begins work. If a former employee is rehired and therefore must submit a new W-4 to the employer, then the employer must submit a new hire report on the day the employee returns to work.

- employers (other than the federal government and multi-state employers) must report the following information to the State Directory of New Hires in the state where the employee

[37]Independent contractors or subcontractors may be their own employers or may have employees. In this case, they are required to file new hire reports in their capacity as employers. Also, states are free to go beyond the federal requirements and extend their laws to require employers to file new hire reports on independent contractors. New Hampshire has done this. It encourages all employers to file new hire reports on independent contractors (whatever the size of the contract)to file new hire reports and requires reporting when the contract exceeds $2,500.This increased their child support collections by over $1 million. See, OCSE’s *Child Support Report* p. 3 (July 1999).

works: the employee's name, address (even if it is outside the country), and social security number[38] and the employer's name, address and federal employer identification number. The federal government will report the same information directly to the National Directory of New Hires. Multi-state employers will report the same information either to the state where the employee works or to a single designated state. (See INTERSTATE ISSUES below).

- employers have the option of reporting this information on a W-4 form or an equivalent form. States are free to develop reporting forms for employers' use but the ultimate decision as to the form to use is up to the employer.

- states may request additional information from employers pursuant to a state statute. However, they may run into a problem if the information is not contained in the employee's W-4 form and the employer has exercised its right to report via W-4. IRS regulations forbid altering the W-4 form, so a state wishing additional information would have to require the employer to file that information separately.

- if states do obtain additional information, they have the option of reporting some of it to the National New Hire Directory. The National Directory will be capable of accepting the employee's date and state of hire and his/her birth date and the employer's State Employer Identification Number (EIN).

- employers can be given up to 20 days after the date of employment to file their report. States are free to set shorter (but not longer) reporting periods. Reports may be filed by mail, by electronic tape or electronically.

- how long to retain the information received through new hire reporting is up to the state. States have typically chosen periods of 6 to 9 months.

- federal law allows states to impose civil, monetary penalties on employers who fail to meet their new hire reporting requirements. As clarified by BBA, the statute allows a penalty of up to $25 for each inadvertent failure to report an individual and up to $500 if the failure to report is the result of a conspiracy between the employer and the employee. States may not impose financial penalties in excess of these amounts. However, they may choose to impose non-monetary civil penalties on employers who fail to meet their new hire reporting requirements.

- within five business days of receiving new hire information from an employer, the SDNH must enter the information in its data base. Within two days of entering the information, each state is now required to conduct a match between the social security numbers obtained through new hire reporting and with the State Central Case Registry.

[38]Currently, there is no verification of the social security number (SSN). However, OCSE and the Social Security Administration (SSA) are about to begin a pilot project in which SSA will compare new hire reports from two states (Illinois and Massachusetts)to its data base of names and SSN and inform employers when an incorrect SSN has been used. The employer can then correct the records. See OCSE's *Child Support Report*, p.4 (July 1999).

- if a match is found, the IV-D agency must be notified and it must generate a wage withholding order to the employer.

Federal Guidance on New Hire Reporting for Multi-state Employers. Multi-state employers are defined as those with employees in two or more states who elect to transmit their new hire reports magnetically or electronically. 42 USC Section 653A(b)(1)(B). These employers have to file the same information, subject to the same rules as described above. However, they have a choice about where to file. They can report to the SDNH in every state in which they have employees or they can elect to report all their new hires to a single state's SDNH. Those wishing to report to a single state simply have to notify HHS in writing of their option. A form for employers to use in this regard is attached as an Appendix to OCSE Action Transmittal 99-05 (March 24, 1999). According to that same Action Transmittal, the NDNH maintains a list of employers who have made this choice and the state to which they have chosen to report. An updated list will be provided to the states each month.

Action Transmittals 97-15 and 97-16 provided early guidance on dealing with the new hire reporting requirements for multi-state employers. This guidance has now been consolidated, updated and expanded in Action Transmittal 99-05. According to this guidance:

- while employers have wide latitude, if they wish to report to only one state, it must be a state in which they have employees. Moreover, their choice is limited to reporting to *every* state in which they have employees or *only one* state. They do not have the option of reporting to several (but less than all) of the states in which they have employees.

- parent companies with subsidiaries in other states may qualify as multi-state employers if they have an employer/employee relationship with the employees of the subsidiary.

- companies which share an FEIN must make a common decision about whether to designate one state for SDNH purposes.

- multi-state employers wishing to report to only one state can make this election by mailing notification of their designation to HHS . Employers are not required to use the HHS-approved form but would be well advised to do so as it specifies all of the information HHS needs in order to process the request.

- multi-state employers need not –and cannot be required to--notify the effected states that they have chosen one-state reporting. HHS will inform the states.

- states do not have veto power over a multi-state employers selection. Nor may states assess a charge against multi-state employers who choose to report to their SDNH. In addition, while a state might incur expenses related to handling a substantial number of new hire reports from a multi-state employer, enhanced FFP is not available to off set these costs.

- multi-state employers who choose to report to one state must follow the rules of that state for *all reported* employees. If the chosen state requires employers in its state to submit more information than is required by federal law, then the multi-state employer must submit the additional information for all of its employees, not just those hired in the chosen state.

- multi-state employers who transmit information magnetically or electronically to a single state must submit their information twice a month with the reports being not less than 12 or more than 16 days apart.

Federal Guidance on State Reporting to the National New Hire Directory: Under PRWORA and OCSE ATS 97-10 (July 30, 1997) and 99-05 (March 24, 1999), within three business days of entering the information in its data base, the SDNH must furnish the required information to the National Directory of New Hires (NDNH). This includes the employee's name, address and social security number as well as the employer's name, address and federal employer identification number.

As noted above, in addition to this information, PRWORA required that states provide certain wage and unemployment claim information to the NDNH on a quarterly basis. The timing, content and format of these wage and unemployment claims reports were left to the Secretary of HHS to determine. On July 25, 1997, the Secretary issued a proposed format for public comment (62 *Fed. Reg.* 40092). On October 7, 1997, she proposed regulations governing the timing and content of the submissions. See, Action Transmittal 97-18 (October 28, 1997). These regulations (45 CFR Section 303.108) were finalized on July 2, 1998 at 63 *Fed. Reg.* 36185-36190 and transmitted to the states in Action Transmittal 98-18 (August 3, 1998). Under these regulations:

- a new 45 CFR Section 303.108 is created. Under this regulation, definitions of both wages and unemployment compensation or claims are provided."Wage information" means the name and social security number of an employee, his/her aggregate wages, and the name, address and federal identification number of the employer reporting the wages. "Unemployment compensation or claim information" means the name, social security number and most recent home address of any individual who has filed a claim for, is receiving, or has received unemployment compensation during the quarter, and the aggregate, gross amount received.

- *wage information* is to be transmitted to the NDNH no later than the end of the fourth month following the reporting period. For example, wage information for the January-March reporting period would have to be reported to the National Directory by July *31*. *Unemployment claims information* would be transmitted to the NDNH no later than the end of the first month following the end of the reporting period. In other words, unemployment information for the January-March period would be reported no later than April 30. Both data sets would have to be reported using standardized formats developed by HHS.

The Preamble to the regulations contains some additional information. It clarifies that:

- states are free to decide which entity will make the reports to the NDNH. However, the IVD agency remains responsible for making sure that this information is properly transmitted. Since transmittal of the data is a state plan requirement, if the information is not transmitted to the NDNH, then the penalty for failure to have an approvable state plan is applicable. 63 *Fed Reg*. 36186 (col. 3) and 36189 (col. 1).

- in addition, a State Employment Security Agency which fails to cooperate in this process

may be decertified by the Secretary of Labor. 63 *Fed. Reg*. 36189 (col. 2). However, it is not anticipated that there will be problems in this regard since the regulation does not require that a state obtain any information that it does not already collect. 63 *Fed. Reg*. 36188 (col. 3).

C states will be reimbursed for the reasonable, direct costs for extraction, formatting and transmission of the information to the NDNH.63 *Fed. Reg*. 36188 (col. 2).

In addition, Action Transmittal 99-05 (March 12, 1999) adds the following:

- states are free to decide which entity will actually provide the quarterly wage and unemployment compensation information to the NDNH.

- HHS will work with each SDNH to determine the appropriate amount of reimbursement for the costs associated with transmitting data to the NDNH.

Federal Guidance on Privacy and Data Security Issues: Because of the sensitive nature of the information, there is a need to be clear about who has access to SDNH and NDNH information. AT 99-05 and revised 45 CFR Section 302.35, 64 *Fed. Reg*. 6248 (February 9,1999) provide the following:

- State Employment Security Agencies (SESAs) can be given access to data in any state's SDNH. However, they cannot be given direct access to NDNH data or access to data derived from NDNH matches. . Workers compensation agencies may also be given access to SDNH information.

- whether SDNH information can be shared with entities administering state Income and Eligibility Verification System (IEVS) depends on where the SDNH is located and whether or not it is part of the state's ADP system. If the SDNH is located within IVD and/or is part of the ADP system then the rules governing access to information found at 42 USC Sections 654(16) and 654a(d) apply. If the SDNH is operated independently, then the state could decide to give access to the IEVS.

- clerks of court who have cooperative agreements to provide services in IVD cases may be given access to SDNH information but only for IVD purposes.

- private contractors may be given access to SDNH information if the contract creates an agency relationship between the state and the contractor. The contractor would then have to follow all IVD privacy safeguards and the IVD agency would be responsible for making sure that the contractor did so.

- SDNH information may not be given to employers.

- NDNH information cannot be given directly to custodial parents seeking to enforce custody and visitation orders.

Expanded Paternity Establishment

Overview of the Law: Under PRWORA, as amended by the BBA, states must have a variety of procedures available for the voluntary acknowledgment of paternity and the resolution of contested paternity cases.

In regard to voluntary paternity establishment, states must make it possible for parents to establish paternity in hospitals and other birthing facilities, at birth records agencies, and at "other entities" designated by federal regulation as appropriate places for voluntary paternity establishment services to be made available. 42 USC Sections 666(a)(5)(C)(ii) and (iii). State law must make it clear that a father's name can appear on his nonmarital child's birth certificate only if paternity has been acknowledged. Id. Section 666(a)(5)(D)(i)(I).[39] States must automatically treat a voluntary acknowledgment as a legal finding of paternity unless rescinded within 60 days (or a shorter period if a legal proceeding is brought during that time and the parents have a chance to renounce the acknowledgment but fail to do so). 42 USC Section 666(a)(5)(D)(ii).

In addition, the Secretary of HHS was required to develop the minimum requirements of a paternity acknowledgment (including the social security number of each parent) and other common elements. 42 USC Section 652(a)(7). Once this was done, states were to develop and use an acknowledgment which met the Secretary's minimum requirements and to give full faith and credit to such acknowledgments signed in other states. 42 USC Section 666(a)(5)(C)(iv).

In regard to contested paternity cases, states must bar jury trials, 42 USC Section 666(a)(5)(I); allow putative fathers to initiate paternity actions, id. Section 666(a)(5)(L); unless otherwise barred by state law or a good cause exception, provide genetic tests on the request of any party, id. Section 666(a)(5)(B)(i); pay for genetic tests which have been ordered by the IVD agency, id. Section 666(a)(5)(B)(ii)(I); in the absence of an objection, admit accredited genetic tests and medical bills without a foundation, id. Sections 666(a)(5)(F) and (K); create a presumption of paternity based on genetic test results, id. Section 666(a)(5)(G); and require temporary support where there is clear and convincing evidence of paternity. 42 USC Sections 666(a)(5)(J).

Federal Guidance on Required Changes in Voluntary Paternity Establishment: OCSE Action Transmittal 97-10 (pp. 25-27) answered a few questions:

- a signed voluntary acknowledgment of paternity becomes a legal finding of paternity if not rescinded within 60 days of the signing. States which previously gave signatories of voluntary paternity acknowledgments less than sixty days to rescind their

[39] Alternatively, the father's name can appear on his non-marital child's birth certificate if he has been adjudicated to be the father. 42 USC Section 666(a)(5)(D)(I)(II).

acknowledgments had to change their law to give signatories a full sixty days to rescind.

- a signed voluntary acknowledgment of paternity becomes a legal finding before the expiration of 60 days if 1) an administrative or judicial proceeding relating to the child is brought before the expiration of the 60-day period; and 2) the signatory is a party to that proceeding; and 3) the signatory does not challenge the acknowledgment at that time. For purposes of this provision, the date of the administrative or judicial proceeding or the date on which a default order is entered is the date of disposition of the case.

- for purposes of determining whether a state has met its paternity establishment percentage, the state may count an acknowledgment as an "establishment" on the date it is filed. If the acknowledgment is later rescinded, then the case must be deducted from the states established paternity count. If paternity is later established, the case can be added back in.

- states which have paternity establishment and birth records agency procedures in place which do not meet the requirements of the federal law can seek waivers from HHS. If they can show that the federal requirement would not make their existing program more efficient and effective, a waiver can be granted.

On January 5, 1998, HHS also published proposed rules governing the expansion of voluntary paternity establishment programs to birth records agencies and other entities. 63 *Fed. Reg*. 187-193. These revised regulations (45 CFR Section 303.5) were adopted in final form on March 10, 1999 with an effective date of April 9, 1999. 64 *Fed. Reg.* 11802-11818. The final regulations :

- require that voluntary paternity establishment services be available at all public and private birthing hospitals in the state as well as at the State birth record agencies.[40]

- allow states broad discretion to decide what other entities (if any) should be allowed to offer voluntary paternity establishment services. The state could include 1) health care providers such as public health clinics, WIC and MCH clinics, private obstetricians, gynecologists, pediatricians and midwives; 2) public assistance agencies such as IVA, IVD and Food Stamp offices; 3) child care providers, including Head Start, child care agencies, and individual providers; 4) Community Action Agencies and Community Action programs; 5) secondary schools; 6) legal services programs and the offices of private attorneys; and 7) any similar public or private health, welfare or social services organization.

- specify that all of the entities providing voluntary paternity establishment services must receive forms and materials from the state. Moreover, the state would have to provide all of them with the same training, guidance and written instructions, and subject them all to the same yearly assessment protocols.

- provide that Federal Financial Participation (FFP) is available to defray the costs to the

[40] In some states, there are also local birth records agencies. These agencies are *not* mandatory participants in the voluntary paternity acknowledgment program. However, a state can designate them as sites which offer voluntary paternity establishment services if it wishes to do so. 64 *Fed. Reg*. 11805 (2d col., middle)

state of developing and disseminating the required materials, as well as reasonable and essential short-term training costs associated with the program. In addition, FFP is available to pay up to $20 for each voluntary acknowledgment obtained by a hospital, birth records agency or other entity participating in the states voluntary paternity establishment program.

In addition, the following guidance is provided:

- all of the entities participating in the state's voluntary paternity establishment program must provide to the mother and alleged father (if he is present) written materials about paternity establishment; any necessary forms; a written explanation *and* either an oral or an audio/video presentation about the rights, responsibilities, legal consequences of, and alternatives to acknowledging paternity; and the opportunity to speak (either in person or by phone) with a trained person to answer any questions or clarify the information. If state law provides any particular protections to minor parents, the explanatory materials must include this information.

- the voluntary acknowledgment form must be signed by both parents and their signatures must be authenticated by a notary or witness(es).[41]

- the state can decide where the signed, original acknowledgments are to be filed. However, if it chooses an entity other than the state registry of birth records, then the entity which obtains the acknowledgment must also file a copy with the state registry of birth records.

- an entity designated by the state will record information from the acknowledgments into a statewide database. This database must be made available to the IVD agency.

Federal Guidance on Paternity Acknowledgment Forms: On July 22, 1997, OCSE published proposed minimum data elements for each state to use in its paternity acknowledgment form. 62 *Fed. Reg.* 39246. Based on public comment, these were revised and re-promulgated in Action Transmittal 98-02 issued January 23, 1998. As revised, the final requirements are:

- current full name, address, social security number and date of birth of the mother and the father.

- current full name, date of birth, and birthplace of the child.

- a brief explanation of the legal significance of signing the acknowledgment and a statement that both parents have 60 days to rescind the acknowledgment.

- a clear statement signed by both parents indicating that they understand that signing the acknowledgment is voluntary and that they understand what their rights, responsibilities, alternatives and the consequences are.

[41] The Response to Comments notes that the signatures need not be on the same document. There could be two separate documents which establish paternity so long as each parent has signed and the signature has been authenticated or witnessed. 64 *Fed. Reg*. 11806 (3d col., middle).

- signature lines for the mother, father, and any witnesses or notaries.

There is also a strong recommendation that the form contain the sex of the child, the father's employer and the mothers maiden name. Not as strongly recommended were the following: daytime phone number of the mother and the father, birthplace of the mother and the father, hospital of birth of the child, ethnicity of father, medical insurance, place where acknowledgment was completed, offer of name change for child, signature line for guardian ad litem or legal guardian if one of the signatories was a minor, place for husband to sign in case biological father was not mother's husband, an advisory to the parents that they may wish to seek legal counsel or obtain a genetic test, and a statement re the custody status of the child under state law once the acknowledgment is signed.

Federal Guidance on Contested Cases: There are Interim Final regulations on genetic testing in contested cases. They are found at 45 CFR Section 303.5 (64 *Fed. Reg*. 6249-6250, February 9, 1999).They provide that:

- if any party to a contested case requests them, the IVD agency must order genetic tests. The request must meet the statutory requirement that it be accompanied by a sworn statement from the party requesting tests 1) alleging paternity and setting forth sufficient facts to establish sexual contact between the parties; or 2) denying paternity and setting forth sufficient facts to negate sexual contact between the parties.

- an exception can be made in a public assistance case in which the responsible entity has made a "good cause" determination that the recipient need not cooperate with paternity establishment. An exception can also be made (in public assistance or non-public assistance cases) if the IVD agency has decided it would not be in the best interests of the child to establish paternity because the pregnancy was the result of forcible rape or incest or the child is being placed for adoption.

- if the IVD agency orders tests, it must pay for them. If paternity is later established, the state may opt to recoup the cost from a father who denied paternity.[42]

- if a party request additional testing, that party must bear the costs in advance.

[42]See, also 45 CFR Section 303. 7(d)(3) (64 Fed. Reg. 6250, February 9, 1999) for assessing genetic test costs in interstate cases.

Expanded Enforcement Authority

Overview of the Law: For over a decade, federal law has required state to use income withholding in appropriate child support cases. PRWORA added a number of other enforcement tools to the state arsenal. Under PRWORA, states must have authority to suspend drivers, professional, occupational, sporting and recreational licenses of delinquent obligors. 42 USC Section 666(a)(16) Credit bureaus must provide reports to authorized IV-D officials, and IV-D agencies must report arrearages to credit bureaus.42 USC Section 666(a)(7). State agencies must be authorized to order income withholding, issue subpoenas, increase monthly support to include arrears, change payees, obtain access to specified records (including law enforcement and corrections), seize payments from a variety of sources, and force property sales. 42 USC Section 666(c)(1). States must void fraudulent transfers. 42 USC Section 666(g). Passports must be denied for arrears exceeding $5,000. 42 USC Section 652(k).

Finally, PRWORA requires states to conduct quarterly data matches with financial institutions. These matches are intended to help the state locate the assets of delinquent obligors and attach those assets to obtain arrearage payments. Since compliance could be burdensome for institutions that operate in more than one state, the Secretary of HHS is authorized to assist state IVD agencies and multistate financial institutions to reach agreement on how the process will be done. 42 USC Section 652(l).

The state may pay reasonable fees to financial institutions to cover the actual costs incurred. 42 USC Section 666(a)(17). Financial institutions which provide information to a IVD agency as part of this process are not liable under any state or federal law for disclosing the information. The IVD agency must limit use of the information to child support purposes. If anyone knowingly or negligently releases financial information for a different purpose, they may be sued for civil damages. 42 USC Section 669A(c).

Federal Guidance on State Laws and Procedures: There are Interim Final regulations that implement some of the PRWORA changes, 64 *Fed. Reg*. 6237-6253 (February 9, 1999). There are also four Action Transmittals which deal with some questions which have arisen. They are Action Transmittal 97-10 (July 30, 1997) which deals with a variety of issues; Action Transmittal 98-03 (January 27, 1998) which promulgates the standard income withholding form which states must now use in all intra-and interstate cases; and Action Transmittals 98-07 (March 2, 1998) and 98-29 (October 13, 1998) which address financial institutions data match issues. Important points from this guidance are summarized below.

Income Withholding: Action Transmittal 97-10 (pp.15-16) provided initial guidance to states. This was supplemented by Interim Final regulation 45 CFR Section 303.100 (64 *Fed. Reg*. 6251-6252, February 9, 1999). Under this guidance:

C the federal law contains a definition of "income" which goes beyond just wages to include

any periodic form of payment (e.g., salary, commissions, bonuses, worker's compensation payments, pension/retirement payments). States are free to have an even broader definition.

- when immediate income withholding is ordered or when income withholding is commenced due to a default or the request of one of the parents, the state must notify the obligor that such withholding *has* commenced. Advanced notice to the obligor is not required.

- the notice to the obligor that withholding has commenced should be sent concurrently with or within a few days of the date the withholding order is sent to the employer.

- federal law requires employers to remit withheld wages to the state collection and disbursement unit within seven business days of the date the income would have been paid to the noncustodial parent. States can impose a *shorter* time frame if they wish to do so.

While most employers are now comfortable with the income withholding process, it appears that some federal agencies have not been fully compliant as they are required to be by statute (42 USC Section 659) and Executive Order 12953. Dear Colleague Letter 98-107 addresses this problem and makes it clear that federal agencies are to accept income withholding orders. They "may not require a certified copy of the child support order, nor may they require that the notice be sent by certified mail, as there is no basis to support such requirements."

License Suspension: According to Action Transmittal 97-10 (pp. 17-19):

- states must have laws permitting the withholding, suspension or restriction of drivers, professional, occupational and recreational licenses of obligors who are in arrears on their support obligations or who fail to respond to subpoenas or warrants issued in paternity or support proceedings unless they obtain a federal waiver from one or more of these requirements. Failure to enact such laws (e.g., failure to enact some procedure for withholding or suspending recreational licenses) could result in a determination that the state does not have an approvable IV-D plan. This, in turn, could trigger a IV-D sanction. See REQUIREMENT THAT THE STATE OPERATES A CHILD SUPPORT PROGRAM, *supra.*

- such laws need not cover *all* professional, occupational and recreational licenses. Since the federal statute is silent on this, *states may determine which professional, occupational or recreational licenses* are to be included.

- so long as some state agency is responsible for implementing the license suspension procedures, the federal law is satisfied. The state IV-D agency need not be the administering agency.

- license revocation procedures need not be universal. The state may use them only in "appropriate cases" if it chooses.

Liens: According to Action Transmittal 97-10 (p. 22), PRWORA requires that states have laws

under which liens arise by operation of law when an obligor is in arrears. States have great latitude in determining what procedures they will follow and what notice they will give in implementing their law. Consistent with this philosophy, the existing federal regulation on liens (45 CFR Section 303.103) has been deleted.64 Fed. Reg. 6252 (February 9, 1999).

Expedited Procedures: Action Transmittal 97-10 (p.9) provided initial guidance in this area. This has now been supplemented by Interim Final regulation 45 CFR Section 303.101 (64 *Fed. Reg.* 6252, February 9, 1999). This guidance provides as follows:

- under 42 USC Section 666, state law must give the IV-D agency authority to take certain actions administratively and without the need to obtain an order from any other judicial or administrative body. (This includes ordering genetic tests in contested paternity cases, subpoenaing financial information, obtaining access to a variety of public and private records, changing the payee on a support order, ordering income withholding, and securing assets when an obligor is in arrears.) Unless a state obtains a waiver of these requirements, it must adopt them. Waivers will not be granted simply because a state's existing judicial or administrative process system processes cases within federal time frames.

- a new definition of “expedited process” is provided. The definition now includes the IVD agency procedures described above.

- in addition to their use in establishing paternity and establishing/enforcing support orders, expedited processes are to be used –where appropriate--in modifying support orders.

- states can provide whatever due process they wish. If they wish their IV-D agency to provide pre-deprivation notice and a hearing before taking action that is acceptable.

- the requirement that states have written procedures for ensuring the qualifications of presiding officers has been deleted.

Financial Institution Data Matches: Action Transmittal 98-07 deals with the basic Financial Institution (FI) data match program as follows:

- states must enter into an agreement with *every* financial institution (FI) doing business in the state which maintains "accounts" to participate in the quarterly data match program. If there is a banking association or similar entity authorized to act as an agent for several individual FIs, then the state may enter one agreement with that agent on behalf of the larger group.

- "financial institutions" include depository institutions, federal and state credit unions, benefit associations, insurance companies, safe deposit companies, money market mutual funds and any other entities that provide financial services and maintain individual accounts. "Accounts" are defined to include demand deposit, time deposit, checking, savings, negotiable withdrawal order, and money market mutual fund accounts.

- there is no standardized form for such an agreement but the OCSE Financial Institution

Work Group will be developing sample agreements which states can use if they wish.[43] In the meantime, it is suggested that the agreements cover 1)the specific information to be reported; 2) the time frames and procedures to be used in conducting the data match and reporting the information; and 3) any data formats to be used.

- states which do not enter into agreements with all financial institutions face the loss of IVD funds and possibly TANF funds. A state might also be penalized if FIs do not live up to their agreements and conduct the data matches. For this reason, states may want to include serious penalties in their state law for FIs which refuse to enter into data match agreements or violate the terms of those agreements.

- states can set a minimum threshold on the amount of arrears which must be owed before a case will be sent for FI match.

- states may conduct matches more frequently if they wish to do so, but they *must* perform a match each quarter for every parent who owes arrears in an amount which exceeds the states threshold amount. While OCSE does not require this, it suggests that all state use the same time frame for submitting requests to FIs and that--based on discussions with financial institutions-- those dates be the 15th of January, April, July and October. OCSE also suggests that FIs be given 45 days to respond to match requests.

- a state may supply the FI with the name and social security/ taxpayer identification number of each delinquent obligor and the financial institution would then match that list against its list of depositors. If it finds a match, then the FI must provide the state with the name, record address, social security/taxpayer identification number, and other identifying information. Conversely, the FI may send the IVD agency that same information on all of its depositors and the IVD agency would run that list against its list of delinquent obligors. Practice in this regard need not be uniform: a state could allow some financial institutions to send a list of depositors to IVD while requiring others to run the IVD list against the list of depositors.

- states will have to decide whether to pay fees to FIs for participating in the match program and what those fees will be. OCSE and the FI Work Group will develop materials for states to use in determining fees. FFP is available for the cost of reasonable fees.

- just because a match is made does not obligate the state to levy on the asset. A state can decide not to act if the amount in the account is too small, for example. A state could also decide to levy against certain types of accounts but not others or to leave a minimum balance in an account and not take the whole thing. This would all be governed by state lien law.

- state law must address the issue of who is responsible to pay the FI any fee or penalty which is assessed when a levy results in an account going below the minimum balance required by the FI.

[43] See, Dear Colleague Letter 99-15 (February 17,1999) for a generic agreement model.

To assist states with this process, OCSE has developed brochures and presentations. See, Dear Colleague Letters 99-28 (March 16, 1999) and 99-38 (April 14, 1999).

Action Transmittal 98-29 (October 13, 1998) addresses issues which arise with multistate financial institutions. It makes clear that the federal Office of Child Support Enforcement (OCSE) does not have direct authority to enter into agreements with multistate financial institutions on behalf of a state. Rather, each state will have to grant OCSE authority to act as its agent to negotiate and enter agreements with multistate financial institutions. Once this is done, OCSE can enter an agreement under which the multistate financial institution provides the information to OCSE and OCSE distributes it to the states. However, it will remain the state's responsibility to ensure compliance by the financial institutions. In addition, states will be able to draw down 66 percent FFP for expenses related to the development and administration of their financial institution data match programs, including their multistate program.

Federal Guidance on the Use of Federal Enforcement Techniques: The federal income tax offset program has long been a major source of child support collections. In this program, the Internal Revenue Service (IRS) seizes any federal income tax refund owed to a qualifying obligor who is delinquent in his/her child support obligations.[44] The IRS has also operated a full-collection service for qualifying cases. In this service, the IRS uses all its enforcement tools to collect delinquent support. Recently, offset of other federal payments and passport revocation have been added to the list of federal enforcement techniques.

On January 1, 1999, the federal income tax refund intercept program was transferred from the IRS to the Treasury's Financial Management Services (FMS)[45] and merged with the administrative offset program. FMS is now capable of administratively offsetting federal retirement payments, federal vendor payments and miscellaneous payments (e.g., expense reimbursements, travel payments), and federal tax refunds to pay child support debts. Soon the system will also be able to offset federal salary payments.[46] However, some payments are excluded from offset. According to Action Transmittal 98-17 (July 6, 1998), not subject to administrative offset are Social Security, Black Lung, Railroad Retirement and benefit payments from the Department of Veteran's Affairs.

This AT also says that states will be required to submit to FMS all cases which are eligible for tax offset and passport revocation[47]; state can decide whether they want to submit cases for administrative offset. However, if a case is submitted for federal tax offset it will be deemed eligible for administrative offset as well.

Action Transmittal 98-17 also sets up a system under which states need only report a case once. Thereafter, the information can be updated and new cases can be added but ongoing cases will not

[44] If the family receives public assistance the amount owed must be at least $25. In non-public assistance cases, the amount owed must be at least $500. Proposed 31 CFR Section 285 (c).

[45] For more on this, see also proposed federal regulations published at 63 *Fed. Reg*. 41688-41693 (August 4, 1998) and provided to the states in Dear Colleague Letter 98-86 on August 21, 1998.

[46] According to the AT 98-17, up to 50% of the obligors salary will be amenable to offset in this program.

[47] The Action Transmittal indicates that--at this time-- the State Department is *denying* passports to those who are $5,000 or more in arrears on their support obligations. Procedures for *restricting or revoking* passports of delinquent obligors have not yet been put in place.

have to be resubmitted. Moreover, states will be able to request all three remedies at once and --if they wish-- they can also request that the case be submitted for multistate financial institution data match.

If an offset occurs, FMS will notify the noncustodial parent, the custodial parent, and the state. In addition to the fact that an offset has occurred, FMS will inform the custodial parent and the state the source of the offset funds. This is important because (as noted in the section on DISTRIBUTION above), the source of the funds determines whether the state or the custodial parent has first claim on the money. If the collection was made through a federal tax offset, once it reaches the state, it must be disbursed within 30 days to the TANF, IVE or Medicaid agency if it is owed to them. If the funds are owed to a non-public assistance family, they may be held for up to six months if the offset was on a joint return. This gives the joint filer time to claim any share of the refund owed to her/him.

Action Transmittal 98-17 also contains an extensive discussion of the pre-offset notice and complaint procedures which must be followed.

As to passport denial, Dear Colleague Letter 99-41 (April 20, 1999) describes the procedures to be followed.

Interstate Issues

Overview of the Law: The passage of PRWORA required the Secretary of HHS develop a number of new interstate child support enforcement forms. Specifically mandated were forms for interstate income withholding, administrative subpoenas, and imposition of liens. 42 USC Section 652 (a)(11). In addition, PRWORA required states to use these forms after March 1, 1997. 42 USC Section 654(9)(E).

While not specified in the statute, the creation of State Directories of New Hires (SDNH) necessitated the development of a form for multi-state employers to use in designating the state to which they would provide their new hire information. The UIFSA mandate also necessitated new forms to insure uniform practice under the new law.

PRWORA, as amended by the BBA and CSPIA, also required states to develop procedures for high volume, automated Administrative Enforcement in Interstate cases (AEI). 42 USC Section 666(a)(14). Under the current version of this section of the statute, states are to use automatic data processing to search their data bases (e.g. license records, Employment Service data, the State New Hire Registry) to locate and seize the assets of delinquent obligors when requested to do so by other states. The limitation on this obligation is that a state does not have to do more than it would in its own (intrastate) cases.

Finally, PRWORA required states to adopt the Uniform Interstate Family Support Act (UIFSA). 42 USC Section 666(f).By implication, the old interstate law called the Uniform Reciprocal Enforcement of Support Act (URESA) had to be repealed.

Federal Forms: Action Transmittal 97-06 (May 1997) promulgated the standardized interstate child support enforcement forms along with a glossary of terms and instructions for using the forms. These forms reflect the switch from URESA to UIFSA and should greatly improve transmission of documents and information in interstate cases.

Action Transmittal 97-03 was issued in March 1997 and was superseded by OCSE AT-97-19 in November of that year. This Action Transmittal promulgates the forms to be used in interstate cases for issuing administrative subpoenas and imposing liens.

Finally, Action Transmittal 98-03, issued January 27, 1998, contains the federally approved standardized income withholding form required by PRWORA. This form should be useful in expediting direct income withholding in interstate cases as envisioned by UIFSA.

Federal Guidance on AEI: According to Action Transmittal 98-05 issued March 2, 1998, OCSE does not plan to issue regulations in this area. Rather, states should follow the plain language of the statute and what guidance is provided within this AT. Unfortunately, the statute was amended after the issuance of this AT, so its current validity is not clear. Nonetheless, much of what is in the AT

seems applicable under the revised statutory language, so to the extent it is helpful, the following guidance could be followed:

- a state seeking AEI is the "requesting state" and the state being asked to conduct the match and seize any assets found is the "assisting state".

- the request constitutes a certification by the requesting state of the amount of the support delinquency owed and that it has afforded the obligor due process as defined under its law.

- requests can be submitted electronically, by tape, or by other means. It is expected that in the near future, states will use the new Connect:Direct technology to submit their requests.

- when it receives a request, the assisting state is **not** to open a case or include the request in its State Case Registry. Rather, it is to incorporate the information from the requesting state into its automated matching process for its own cases. (Since a case is never opened, it need not be closed. Therefore, the usual case closure criteria do not apply.)

- the same time frame for action that is applicable in intrastate cases is applicable in AEI cases.

- if assets are identified, they are to be seized and transmitted to the IVD agency of the assisting state. The assisting state will record the collection and forward the assets to the requesting state.

- if the obligor wishes to contest the seizure of the asset, the contest takes place in the state where the asset is located. The requesting state would have to promptly provide any information needed to the assisting state.

- if a match uncovers locate information or an asset that is suitable for *ongoing* enforcement action, the assisting state must promptly notify the requesting state. This would include information about an employer which might lead to income withholding, the fact that the obligor was entitled to lottery installment payments, or the existence of Unemployment Compensation Insurance benefits. The requesting state could then pursue direct income withholding (if appropriate) or file the necessary forms and turn the case into an interstate case. The assisting state would then include the case in its caseload and take enforcement action.

- the assisting state may--but is not required to-- provide the requesting state with negative match results.

- states must keep records of the number of AEI requests they receive, the number of cases in which a collection was made, and the total amount collected.

- when an asset is seized, for incentive payment purposes, both the requesting state and the assisting state can include the amount in their collections.

Beyond this, OCSE will provide neither standardized criteria for submitting requests from one

state to another nor standardized forms for doing so. As a result, each state will have to consult with every other state to which it wishes to make AEI requests and determine what that state's criteria for submission are, what its capacity to handle such requests is, and what forms or data elements the assisting state needs in order to process a request.

AT 98-05 does offer some non-binding suggestions as follows:

- the law does not specify how many cases can be submitted to another state or how frequently they can be submitted. States should develop a "rational basis" for submitting AEI requests to other states. For example, AEI requests should be sent to an assisting state only when the requesting state *knows* that the obligor has assets in the assisting state or when, based on geographic proximity, past contact or an FPLS match there is *reason to believe* the obligor has assets in the assisting state.

- the requesting state must also take into account the standards developed by the assisting state to determine when it will do a match on its own (since the assisting state only has to process cases which it would process if they were intrastate). Thus, AEI requests should be sent to another state only if they meet that state's standards in areas such as the arrears threshold or date of last payment

- requesting states should also take into account the degree of computerization in the assisting state. OCSE notes that "many State systems do not have the ability to successfully integrate large numbers of AEI cases into their IVD data bases without it being disruptive or extremely time consuming".

- the following data elements would be useful to include in an AEI request to another state: name, address, date of birth, social security number, requesting state's case ID number, certified amount of arrears, monthly support obligation, date of last payment, and FIPS code. Also helpful would be gender, place of birth, and custodial parent's name.

OCSE also expects that the greatest use of AEI will occur once states have their Financial Institution (FI) match program in place. This raises an additional problem of cost. State laws may allow financial institutions to impose fees on the IVD agency for data matching. If that is the case, the assisting state may require the requesting state to pay the applicable fees. Moreover-- because of the potential problem to financial institutions if there is not a standardized format for FI match requests-- OCSE does intend to work with states and financial institutions to develop such a standardized format for FI matches.

Federal Guidance on New Hire Reporting in Interstate Cases: By October 1, 1998, each state was required to have in place a State Directory of New Hires. (See Section on NEW HIRE DIRECTORIES above for details.) Multi state employers have the option of reporting to each state in which they have employees or designating a single state to which they will report. Action Transmittal 98-06 (March 2, 1998) contains several sections dealing with multi state employer issues. Of particular note are:

- the law of the state to which the employer has chosen to report governs what information has to be reported. For example, if State A goes beyond federal law and requires the

reporting of independent contractors but State B does not require such reporting and the employer chooses to report to State B, then the employer need not report its independent contractors.

- a parent company with subsidiaries can be a multi state employer if it has an employer/employee relationship with employees of its subsidiaries. It can, therefore, designate a single state to report to for New Hire reporting purposes. If it does so, all income withholding notices will be sent to the parent company's W-4 address. If it does not wish to handle all income withholding orders, then the parent company should designate an alternate address for withholding purposes in its report.

- FFP is not available to defray costs incurred by states which elect to pay employers for submitting new hire reports. Thus, if a Multi state employer selects a given state to report its new hires to, and that state pays employers for submitting the information, the state will have to absorb the cost.

Federal Guidance on UIFSA: According to Action Transmittal 97-10, the July 18, 1996-version of UIFSA is the one states should use for purposes of drafting their own state laws. No variations of or omissions from this document are acceptable.

Interim Final regulation 45 CFR Section 303.7 (64 *Fed. Reg*. 6250, February 9, 1999) also makes adjustments in the old regulation to reflect the fact that all states are now using UIFSA and the mandated federally-approved interstate forms.

Federal Guidance on Direct Income Withholding in Interstate Cases: One major difference between URESA and UIFSA is that UIFSA allows direct income withholding, i.e., one state can send an income withholding order directly to an employer in another state and the employer in the other state must honor that order. As a result, there are now two distinct ways of enforcing an interstate income withholding order: the traditional two-state method (where the case is sent from one state's IVD agency to the state agency of another state for enforcement) and UIFSA's one-state direct withholding method.

In recognition of this, 45 CFR Section 303.100 has been revised. (64 *Fed. Reg.* 6251-6252, February 9, 1999). Revised 45 CFR Section 303.100(f)(3) covers the traditional two-state process and is similar to the old regulation 45 CFR Section 303.100(h). New 45 CFR Section 303.100(f)(2) covers the direct withholding process. Of particular note, it describes how to determine the 1) correct processing fees; 2) withholding limits; 3) time periods for implementing withholding and remitting payments; 4) priorities for withholding; and 5) allocation of payments when the employee has obligations to more than one family in cases where the direct withholding method is being used. In all these situations, the law of the employee's work state applies.

The regulation does not provide guidance for dealing with an obligor's challenge to a direct income withholding order. UIFSA requires that the contest be held in the employer's state. However, that state may have none of the necessary paperwork. According to Action Transmittal 97-10, states can deal with this problem in one of several ways including: 1) have the obligor register the income withholding order in the state of his principal employment; 2) have the

initiating state register the order in the employer state; and 3) withdraw the direct income withholding order and initiate a two-state action.

Simplified Review and Adjustment of Orders

Overview of the Law: Under PRWORA, states must review and adjust support orders at least once every three years upon the request of either parent. (If the family has assigned its support rights in order to receive TANF-funded assistance, the state may also request such a triennial review.) The requesting party need not show that there has been a substantial change in circumstances. In making the adjustment, states have the option to use their child support guidelines or a cost-of-living adjustment. 42 USC Section 666(a)(10)(A). Parents must be notified of their right to such a review at least once every three years. Id., Section 666(a)(10)(C).

In addition, states are required to provide notice to all those receiving services from the in IVD agency whenever there is a proceeding scheduled at which a support order might be modified. They are also required to provide --within 14 days of the date of issuance--a copy of any order modifying the support amount/determining that modification is not in order. 42 USC Section 654(12).

Federal Guidance: Action Transmittal 97-10 (pp. 28-31) provided initial guidance. This was supplemented by Interim Final regulations , 45 CFR Section 303.8 (64 *Fed. Reg*. 6250, February 9,1999). This guidance provides as follows:

- a custodial parent, a noncustodial parent and any other person/entity who has standing to request an adjustment may ask for a triennial review.

- at least once every three years, each parent must be notified of this right. The notice must tell the parent when, where and how to request a review. Within 180 days of receiving the request or locating the non-requesting parent (whichever occurs last) the state must conduct the review and adjust the order/determine that an adjustment is not warranted.

- a IVD agency must conduct a triennial review only if one of the parents makes a request or--if there is a IV-A child support assignment--the IV-D agency decides a review is called for. In IV-A assignment cases, the IV-D agency is free to choose which cases it wants to review. It need not seek review in every case.

C the review must involve application of the state's child support guidelines or the use of a cost-of-living adjustment. The state with legal authority to adjust the order is the state which should conduct the review/adjustment process. The laws and procedures (including the child support guidelines) of the reviewing state are to be applied.

C if the review reveals that only a small adjustment is called for, the IVD agency may be able to decline to pursue the adjustment. The state can establish reasonable quantitative standards for use in deciding whether an inconsistency between the current support award and the amount determined as a result of the review is large enough to warrant actually

seeking modification of the order. The standards can be a fixed dollar amount (e.g., at least $5 a month) or a percentage increase (e.g., there mist be at least a 5% decrease in the order) or both.

C the review and adjustment process must include a way for parents to challenge any proposed adjustment as well as a way to challenge any decision that an adjustment is not warranted.

C in addition to the triennial review, the IVD agency can provide modification services more frequently if there has been a "substantial change in circumstances." The burden is on the party seeking review to demonstrate that there has been a "substantial change in circumstances" as defined by the state. This policy may be in a statute, a regulation, or a court rule.

C in general, the state is free to define "substantial change in circumstances" as it wishes (e.g., the modification must result in a 20% or more change in the amount ordered). The one limitation on this is that the need to provide for the child’s health care needs must be grounds to petition for an adjustment of an order, even if an adjustment to the cash support is not sought or warranted.

Medical Support Enforcement

Overview of the Law: PRWORA, the BBA and CSPIA all made changes in medical support enforcement. The current version of the law requires the Secretary of HHS to issue regulations which require that 1)IVD agencies include medical support in any order that they obtain; and 2) that those agencies enforce medical support orders whenever health care coverage is available to the noncustodial parent at reasonable cost.[48] The regulations are also supposed to address the issue of information exchange between the IVD agency and the Medicaid agency. 42 USC Section 652(f).

The CSPIA also authorizes the creation of a National Medical Support Notice ("Notice"). Once promulgated, this Notice is to be used by all IVD agencies to enforce medical support. All employers--including those with ERISA plans-- are required to honor such Notices. 42 USC Section 666(a)(19)(A). If the IVD agency knows who the noncustodial parent's employer is, it must send the Notice. 42 USC Section 666(a)(19)(B)(i). If the employer is identified through the State New Hire Directory process, the IVD agency must send the Notice to the employer within two days of the date on which the employee is entered in that Directory. 42 USC Section 666(a)(19)(B)(iii). An employer who receives such a Notice must transfer the Notice to its insurer within twenty business days. Id. Section 666(a)(19)(B)(ii). If the employee terminates employment, the employer is required to inform the IVD agency. Id. Section 666(a)(19)(B)(iv).

In 1997, Congress also expanded the availability of publicly subsidized health insurance to children who can not obtain coverage through their parents. Under the Children's Health Insurance Program (CHIP) legislation, states can expand their Medicaid programs, create separate child health programs, or both to cover these children.

Federal Guidance: Interim Final regulations implementing some of these changes were issued at 64 *Fed. Reg*. 6250 (February 9,1999). The major issue addressed by these regulatory changes is whether non-public assistance families have the option to decline medical support enforcement services. Under the revised regulations, and in accordance with the revised law, they do not.[49] 45 CFR Sections 303.30 and 303.31.

As noted above, the CSPIA also authorized the creation of a National Medical Support Notice ("Notice") to be used by all IVD agencies to enforce medical support. A proposed form for this Notice

[48] Federal regulations already define coverage available through employment as available at "reasonable cost". 45 CFR Section 303.31(a)(1).

[49] In the past, non-public assistance families had the right to decide whether they 1) wanted medical support to be included in their support orders; or 2) wished to have an existing medical support order enforced. Recent changes in the law have essentially foreclosed these options: state IVD agencies are now required to both include medical support in *any* orders that they obtain and enforce *all* medical support orders. 42 USC Section 652(f).

was to be published in May 1999 so that there could be broad public comment. Publication has been delayed (in order to provide the National Medical Child Support Working Group also created by CSPIA to have input prior to publication0. Federal Register publication is now anticipated for August 1999.

In the meantime, Action Transmittal 97-10 (p. 14) indicates that when a IVD agency sends its medical support notice to a new employer, the notice transfers coverage from the old employer to the new one. Under federal law, the non-custodial parent need not receive prior notice of the transfer. States are free to provide whatever additional notices to the non-custodial parent they deem necessary.

OCSE has also recognized that many children will not be able to obtain private coverage through their non-custodial parents. A large number of children in the IVD system are in this category but are eligible for coverage under the new CHIP programs. OCSE is encouraging state IVD programs to become involved in CHIP outreach and enrollment activities so that those who do not obtain private coverage can be served by the new CHIP programs. Dear Colleague Letters 97-91 (December 6, 1997) and 98-23 (February 25, 1998) from David Gray Ross, Deputy Director, Office of Child Support Enforcement to All State IVD Directors.

Automation Issues

Overview of the Law: The basic child support program automation requirements are described at 42 USC Section 654(16). One of these requirements is that the state operate a "*statewide* automated data processing and information retrieval system." Additional automation requirements are found at 42 USC Section 654A. This statute calls for a "*single statewide* automated data processing and information retrieval system." This system must be capable of 1) accounting for the use of program funds; 2) maintaining the data necessary to meet reporting requirements; 3) calculating performance indicators; 4) establishing and maintaining a central case registry (a single entity which contains an abstract of every child support order being enforced by the IVD agency and any other orders entered or modified in the state after October 1, 1998); 5) interacting with a central collection and disbursement unit separately established by the state; 6) safeguarding data integrity; 7) matching data with other federal and state data bases; and 8) supporting expedited administrative processes.

The Secretary of HHS--acting through OCSE--has long had *discretionary* authority to waive the state wideness requirement for a state which wanted to use an "alternative system**."** Usually, the "alternative system" involved linking existing, separate, local systems in lieu of creating a new, single, statewide system. The Secretary could grant a waiver if she felt that the alternative system enabled the state to substantially comply with IVD program requirements, meet its paternity establishment goals and other performance measures, and submit complete and reliable data. In addition, the alternative system had to meet all federal certification requirements.[50]

The recently enacted CSPIA changes the waiver process. The new legislation 1) relaxes the criteria for obtaining a waiver of the single, statewide system requirement; and 2) requires the Secretary of HHS to grant waivers to those who meet those relaxed criteria.[51] 42 USC Section 652(d)(3). However, it also imposes some safeguards and requires a state desiring a waiver to absorb some of the cost related to a locally-linked system. (on the financing point see pp.56-57 *infra.*

The Secretary of HHS will continue to have *discretion* to grant a waiver of *any* of the automation requirements so long as the alternate system allows the state to meet its basic program and performance requirements and provides complete and reliable data on such performance to the federal government. The state must also meet the requirements of 42 USC Section 1115(c)(3) or promise to take steps to improve child support performance as part of its waiver package.

If a state seeks a waiver of the single, statewide system requirement and meets the basic requirements described above, then the Secretary will be *obligated* to grant the waiver request if the state can also demonstrate to her satisfaction that the proposed alternate system enables the state

[50] See, 45 C.F.R. 307.5(h). See, also Department of Health and Human Services, AUTOMATED SYSTEMS FOR CHILD SUPPORT ENFORCEMENT: A GUIDE FOR STATES (rev. 1993).

[51] As is discussed below, the CSPIA also changes the funding for locally-linked systems.

to:

- meet all the functional requirements of 42 USC Sections 654(16)and 654A.
- calculate the distribution of collections in accordance with 42 USC Section 657 and properly account for distribution in interstate cases and cases where obligors have support orders for children in different families and/or different states or sub-state jurisdictions.
- maintain one point of contact which provides seamless case processing for *interstate* cases and provides coordinated, automated *intrastate* case management.
- use standardized data elements, forms, and definitions throughout the state.
- process cases as quickly, efficiently and effectively as such cases would be processed through a single statewide system.

42 USC Section 652(d)(3)(A)(i)(I)-(VI).

Federal Guidance on Basic Systems Development: OCSE provided its first AUTOMATED SYSTEMS FOR CHILD SUPPORT ENFORCEMENT: A GUIDE FOR STATES in 1987. This GUIDE was updated in 1993. Action Transmittal 99-06 (March 25, 1999) provides a further update to reflect the automation requirements of PRWORA. The revised GUIDE defines the minimum functionality required of automated systems and establishes the certification criteria OCSE will use to determine whether the states have met the requirements of the Family Support Act of 1988, PRWORA and their implementing regulations.

In addition, Action Transmittal 99-03 (March 16, 1999) provides additional guidance to states in the preparation of APD planning documents. This guidance is in the form of an ADDENDUM to the APD GUIDE.

Federal Guidance on Waivers of the Automation Requirements: Action Transmittal 98-23 (July 31,1998) begins by reiterating the basic statutory requirements for a waiver described above. However, it does add one important detail to the discussion. In addition to meeting the functional requirements of 42 USC Sections 654(16) and 654A, the alternative system must also meet all but four of the functional requirements laid out in OCSE's "Automated Systems for Child Support Enforcement: A Guide for States." (The exceptions take into account that the state will be involved in developing more than one system and will be using duplicative application software.)[52]

The Action Transmittal also highlights which areas OCSE will focus on in deciding whether to grant a waiver request. These include:

[52] This is consistent with the legislative history of the provision. Again, as noted in the House Report accompanying the legislation, "Although the Committee provision...specifies in considerable detail the functions an alternative system must perform, it is not the intent of the Committee that States applying for a waiver from the single Statewide system requirement be subject to all of the requirements appropriate for single Statewide systems." The report then outlines specific requirements in the AUTOMATED SYSTEMS GUIDE, which do not apply to alternative linked systems. H.R. Report 105-422, p. 21.

- whether the alternative system enables the state IVD agency to control, account or and monitor the paternity determination and support collection processes. The alternative system must ensure "coordinated, automated intrastate case management by the IVD agency."

- whether the alternative system eliminates duplicative data entry. The alternative system must be structured so that common data elements are *entered only once.* If a case is entered in one local system and the family moves so that it now resides in an area served by a different local system, the transfer must occur without the need for reentry of the case information. Moreover, updates must be made *automatically to all components of the system*. In other words, if information is updated in one part of the system it must be electronically synchronized so that it is updated in all parts of the system.

- the extent to which all the components are electronically linked and the linkage is transparent to users.

The Action Transmittal notes "The principles of transparent linkage and avoidance of duplicate data entry are essential for a State electing to implement an alternative system configuration. The intent is to ensure that caseworkers using different local systems within the State, as well as child support workers in other States, are not adversely impacted in processing child support cases by the State's decision to implement an alternative system configuration rather than a single, Statewide system."

In addition, to obtain a waiver of the single statewide system requirement, a state must demonstrate that the locally-linked system can be completed in no more time than it would take to complete a single statewide system. 42 USC Section 652(d)(3)(A)(iv)(V). The Action Transmittal makes clear that the state must "demonstrate *convincingly* " that the alternative system will not take longer to complete than a single statewide system. If a state fails to demonstrate this to the Secretary's satisfaction, the waiver request will be denied.

Finally, the state must submit certain financial information to HHS and HHS must determine the accuracy of this information. This financial information includes an estimate of the total cost of developing and completing a single statewide system as well as the cost of maintaining and operating that system for five years. It also includes an estimate of those same costs for the alternative system or systems. 42 USC Section 652(d)(3)(C). On this point, the Action Transmittal notes that OCSE "will scrutinize State's cost estimates very carefully." OCSE will require substantial, detailed documentation for the cost estimates and the methodology used to come up with them.

As described in Action Transmittal 98-23, to obtain a waiver, a state must submit an Advance Planning Document (APD) which meets all of the requirements of the statute (described above), 45 CFR Part 95, and 45 CFR Part 307. OCSE anticipates that most requests will be part of a state's corrective compliance plan[53] and thus must also meet the criteria for such a plan.[54] The

[53] The CSPIA also creates a new penalty system for states which fail to meet their automation obligations. See REQUIREMENT THAT STATES OPERATE A CHILD SUPPORT ENFORCEMENT PROGRAM AND THE

Action Transmittal cautions that if all these conditions are not met, the waiver request will be denied. Moreover, ". . . the State's submission [must] demonstrate *in detail* how the alternative system configuration will satisfy these conditions. Simple assertions that the system will meet these conditions are not sufficient documentation to permit the Secretary to grant a waiver."

The Action Transmittal also notes that, while an approved waiver itself does not have to be periodically renewed, the APD attached to it is subject to all of the APD requirements. This includes regular, periodic reporting, annual/as-needed updating, and prior approval for any changes.

FINANCIAL CONSEQUENCES FOR FAILING TO DO SO, *supra*.

[54] See OCSE Action Transmittal 98-22 (July 31, 1998).

Financial Issues

Overview of the Law: States receive 66 percent federal financial participation (FFP) for the basic costs of their IV-D programs. 42 USC Sections 655(a)(1)(A) and (2)(C).Initially, states also received 90 percent FFP for the automated child support systems required by the Family Support Act of 1988 (FSA). When they missed the 1995 deadline to have those systems in place, Congress extended the deadline but did not provide for this enhanced level of funding. PRWORA restored the 90 percent FFP for costs incurred between October 1, 1995 and September 30, 1997 so that states could complete the automation required under the FSA. 42 USC Section 655(a)(3)(A).

PRWORA also required additional automation efforts including case registries, new hire directories, and central payment and disbursement units. It made federal funds at an 80 percent FFP rate available for this purpose. The amount of federal funds available is capped, however at $400 million. 42 USC Section 655(a)(3)(B).

In addition, as discussed above in the section on CHILD SUPPORT DISTRIBUTION, PRWORA/BBA provided a new "family first" distribution scheme. There was concern that some states might receive less reimbursement for public assistance costs under this scheme than they had in the past. Therefore, the statute contains a "hold harmless" provision . Under this provision, each state is to receive at least as much public assistance reimbursement as it did in fiscal year 1995. 42 USC Section 657(d).

PRWORA also set in place a mechanism for designing a new incentive payment structure. This new structure was developed and enacted into law as part of the CSPIA. The new incentive system will be gradually implemented over three years. Once it is fully implemented, the states will receive incentive payments based on five performance factors: establishing paternity, establishing support orders, collecting current support, collecting arrears, and the program's cost-effectiveness ratio. States will be eligible to receive incentive payments only if they submitted complete and reliable data. The amount available for incentive payments is also now capped. 42 USC Section 658.

Federal Guidance on Basic Program Costs: Interim Final regulations issued at 64 *Fed. Reg*.6252-6253, February 9, 1999) made a number of changes to 45 CFR Part 304. In part these changes reflect the fact that the IVD agency (rather than IVA or Medicaid) is making the child support cooperation determination.

Federal Guidance on Automation Costs*:* OCSE Action Transmittal 96-10 (provided initial guidance on the availability of and limitations on federal financial participation (FFP) for state's automation efforts. This guidance indicates:

C 90 percent FFP is available only for the costs of meeting the Family Support Act

requirements and only for costs included in the state's Advanced Planning Document (APD) as submitted on or before October 1, 1995. Any additional costs incurred as a result of negotiations with contractors or increased labor costs associated with extending the time to complete the system are eligible for the 66 percent FFP rate.

- once a system is operational, it is eligible for funding at the 66 percent FFP rate.

- HHS will publish regulations regarding state allocations of the capped 80 percent FFP funds.[55] States which exceed their 80 percent allocation in implementing these changes will be able to claim 66 percent FFP for the overrun.

- if the state chooses to put its Disbursement Unit and New Hire Directory within the IV-D agency, it can claim 80 percent federal reimbursement for the development costs. If the state chooses an outside entity to perform these functions, then 66 percent funding is available for the basic costs: 80 percent funds are only available only for the costs associated with creating an interface between the outside entity and IV-D.

- 66 percent funding is available for the costs of maintaining records in IV-D and non-IV-D cases required to be in the state case registry.

OCSE Action Transmittal 97-08 (May 14, 1997) deals with one aspect of the transition from the higher (90%) match rate to the lower (80%) one. In it, OCSE recognizes that states may have completed their systems under the Family Support Act requirements and requested a federal review before October 1, 1997. However, the federal review and certification does not take place until after that date. Many states had "hold back" provisions with their computer contractors under which the contractor was not fully paid until federal certification. Thus, payment to the contractors could not be made until after October 1, 1997 when the lowered match rate became effective. To deal with this problem, OCSE agrees that the hold back payments to contractors will be eligible for 90 percent match if :

- the state had an operational statewide comprehensive computerized support enforcement system in place prior to October 1, 1997.

- had requested a Federal Level 2 certification prior to October 1, 1997.

- submitted a request for 90 percent match on the hold back payment to OCSE by August 31, 1997 which explains the rationale behind the request and was signed by the individual responsible for submitting the state's quarterly expenditure reports.

- deposited the 10 percent state share in an escrow account with a third party.

Federal Guidance on Funding for Automated Systems Operated Pursuant to a Waiver: As noted above, CSPIA makes it somewhat easier for states to obtain a waiver of automation

[55] These regulations were issued on August 19,1998 at 63 *Fed. Reg.*44401-44407 and provided to the states in Action Transmittal 98-25. They will be codified at 45 CFR Section 307.31.

requirements. However, if a waiver is approved, a state is eligible for only 66 percent FFP. Moreover, the amount eligible for federal funding is limited to the *lower of* the two cost estimates submitted with the waiver request (the estimate for cost of developing, implementing, maintaining, and operating a single statewide system and the same costs for the alternative system). 42 USC Section 655(a)(1)(D). The latter provision is designed to ensure that "the total federal reimbursement will not exceed the amount the State would have received to build and operate a single Statewide system."[56] So, if the Secretary approves an alternative system which is more costly than a single statewide system, the state will bear additional costs. On the other hand, if a state claims that the alternate system will be less costly than a statewide system, the state will be limited in its claims for reimbursement to the estimated cost of the alternative system.

Action Transmittal 98-23 (July 31, 1998) makes two additional important points. *First,* it emphasizes that if a state incurs costs in excess of the amounts approved in its waiver request, the cost will have to be born entirely by the state. FFP will not be available for such cost overruns. *Second,* a state which anticipates using all of its capped automation funds cannot avoid the cap by delaying implementation of the alternative system until after fiscal year 2001.The limit on FFP is in effect through the date the system is implemented and for an additional five years. "If the development and implementation take longer than originally estimated, the State is still subject to the cap on FFP for five years after the date of implementation and must absorb any additional cost related to the delay. During that period of time, FFP in costs associated with developing, implementing, maintaining and operating the alternative system configuration may not exceed the cap established by OCSE."

Federal Guidance on Hold Harmless Payments*:* As noted above, the federal statute contains a hold harmless provision which assures states that they will obtain a share of the child support collected for public assistance families in an amount equal to what they obtained in Fiscal Year 1995. 42 USC Section 657(d). Action Transmittal 98-10 (March 20, 1998) explains how the hold harmless amount will be calculated:

- to make the comparison, OCSE will use the 1995 fiscal year data contained in the most recent Annual Report to Congress. If adjustments are made to the 1995 data, the adjusted data (not the data reported in the Fiscal Year 1995 Annual Report) will be used.

- the hold harmless payment calculation will be done after the close of the fiscal year. OCSE hopes that the calculation will be completed within 6 months of the end of the fiscal year.

- in making the calculation, OCSE will compare each state's share of child support collections for that fiscal year with the state's Fiscal Year 1995 share. If the current fiscal year's state share is greater than the 1995 state share, there will be no hold harmless payment. If the Fiscal Year 1995 state share was greater than the current fiscal year's state share, the state will be eligible for a hold harmless payment.

This Action Transmittal was followed by Interim Final regulations issued February 9, 1999 at 64 *Fed. Reg* 6252-6253. Revised 45 CFR Section 304.26 begins with an explanation of how the state

[56] H.R. Report 105-422, p. 21.

should calculate the federal share of the support collected and retained as reimbursement for IVA and foster care payments. It goes on to explain that the primary use of the federal share will be to finance any incentive payments owed to the state.45 CFR Section 304.26(b). The remainder of the federal share will be used to fund any hold harmless payments the state can claim. 45 CFR Section 304.26(c). Thus, it is possible–particularly if a state earns substantial incentive payments for its program performance-- that there will be insufficient federal share funds to finance the state's entire hold harmless payment claim. If there is not enough left in the federal share to fully fund the hold harmless payment, the state will receive what remains of the federal share, but nothing more.[57]

[57] Action Transmittal 98-10 had already informed the states that this would be the case.

Case Closure

Overview of the Law: In every state's child support system, there are old and duplicate cases as well as some cases in which there is too little information to proceed. Since 1989, federal regulations have required that IVD agencies have a system for closing such cases. 45 CFR Section 303.11(a). However, to insure that difficult but workable cases were not closed, the federal regulations limited agency discretion, allowing closure in only 12 specific situations. 45 CFR Section 303.11(b). Moreover, if an agency decided to close a case, in most instances. it had to notify the custodial parent in writing of its intent to do so. It also had to give that parent 60 calendar days to provide new information which would make it possible for the IVD agency to work the case. If new information was provided, the case had to remain open. Moreover, if the case was closed and the custodial parent then obtained additional information which could lead to paternity/order establishment or enforcement, then the case had to be reopened. 45 CFR Section 303.11(c). Finally, records of closed cases had to be retained for at least 3 years. 45 CFR Section 303.11(d).

For a variety of reasons, states have sought revision of these regulations to make it easier to close cases. In part, this push was the result of automation: as states were automating their IVD systems, they were trying to clean out their unworkable cases. They felt that the case closure regulations inhibited their ability to do this.

The push for change was also motivated by the adoption of a new child support incentive payment system.[58] Within the next three years, this new system will provide fiscal incentives to states for their success in establishing paternity, establishing support orders, collecting current support, collecting arrears, and cost efficiency. Except for cost efficiency, incentive payments will be calculated by dividing the number of cases in which a service was successfully provided (the numerator) by the number of cases needing that service (the denominator). Thus, it is important to states that the denominator accurately reflect the actual number of cases needing a particular service. State incentive payments will also increase if the denominator is limited to workable cases on which there is enough information to proceed.

In the cost efficiency area, there is also a reason to seek to close difficult cases: the incentive payment is calculated on a cost per case basis. By eliminating costly, hard-to-serve cases, states can improve their cost effectiveness ratio. In other words, agencies which close difficult cases can boost the probability that they will earn larger incentive payments.

Federal Guidance: On March 10, 1999**,** OCSE issued revised regulations on the standards for IVD case closure. 46 *Fed. Reg.* 11,810-11,818**.** The changes became effective on April 9, 1999. The new standards make it much easier for state child support enforcement agencies to close cases, especially when the custodial parent does not have the noncustodial parent's address and Social Security Number (SSN).

[58]The Child Support Performance and Incentive Act of 1998, to be codified at 42 USC Section 658A.

In brief, under the final regulations:

C states continue to have an obligation to have a case closure system.

C all of the current case closure criteria remain in effect. However, as described below, it is easier for IVD agencies to close certain cases. This includes cases where 1) paternity needs to be established but the identity of the father is unknown; 2) the identity of the noncustodial parent is known, but there is insufficient information to locate him/her; and 3) the state is unable to contact the custodial parent and the family is not receiving Temporary Assistance to Needy Families (TANF). It is also now easier to close interstate cases where the initiating state has not followed up with additional information when requested to do so by the responding state.

C the words "absent parent" are replaced with the words"noncustodial parent" in appropriate places throughout the regulation to reflect the fact that not all noncustodial parents are absent.

C similarly, the words "custodial parent" are replaced with the phrase "recipient of services" to reflect the fact that in some paternity and support order modification cases, noncustodial parents (rather than custodial parents) may be the recipients of IVD services.

C there are revised notice requirements for informing recipients of services when the state intends to close their cases. The exact nature of the requirements will vary depending on the reason for case closure.

C IVD records have to be retained for at least 3 years.

In addition to this general framework, the new regulations contain detailed guidance in regard to specific case closure situations.

- *When There is No Current Support Order and Minimal Arrears Are Owed.* In the past, there were two separate provisions allowing closure of cases in which there was no current support order. The first allowed case closure when the child had reached the age of majority, there was no current support order, and arrears owed were less than $500 or were unenforceable under state law. The second allowed case closure under the same circumstances when the child was still a minor. The new regulation combines these two sections into one allowing case closure any time there is no longer a current support order and arrears are either under $500 or unenforceable under state law. When this is the reason for case closure, the family which requested services must be notified in writing 60 days prior to case closure and be given an opportunity to provide information which demonstrates that the case does not meet these criteria and can be worked.

- *Unworkable Paternity Cases.* Revised 45 CFR Section 303.11(b)(3) deals with closure of paternity cases. As under the old regulation, it allows case closure where paternity cannot be established because i) the child is at least 18 and is barred by the statute of limitations from establishing paternity; or ii) the putative father has been excluded from paternity by a

genetic test or court/administrative hearing and no other putative father can be identified; or iii) conception was the result of forcible rape or incest or the child is being placed for adoption. The revised regulations, however, and add a new subsection which allows a case to be closed when the identity of the biological father is unknown and cannot be ascertained after diligent efforts.[59] In addition, if lack of the father's name is invoked as a reason for case closure, the IVD agency[60] must conduct at least one *interview* with the mother. The IVD interview may be face-to-face or it may be conducted by telephone. The latter option is made available to accommodate working parents and those living far away from the IVD agency's office. 64 *Fed. Reg*.11813 (3d. col., bottom) -11814 (1st col., top). If the interview does not produce any further leads, the agency must send the mother written notice that the case will be closed and it must provide her 60 days in which to come up with additional information which could lead to paternity establishment.

- *When There is No Address or Social Security Number for the Noncustodial Parent.* Under the old regulation, states were allowed to close cases when the missing parent could not be located. However, before closing such cases, the state had to make *regular* attempts to locate the missing parent using *multiple sources* for at least *3 years*. Only if those efforts were unsuccessful, could the IVD agency close the case. Moreover, the old regulations did not define "the location of the noncustodial parent", creating the sense that if there was some information about his/her whereabouts, income or assets, the case could not be closed. The revised and renumbered regulation seemingly keeps this basic scheme but it makes two changes which dramatically alter its applicability. *First,* while not contained in the regulation itself, the Response to comments defines "location of the noncustodial parent " to be his/her residence or employment address. 64 *Fed Reg*. 11814 (2d. col., middle). Thus, any case entering (or presently in) the IVD system without a valid home or work address for the noncustodial parent would be amenable to closure under this section even if there is other information available (e.g., location of property, a bank account) which could lead to action on the case. *Second*, IVD cases are divided into two types: those in which there is sufficient information to initiate an automated locate effort and those in which there is not sufficient information to do so. When there is sufficient information to initiate an automated locate, the scheme laid out in the current regulations would be followed: before closing a case, the state would have to make *diligent* efforts,[61] using multiple sources, for at

[59]The regulation does not define "identity" but the Response to Comments says "identity" means "name". Thus, a case may be closed under this criteria only when the name of the father is unknown. 64 *Fed. Reg*.11814 (1st col., bottom). The regulation also does not define "diligent efforts". However, the Response to Comments suggests that if the state has any information, it must make a serious and meaningful attempt to obtain the father's name using that information. For example, if the mother provides a last known address or name of an employer for the father, the agency must pursue that lead. 64 *Fed. Reg*.11814 (2d col., middle)

[60] The IVD agency can contract with another agency to do the interview on its behalf. In the absence of such a contract, another agency (e.g., the TANF or Medicaid) agency would not be sufficient. 64 *Fed. Reg*. 11813 (2d. col., bottom)

[61]Diligent efforts are those meeting the requirements of 45 CFR Section 303.3 which includes using all appropriate state locate sources, the Federal parent Locate Service (FPLS), and other state locate sources. If the initial attempt is unsuccessful, repeat efforts must be made quarterly or whenever new information which might aid in locating the missing parent becomes available. 64 *Fed. Reg*. 11815 (1st col., middle)

least 3 years.

However, in cases in which there is insufficient information to initiate an automated locate, [62]the state would only have to make such efforts for 1 year before closing the case. When the state wants to close a case because automated locate is not possible and one year has passed, it must notify the family in writing. The family then has 60 days to supply the SSN and keep the case open. If it does not supply the information (or something that would lead to the SSN), the case can be closed.

- *When the Family Receiving Services Loses Touch With the IVD Agency.* The revised regulation also alters the ability of states to close cases when they cannot get in touch with the family receiving services. (This can happen when a custodial parent moves and does not immediately inform the IVD agency of her/his new address.) The old regulation allowed states to close non-AFDC cases when it **could not contact** the custodial parent within a 30 calendar day period despite attempts by phone and at least one certified letter. 45 CFR Section 303.11(b)(11). As amended and renumbered 45 CFR Section 303.11(b)(10), allows non-IVA cases to be closed if the IVD agency is unable to contact the family receiving services for 60 calendar days despite an attempt by at least one first class letter to the family's last known address.[63] At the end of the 60 day period, the agency will have to send another first class letter to the family informing them that their case is going to be closed.[64] If there is no response to that second letter, after 60 days, the IVD agency can close the case. If contact is re-established during the second 60 day period, the case cannot be closed.

- *Interstate Cases Where the Initiating State is Not Cooperating with the Receiving State***.** A new 45 CFR Section 303.11(b)(12) is created to allow closure of interstate cases when the initiating state fails to take an action which is essential for the next step in providing services**.** For example, a responding state might request that the initiating state provide it with a copy of the payment records in a case so that arrears can be documented and then enforced. If the initiating state does not provide the documents, and, as a result, the responding state is unable to act, then the responding state can close the case. When a case is proposed to be closed for this reason, the affected family does not have to be provided with written notice, but the initiating state does. If, in the next 60 days, the initiating state provides the necessary information, the case cannot be closed.

- *Public Assistance Cases In Which The State Has Decided Not To Pursue Support.* Families receiving public assistance are generally required to cooperate with the state in

[62]The Response to Comments explains that "sufficient information to conduct an automated locate effort" means the missing person's name and Social Security number. 64 *Fed. Reg.* 11814 (2d col., bottom).This narrow definition could be problematic. For parents and caretakers lacking a valid Social Security Number (SSN) for the missing parent . While this will change somewhat over time as more marriage, birth, and divorce records do contain SSNs for both parties, it will remain a problem in cases where there are no such documents (e.g., contested paternities) and in situations where the missing parent has used an invalid SSN .

[63] The 60 day period begins on the date that the letter is mailed to the family. 64 *Fed. Reg*. 11815 (3d col., middle)

[64] For a discussion of the applicability of both notice provisions, see 64 *Fed. Reg*. 11815 (2d col., bottom).

pursuing child support. For many years, federal law has allowed states to grant "good cause" exceptions to these cooperation requirements. When such exceptions are granted (primarily in domestic violence cases), states can either proceed without the parent's cooperation or (if there is a risk of harm to the parents or their children) drop the matter.

In the latter situation, the case closure regulations have always allowed the IVD agency to close the child support case (if one has been opened). The revised and renumbered regulation retains this basic framework. However, in recognition of changes made by PRWORA, the new regulation acknowledges 1) the various agencies (including the food stamp agency and IVD agency itself) which may be involved in granting exceptions to the cooperation requirement; and 2) the fact that some states grant "other exceptions" (beyond traditional "good cause") to the cooperation requirement. When a child support case is closed under this provision of the regulations, the family does not have to be notified. Presumably this is because the agency granting the exemption and making the decision not to proceed would have already informed the family of this decision.

- *Re-application for Services after Case Closure.* If a case is closed pursuant to one of the 12 allowable reasons, the family may reapply for services if there is a change in circumstances (e.g., new information becomes available). However, the family will have to complete a new application and pay any application fee the state assesses.

Appendix A

SUBJECT MATTER OF ACTION TRANSMITTALS AND REGULATIONS ISSUED AS OF JUNE 1, 1999

AT 97-01	CALCULATION OF THE FEDERAL SHARE ON COLLECTIONS MADE IN FOSTER CARE CASES.
AT 97-02	INSTRUCTIONS FOR REQUESTING A WAIVER OF THE MANDATORY LAWS AND PROCEDURES REQUIRED BY 42 USC SECTION 666
AT 97-03	INTERSTATE SUBPOENA AND LIEN FORMS SUPERSEDED BY AT 97-17)
AT 97-04	NEW HIRE DIRECTORIES
AT 97-05	IVD PLAN DISAPPROVAL
AT 97-06	UIFSA FORMS PACKET
AT 97-07	INSTRUCTIONS FOR REQUESTING AN EXEMPTION FROM CERTAIN ASPECTS OF THE STATE DISBURSEMENT UNIT REQUIREMENT
AT 97-08	REDUCTION IN FFP FOR ADP SYSTEMS
AT 97-09	REVISIONS IN THE IVD PLAN PREPRINT
AT 97-10	MISCELLANEOUS QUESTIONS AND ANSWERS ABOUT PRWORA
AT 97-11	PATERNITY ACKNOWLEDGMENT DATA ELEMENTS
AT 97-12	STATE PLAN PAGE RE NEW HIRE DIRECTORY
AT 97-13	STATE COLLECTION AND DISBURSEMENT UNIT
AT 97-14	OMB APPROVAL OF FINANCIAL REPORTING FORM
AT 97-15	NEW HIRE REPORTING FOR MULTI-STATE EMPLOYERS SUPERSEDED)
AT 97-16	NEW HIRE REPORTING FOR MULTI-STATE EMPLOYERS
AT 97-17	DISTRIBUTION OF SUPPORT COLLECTIONS

AT 97-18	PROPOSED RULES FOR REPORTING INFORMATION TO NATIONAL NEW HIRE DIRECTORY
AT 97-19	ADMINISTRATIVE SUBPOENA AND LIEN FORMS FOR INTERSTATE CASES
AT 98-01	PROPOSED RULES FOR THE VOLUNTARY PATERNITY ESTABLISHMENT PROCESS
AT 98-02	REQUIRED DATA ELEMENTS FOR PATERNITY ACKNOWLEDGMENTS
AT 98-03	STANDARDIZED INCOME WITHHOLDING FORM
AT 98-04	PROPOSED CASE CLOSURE REGULATIONS
AT 98-05	HIGH-VOLUME, AUTOMATED ADMINISTRATIVE ENFORCEMENT IN INTERSTATE CASES
AT 98-06	NEW HIRE DIRECTORIES
AT 98-O7	FINANCIAL INSTITUTION DATA MATCH REQUIREMENTS
AT 98-08	STATE AND FEDERAL CASE REGISTRIES
AT 98-09	PROPOSED REGULATIONS ON ADP FUNDING
AT 98-10	IMPLEMENTATION OF HOLD HARMLESS PROVISION
AT 98-11	PROPOSED REGULATIONS ON ADP REQUIREMENTS
AT 98-12	ANNUAL PERFORMANCE ASSESSMENT
AT 98-13	PROPOSED CHANGES IN THE AUTOMATED SYSTEMS GUIDE TO REFLECT CHANGES IN THE LAW AND THE PROPOSED REGULATIONS. SEE AT 98-11.
AT 98-14	NA
AT 98-15	FINANCIAL DISTRIBUTION TEST DECK
AT 98-16	REVISIONS TO STATE PLAN PRE-PRINT PAGES

AT 98-17	INSTRUCTIONS FOR SUBMITTING REQUESTS FOR FEDERAL TAX INTERCEPT, ADMINISTRATIVE OFFSET, PASSPORT REVOCATION AND FINANCIAL INSTITUTION DATA MATCH IN INTERSTATE CASES.
AT 98-18	FINAL REGULATION RE STATE SUBMISSION OF QUARTERLY WAGE AND UNEMPLOYMENT COMPENSATION DATA TO NATIONAL DIRECTORY OF NEW HIRES.
AT 98-19	NA
AT 98-20	INSTRUCTIONS FOR COMPLETING ANNUAL DATA REPORT OCSE-157.
AT 98-21	COOPERATIVE AGREEMENTS BETWEEN INDIAN TRIBES AND STATE IVD AGENCIES.
AT 98-22	IMPLEMENTATION OF ALTERNATIVE PENALTY PROVISIONS CONTAINED IN THE CHILD SUPPORT PERFORMANCE AND INCENTIVE ACT OF 1998.
AT 98-23	PROCEDURE FOR REQUESTING A WAIVER TO IMPLEMENT AN ALTERNATIVE AUTOMATED SYSTEM CONFIGURATION.
AT 98-24	IMPLEMENTATION OF CHILD SUPPORT DISTRIBUTION REQUIREMENTS.
AT 98-25	ALLOCATION OF 80 %FUNDING FOR AUTOMATED SYSTEMS.
AT 98-26	FINAL REGULATIONS ON AUTOMATED SYSTEMS.
AT 98-27	PLACEMENT OF FAMILY VIOLENCE INDICATOR
AT 98-28	
AT 98-29	FINANCIAL INSTITUTION DATA MATCH Q &A

AT 98-30	INTERSTATE CASE PROCESSING /UIFSA
AT 99-O1	PRWORA CONFORMING REGULATIONS
AT 99-02	PATERNITY ESTABLISHMENT REGULATIONS
AT 99-03	ADDENDUM TO THE STATE SYSTEMS APD
AT 99-04	CASE CLOSURE REGULATIONS
AT 99-05	STATE AND NATIONAL NEW HIRE DIRECTORY Q & A
AT 99-06	AUTOMATED SYSTEMS GUIDE (REV. APRIL 1999)
AT 99-07	ACCESS AND VISITATION PROGRAMS