NCCSD
National Council of Child Support Directors

TO: Office of Child Support Enforcement

FROM: National Council of Child Support Directors

DATE: September 30, 2020

RE: Draft Action Transmittal regarding intergovernmental case processing

Thank you for the opportunity to make a high-level review of the draft Action Transmittal (AT) and offer these comments. Intergovernmental cases make up a significant portion of state IV-D caseloads, and business processes in intergovernmental cases are often supported by complicated computer programming that is not easily changed. Thus, it is especially important for regulatory changes and guidance in this area to be well-informed and aware of the implications for states.

Roughly 30 states participated in NCCSD's review of the draft AT. The following comments reflect the collective thoughts of the child support professionals who participated in the review, but not necessarily all 54 states and territories who belong to NCCSD. It is not NCCSD's role to resolve disagreements among states and present a unanimous national recommendation to OCSE on a given topic, but the comments below reflect a consensus of the participating states on the draft AT.

States generally prefer less regulation and more flexibility. Nevertheless, intergovernmental case processing is an area where additional rulemaking appears needed to clarify state responsibilities and bring greater consistency and reliability to intergovernmental processes. This includes revisiting a few decisions made by OCSE in the previous intergovernmental rule. However, the states reviewing the draft AT agree that an AT is not the appropriate method to promulgate new or changed requirements for states.

The discussions on the draft AT have confirmed the value of further work in this area, and NCCSD will continue working on recommendations to OCSE for a future intergovernmental rulemaking.

UIFSA (General)

2: States understand the answer in the draft AT to initially distinguish among situations where application of the procedure set forth in UIFSA section 207, determination of controlling order, is appropriate because multiple valid orders exist, with situations where a determination of validity is appropriate (when there are multiple orders but the

validity of at least one order is at issue). As the answer develops, however, it seems to conflate the ideas. Specifically, after providing examples of how to proceed with a validity determination, the answer concludes, "The end goal is one controlling current support order." However, the end goal of a validity determination is to vacate or declare void the invalid order. NCCSD asks that this sentence be reconsidered to prevent confusion. In the alternative, if the AT is suggesting application of section 207 is appropriately applied to validity determinations, that should be clarified.

States feel the suggested approaches outlined in the draft AT to vacate an invalid order entered in another state are not practical. The first suggested approach involves a state agency filing a motion in another state, requesting the court in that state vacate its order. This is problematic, since IV-D attorneys representing the agency in State A are often not licensed in State B (where the invalid order was issued), nor are they likely to be familiar with that state's laws, court rules, or civil procedure. States urge OCSE to encourage the agency in the state that issued the invalid order to take steps to vacate it whenever possible. If the threshold question of validity is not at odds among the states (i.e., the states agree a particular order is invalid), the agency in the state that issued the invalid order is more properly positioned to take steps to vacate the order.

The second suggested approach involves an agency asking the court in its own state to rule on the validity of another state's order if the tribunal has jurisdiction over both parties. This further calls into question whether it is OCSE's position that application of section 207 is to be applied to determinations of validity. If that is not OCSE's position, states question what legal authority allows for a state to deny full faith and credit to the order of another state, and instead declare the order invalid or void.

States further suggest the answer be expanded to provide guidance with regard to enforcement of child support pending the validity determination.

Choice of Law

3: One state requested that the fifth paragraph in the answer to this question reference UIFSA section 604(c).

4: States agree with this answer and interpretation of UIFSA section 303(1) and (2), concluding the responding state follow local law in the establishment of the child support order. However, the draft AT does not address whether a responding state's refusal to enforce a support order after the parent's parental rights were terminated would be supported by UIFSA, if the initiating state has issued a support order and the initiating state's law provides the obligation to support their child continues after the parent's parental rights are terminated. The draft AT should be expanded to indicate that a responding state's refusal to enforce in this situation would not be supported by UIFSA and run afoul the choice of law provisions outlined in section 604(a).

Establishment of Parentage and Support

6: States are concerned this answer assumes agency policy on prior period support will always be aligned with what relief may be authorized under state law. It fails to

distinguish between what the law might allow and what an agency has decided is appropriate, as a matter of policy, about pursuing prior period support. For example, a responding state's law may authorize support for a prior period but does not require that a party seek to establish support for a prior period. In this instance, the agency can decide as a matter of policy not to pursue prior period support, even though the law allows it.

States agree that the responding state may establish an order setting an obligation for a prior period, in accordance with the responding state's law. However, the responding state is not required to establish an order for a prior period in response to a request from another state. If the agency elects not to pursue prior period support in an intrastate case, the agency should likewise not be required to pursue prior period support in an interstate case.

9: In the question, states suggest replacing "paternity establishment" with "genetic testing", to avoid inadvertently broadening what is otherwise required under federal regulation.

(In the answer, there is a technical error: "associate" should be "associated".)

12: One state requests the following portion of a statement in the answer to this question, ". . . but also forward the case to the local office for any action that can be taken pending necessary action by the initiating agency", include a reference to 45 CFR § 303.7(b)(3).

13: States believe the focus of this question and answer should be reconsidered to concentrate on whether a responding state must provide parentage only establishment services upon request, instead of whether an initiating state can send a request for establishment of parentage only.

UIFSA section 402 authorizes a responding state to determine parentage of a child. The official comment to this section provides, in part, "This article authorizes a "pure" parentage action in the interstate context, i.e., an action not joined with a claim for support. The mother, an alleged father of a child, or a support enforcement agency may bring such an action. Typically, an action to determine parentage across a state line or international border will also seek to establish a support order. See Section 401. An action to establish parentage under UIFSA is to be treated identically to such an action brought in the responding state." Additionally, 45 CFR § 303.7(d)(6) provides that a responding jurisdiction must provide any necessary services as it would in an intrastate IV-D case, including establishing paternity in accordance with section 303.5 (establishment of paternity). Thus, if a state has elected to offer parentage only establishment in intrastate cases, it would follow that service should be offered in interstate cases.

In addition to federal and state law authorizing a parentage only action in the interstate context, the Transmittal #1 – Initial Request provides for an "Establish Parentage"

option under Section 1, Action. By recasting the question to focus on the responsibilities of the responding state, the answer can be clarified to reflect that if the responding state has elected not to offer parentage only establishment in intrastate cases, it would not be required to offer that service in interstate cases.

As a side note, States suggest OCSE consider adding a question on the Intergovernmental Reference Guide (IRG) indicating whether a state offers parentage-only services.

Registration for Enforcement

14: States appreciate this question and answer being included in the draft AT. Sometimes the actions requested on the intergovernmental forms are interpreted too simplistically; this guidance will help resolve disagreements about what is expected of the responding state in response to a request to register and enforce.

17: States strongly object to the premise that a tribunal in the responding state may adjust the arrearage amount. It is true that UIFSA provides a mechanism by which a party may assert as a defense to registration that full or partial payment has been made. However, OCSE fails to identify the authority which allows the responding tribunal to adjust the arrearage amount in response to this defense. If the responding tribunal finds the defense valid, it may choose to stay enforcement, continue the proceeding to permit production of additional evidence, or issue another appropriate order (perhaps making a finding as to the amount of debt that will be subject to enforcement in the responding state). The uncontested portion of the order should still be enforced by the responding state.

States are unaware of legal authority that authorizes the responding tribunal to adjust the arrearage amount. In fact, the Bradley Amendment, 42 U.S.C. Section 666(a)(10), requires all states to treat child-support payments as final judgments as they come due (or lose federal funding). Federal law therefore precludes retroactive modification of arrearages. (See the official comment to UIFSA section 607) Additionally, UIFSA section 604(a) empowers the issuing state with the final say regarding the computation and payment of arrearages, and the existence and satisfaction of other obligations, under the support order. Thus, the responding tribunal is not empowered to disagree with the arrears balance as determined by the issuing state applying its own laws.

States also object to the idea that a judicial determination of the arrearage (a money judgment) should be viewed or treated differently in the event of a contest. As outlined above, and as articulated in detail in the first paragraph of answer 18 in the draft AT, federal law provides that arrears are a judgment by operation of law. Thus, as part of a valid judgment, arrears are already entitled to full faith and credit without the unnecessary step of obtaining a money judgment.

18: States appreciate this guidance being included in the draft AT and agree with the reasoning and outcome therein.

Modification

19: States believe the answer to this question is too simplistic. Initially, an order may be registered for enforcement only; however, it may later be modified, so long as the registering state has continuing, exclusive jurisdiction. UIFSA section 603 does not expressly prohibit the registering tribunal from modifying the order, as the draft AT asserts. Instead, it provides the registering state may not modify the registered order if the issuing state has maintained jurisdiction to do so. Therefore, if the registering state has continuing, exclusive jurisdiction to modify the order, it may do so, even if the order was only initially registered for enforcement.

States suggest rewording the answer in a manner similar to the following:

> If the obligee and obligor currently reside in different states, a tribunal may modify a registered order only if the conditions specified in UIFSA section 611 are met. However, if the obligee and obligor reside in the same state, a tribunal may modify a registered order if the conditions specified in UIFSA section 613 are met. In either residence situation, the registered order may be enforced, but cannot be modified unless the applicable conditions are met.

25: States noted that one exception to the "play away" rule was not included in the answer to this question, which is the exception identified in UIFSA section 613. Per section 613, when the individual parties have both left the issuing state and now reside in the same state, and the child does not reside in the issuing state, the state where both parties reside has jurisdiction to modify. Thus, the party seeking modification does not have to be a nonresident of the state where the modification is sought.

UIFSA Case Processing Topics

27: Discussion of consolidating arrears under multiple orders at the beginning of the answer makes it difficult to find the answer to the more general question that is asked. Suggest rewording the answer to:

> UIFSA addresses the interest rate that applies under an order, to consolidated arrears after registration of an order, and to arrears that may accrue prospectively upon modification of an order.
>
> When a support order is registered in another state, failure of the nonregistering party to contest the validity or enforcement of the registered order in a timely manner results in confirmation of the order and enforcement of the order and the alleged amount of arrears, including interest on the arrears. See section 605 of UIFSA. If the order is registered for modification under section 610 of UIFSA, the registering tribunal will apply its support guideline to determine the modified support amount. When the tribunal modifies the registered order, the modified order becomes the "new" controlling order in the case. From that point forward, the law of the state issuing the new controlling order (the modified order) governs the interest on arrears, both on the consolidated arrears under the "old" order(s)

and on any arrears that prospectively accrue on current support under the modified order. See section 604(d) of UIFSA.

In the rare case where multiple child-support orders exist, the tribunal may need to make a validity determination. Where there are multiple valid support orders, the registering tribunal will determine which is the controlling order under UIFSA section 207 and will determine the total amount of consolidated arrears and accrued interest, if any, under all of the orders. The registering tribunal will apply the law of the state that issued each valid order to compute the amount of arrears and accrued interest under each order in accordance with section 604(a)(2) of UIFSA. After the registering tribunal determines which is the controlling order and issues an order pursuant to section 207(f) of UIFSA consolidating the amount of arrears and interest under all the orders, section 604(d) of UIFSA provides that the law on interest on arrears of the state issuing the controlling order applies prospectively to the consolidated arrears amount as well as to any arrears that continue to accrue under the controlling order.

28: States request this answer be clarified to reflect that a petition to register and modify a support order of another state or foreign country requires a certified copy of the order. The answer, as written, overlooks UIFSA section 609, which requires that a party or agency seeking to modify a child support order issued in another state which has not already been registered in this state, shall register that order in this state in the same manner provided in sections 601 through 608. Thus, the process of registering and modifying a support order of another state is subject to the requirements of 602 (which includes the need for a certified copy of the order).

29: States are requesting further clarification about what is considered a certified copy of an order. Responding states sometimes pass judgment on the adequacy of a copy, which creates difficulty for issuing jurisdictions, especially those that are unable to get certified copies from their own vital records agency.

31: One state suggests mentioning in the answer that PIQ-18-01 Question 2 identifies one exception, providing, “However, if objections about the authenticity of the documents are raised in the course of a proceeding, the tribunal may require submission of original documents, original certified copies, or other evidence of authenticity under state law.”

Collections Allocation from Income Withholding in Multiple Cases Against a Noncustodial Parent

43: States are concerned this answer does not distinguish between not implementing an income withholding order and the collections not being sufficient to satisfy the amount due under the order. For example, assume an obligor has two cases. Income withholding order #1 is issued for current support plus arrears and income withholding order #2 is for arrears only. If collections from the employee are unable to satisfy the current support due under income withholding order #1, then income withholding order #2 would appropriately not be allocated any collections. States note further that an

initiating state which receives collections from a responding state is not always aware whether the collection by the responding state was the result of an income withholding order.

Initiating and Responding State Agency Responsibilities

47: One state recommends including the following hyperlink to the OCSE Intergovernmental Forms Matrix: https://www.acf.hhs.gov/sites/default/files/programs/css/intergovernmental_forms_matrix.pdf .

53: States request OCSE include language in the answer that encourages the initiating agency to allow the forms or documentation to be returned, as opposed to directing the responding agency to forward the documentation to the central registry in the state where the noncustodial parent has been located. In these situations, states generally prefer that the initiating agency sends the documents to the new responding state, especially in cases that have been open for a longer period.

55: States acknowledge that federal regulations currently place responsibility for reporting overdue support to consumer reporting agencies with the responding state IV-D agency. However, OCSE should delete the second paragraph in its entirety. The sole purpose of the paragraph is an attempt to justify the decision to have the responding state report to credit reporting agencies. It does not reflect the reality of how credit reporting is done and overlooks the fact that the initiating state is in a better position to know the actual arrears.

Credit reporting has no nexus to where a person resides. States report to national credit reporting agencies, which, by definition, must engage in interstate commerce and they all use an on-line process to resolve disputes. The fact that states report their delinquent obligors in one-state cases regardless of where they live demonstrates that location is irrelevant.

The initiating state is in a better position to have the most accurate information for credit reporting purposes. As the answer to Q.56 acknowledges, the initiating must or should take certain enforcement actions, such as federal tax offset certification, that result in direct payments to the initiating state.

As OCSE is well aware, its draft rule in this area proposed that the initiating state should be responsible for credit bureau reporting. In the preamble to the final rule, which reversed OCSE's original proposal, OCSE under-represented the number of states commenting in support of the initiating state bearing this responsibility. Such post-NPRM changes lack the opportunity for further comment and pose a risk of unintended consequences or disruption to existing state operations. This makes it critical that OCSE engage with NCCSD at a high level, as it has with this draft AT, before finalizing a rule or promulgating new or revised policy,

At this point, state systems have been programmed to implement OCSE's poor choice to place this responsibility with the responding state, and the cost of changing back would be worthwhile only if there were related changes to make in credit reporting.

56: States recommend reconsidering the use of passport denial as a specific example in this answer. Passport denial is mandatory if the threshold is met. If both the initiating and responding jurisdictions submit the noncustodial parent for passport denial, but have different tolerance levels, it may result in unnecessary confusion and conflict. Administrative offset, insurance match, and MSFIDM are more benign tools if there is duplication because they are optional. Also, the example implies that requiring full collection of payment under a passport denial program, as opposed to allowing for partial payment, is in the best interest of the child and family. This is not necessarily true, especially if it results in the noncustodial parent forfeiting all efforts to get the passport because full payment is believed to be insurmountable.

Requests for Limited Services

57: States feel this answer highlights a deficiency in current regulation: what services are required before the requested action is "completed" by the assisting state agency? It would be helpful to have some expected result from a request for limited services, especially those deemed to be required under federal regulation. In general, with the exception noted in the next paragraph, States feel this is an area that should not be expanded in the draft AT but would benefit from an expanded regulation.

Some states refuse to honor a request for limited services unless they have an open case. For example, a state will refuse to honor a limited services request for a certified order or arrears affidavit unless a complete intergovernmental referral from the requesting state is received. This practice defeats the purpose of a limited service request which is already required in federal regulation. Fulfilling an authorized limited service request is inherent in existing regulations. States request OCSE include guidance in the AT that clarifies that requests for required limited services must be honored regardless of whether the assisting agency has an open case and without requiring the initiating state to open a two-state process.

Protecting Information

60: States request the language in paragraph two of this answer be clarified to reflect that the "only" exception identified in this paragraph is limited to the exception available under UIFSA, but is not exclusive of additional in-state protective steps that may otherwise be required or applicable under state law, rule, or court procedure.

Communication

65: States are concerned that this answer is not worded strongly enough, and prefer the answer given in response to Question 57 of AT-98-30. The responding state should not have direct contact with the service recipient in the initiating state. As noted in response to Question 57 of AT-98-30, "It was never intended that the responding agency would be in direct contact with the custodial party in the initiating State." States request the

last sentence in this answer be removed, as it implicitly approves the responding agency making direct contact with the parent in the other state so long as the responding agency deems that circumstances require such contact. This type of direct contact puts the service recipient in the initiating state at risk of receiving conflicting or wrong information about the status of their case and can create an environment of distrust or disdain among workers in the initiating and responding states.

Interstate Case Closure

70: No change is suggested in the draft AT. However, States feel changes in federal regulations should be considered that would empower states to work together to reduce the delivery of redundant services. For example, if a custodial parent applies for services or applies for assistance and is referred to IV-D in State B, that should be deemed a request to close the case in State A. Duplication of effort is unavoidable if each state in which the custodial parent is an applicant is doing their job and there is little, if any, benefit to the custodial parent. In the 2016 modernization rule, a state and tribe were authorized to coordinate on the best jurisdiction to provide services and initiate a transfer of the case. This was a very beneficial change. Similarly, a state should be able to notify a service recipient of its intent to transfer a case to another state and deem the lack of objection as implied consent to transfer to a new state and close the case in the original state. Importantly, this is not suggesting a residence requirement for IV-D services; indeed, neither state with an open IV-D case may be the state where the custodial parent resides. Rather, a transfer process allows states to manage their limited resources efficiently and further the goal of UIFSA of reducing the number of two-state cases.

72: States are concerned that OCSE is attempting to limit a responding state's ability to close a case to circumstances where the case closure criteria outlined in 45 CFR § 303.11(b)(17) through (19) is applicable. It is significant that OCSE introduced this guidance in the preamble to the final rule in 2016, which eliminated the opportunity for states to comment and raise concerns. In addition, the preamble of a regulation lacks the binding nature of the regulation. This limitation is inconsistent with a literal reading of section 303.11, which does not limit the other closing criteria to use by only the initiating state, and current practice.

States recognize circumstances where application of this limitation is particularly problematic. Assume, for example, the responding state has chosen to close cases when the noncustodial parent's sole income is from Supplemental Security Income (SSI) payments under section 303.11(b)(9), but the initiating state has chosen to continue to enforce these cases. Per UIFSA section 604, the responding state shall apply the procedures and remedies of the responding state to enforce current support and collect arrears. Further, federal regulation compels states to process and enforce orders referred by an initiating agency using appropriate remedies applied in its own cases. If it is the established procedure of the responding state not to enforce cases where a parent's sole income is from SSI, the responding state is compelled by UIFSA and federal regulation to apply that same procedure to the interstate case.

NCCSD urges OCSE to reconsider its position on this limitation. There is nothing in federal regulation that specifically limits the case closure authority of responding states in intergovernmental cases to those three criteria. If a case meets closing criteria outlined in section 303.11, intergovernmental or not, a state is empowered by regulation to initiate case closure. Alternatively, further regulation is needed in this area so a responding state is not required to keep an uncollectible case open merely at the whim of the initiating state.

(In the answer, there is a technical error: an extra comma following a period in the first sentence of the second paragraph.)

75: States believe the answer in the draft AT needs to resolve OCSE's position that the responding state may maintain its own case relative to the parties and the order, with the requirement in 45 CFR § 303.7(d)(9) that provides the responding state must close the case and stop the responding state's income withholding order. If this AT is authorizing the responding state, in response to a request for closure from the initiating state, to only close the intergovernmental case but maintain its own case relative to the parties and the order, then it follows that the responding state should be able to utilize appropriate enforcement processes (including income withholding).