

**DEPARTMENT OF HEALTH AND HUMAN SERVICES****Administration for Children and Families****45 CFR Parts 302, 303, 304, 305, and 308****RIN 0970-AC22****Child Support Enforcement Program; Medical Support**

**AGENCY:** Administration for Children and Families, Office of Child Support Enforcement (OCSE).

**ACTION:** Final regulation.

**SUMMARY:** This regulation revises Federal requirements for establishing and enforcing medical support obligations in Child Support Enforcement (CSE) program cases receiving services under title IV-D of the Social Security Act (the Act). The changes: require that all support orders in the IV-D program address medical support; redefine reasonable-cost health insurance; require health insurance to be accessible, as defined by the State; and make conforming changes to the Federal interstate, substantial-compliance audit, and State self-assessment requirements.

**DATES: Effective Date:** This regulation is effective July 21, 2008.

**FOR FURTHER INFORMATION CONTACT:**

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**SUPPLEMENTARY INFORMATION:****Statutory Authority**

This final regulation is published under the authority granted to the Secretary of Health and Human Services (the Secretary) by section 1102 of the Social Security Act, 42 U.S.C. 1302. Section 1102 of the Act authorizes the Secretary to publish regulations, not inconsistent with the Act, that may be necessary for the efficient administration of the title IV-D program.

This rule also is published in accordance with section 452(f) of the Act, as amended by section 7307 of the Deficit Reduction Act of 2005 (DRA of 2005), which directs the Secretary to issue regulations which require that State agencies administering IV-D programs "enforce medical support included as part of a child support order whenever health care coverage is

available to the noncustodial parent at reasonable cost." Section 7307 of the DRA of 2005 also added two additional sentences to section 452(f) of the Act: "A State agency administering the program under this part [title IV-D] may enforce medical support against a custodial parent if health care coverage is available to the custodial parent at a reasonable cost, notwithstanding any other provision of this part [title IV-D]." And: "For purposes of this part, the term 'medical support' may include health care coverage, such as coverage under a health insurance plan (including payment of costs of premiums, co-payments, and deductibles) and payment for medical expenses incurred on behalf of a child."

This regulation also is published in accordance with section 466(a)(19) of the Act, as amended by section 7307 of the DRA of 2005, which requires States to have in effect laws requiring the use of procedures under which all child support orders enforced pursuant to title IV-D of the Act "shall include a provision for medical support for the child to be provided by either or both parents."

**Background**

Recognizing that State Child Support Enforcement program efforts to secure and enforce medical support orders against child support obligors had met with limited success, Congress enacted the Child Support Performance and Incentive Act of 1998 (CSPIA). CSPIA directed the Secretaries of HHS and the Department of Labor (DOL) to establish a Medical Child Support Working Group (Working Group). The Working Group included 30 members representing: Federal and State CSE programs, employers, payroll professionals, group health plans, and children's advocates. The Working Group identified impediments to the effective enforcement of medical support by State IV-D agencies and made recommendations to eliminate them.

A final report, *21 Million Children's Health: Our Shared Responsibility*, was jointly transmitted to Congress by the Secretaries of HHS and DOL on August 16, 2000. This final rule responds to several of the Working Group's key recommendations. After review of *21 Million Children*, OCSE consulted with a wide range of program stakeholders in 2001 and 2002, including State and local workers and administrators, national organizations, advocates, and other parties interested in medical support enforcement. These consultations explored the feasibility and impact of the Working Group's

recommendations, establishing which recommendations had wide support.

Additionally, HHS's Health Care Coverage Among Child Support-Eligible Children study, published in 2002 after the Working Group's Report, suggests that untapped employer-sponsored insurance through custodial mothers and their spouses might reduce the share of children without private health insurance more significantly than similar insurance through noncustodial parents, for a variety of reasons, including availability, accessibility, cost, and preference. "Half of child support-eligible children living with their mothers are currently covered by [employer-sponsored] insurance. Indeed, the Working Group's decision matrix to determine appropriate health insurance coverage, presented in *21 Million Children*, contains a preference for using the custodial parent's (or step-parent's) health insurance. The Administration's legislative proposal requiring States to seek medical support from either parent, and to enforce, at their option, an order that a custodial parent provide medical support is addressed in this legislation and also meets the requirements in section 7307 of the Deficit Reduction Act of 2005 (Pub. L. 109-171).

**Provisions of the Regulation and Changes Made in Response to Comments**

The Notice of Proposed Rule Making (NPRM) was published in the **Federal Register** on September 20, 2006. During the comment period, we received 36 letters generating 308 comments. On the whole, comments were positive and welcomed the proposed update of medical support regulations, particularly with respect to the definition of reasonable cost and the authority to close cases in which an individual in a Medicaid only, child-only case is not cooperating with the IV-D agency. We made a number of changes to the proposed regulations to accommodate practices already in place in States that are leaders in seeking medical support for children, for example by eliminating a proposed specific order of allocating wage withholdings between child support and medical support which employers would have been required to follow. To impose a requirement now, when States have moved forward without Federal guidance or mandate, would be unfair to those States and contrary to our commitment to State flexibility. On the other hand, we did not agree with comments to expand States' authority to close Medicaid-only, child-only cases to include authority to close any Medicaid-

only case, because the authority would be overbroad and inappropriate when assignment and cooperation with the IV-D agency is required in such cases.

Changes made in response to comments are discussed in more detail under the Response to Comments section of this preamble.

**Section 302.56—Guidelines for Setting Child Support Awards**

Under § 302.56(c)(3), the State guidelines for setting and modifying child support awards must address how the parents will provide for the child(ren)'s health care needs through health insurance coverage and/or through cash medical support in accordance with § 303.31 which defines cash medical support, reasonable cost, and petitioning the court or administrative authority to include health insurance. In response to comments, we expanded the cross-reference to include all of § 303.31, rather than just paragraph (b) which states that the State IV-D agency must petition the court or administrative authority to include health insurance when the order is entered or modified and establish written criteria to identify orders that do not address the health care needs of children.

**Section 303.7—Provision of Services in Interstate IV-D Cases**

Section 303.32 mandates the use of the National Medical Support Notice (NMSN) to enforce the provision of health care coverage for children of noncustodial parents who are required to provide health care coverage through an employment-related group health plan pursuant to a child support order. We added “§ 303.32” to § 303.7(c)(7)(iii), which governs responding State responsibilities in processing and enforcing orders in interstate cases. This is a necessary technical correction identified during the review of comments on the proposed rule.

**Section 303.11—Case Closure Criteria**

Under § 303.11(b)(11) of this regulation, in order to be eligible for closure, a case must meet certain criteria. In response to comments received on the proposed regulation, the final regulation clarifies that case closure under paragraph (b)(11) is only authorized if the recipient of services is not required to cooperate with the IV-D agency as a condition of receiving Medicaid services.

Section 303.11(b)(10) was revised in response to comments with language similar to that in paragraph (b)(11) to read as follows: “In order to be eligible

for closure, the case must meet at least one of the following criteria in a non-IV-A case receiving services under § 302.33(a)(1)(i) or (iii), or under § 302.33(a)(1)(ii) when cooperation with the IV-D agency is not required of the recipient of services, the IV-D agency is unable to contact the recipient of services within a 60 calendar day period despite an attempt of at least one letter sent by first class mail to the last known address.”

**Section 303.31—Securing and Enforcing Medical Support Obligations**

Section 303.31(a)(1) defines “cash medical support” as “an amount ordered to be paid toward the cost of health insurance provided by a public entity or by another parent through employment or otherwise, or for other medical costs not covered by insurance.” A cash medical support collection would be considered current support only if the support was paid timely and in the specific amount required in the order to be paid periodically. Should that amount not be paid timely, the unpaid obligation becomes past-due just like any unpaid current child support obligation. In addition, if a family is receiving Medicaid and has assigned rights to cash medical support but is no longer receiving TANF, current cash child support would be paid to the family and assigned current cash medical support would be paid to the Medicaid agency.

Under § 303.31(a)(2), health insurance is defined to include fee for service, health maintenance organization, preferred provider organization, and other types of coverage which is available to either parent, under which medical services could be provided to dependent child(ren).

Under § 303.31(a)(3), cash medical support or the cost of private health insurance is considered reasonable in cost if the cost to the parent responsible for providing medical support does not exceed five percent of his or her gross income or, at State option, a reasonable alternative income-based numeric standard defined in State law, regulations, or court rule having the force of law or State child support guidelines adopted in accordance with 45 CFR 302.56. In applying the five percent or alternative State standard for the cost of private health insurance, the cost is the cost of adding the child(ren) to existing coverage or the difference between self-only and family coverage.

A State would compute the five percent standard based on the income of the parent being ordered to secure, or pay for private health insurance coverage. The five percent

reasonableness standard would be applied to the parent who is ordered to pay cash medical support for the premium of health insurance, whether it is provided by the obligated parent or another parent. If both parents are ordered to contribute to the cost of the premium, then the individual cost could not be more than five percent of each parent's income (or the alternative standard adopted by the State).

Similarly, if a noncustodial parent is ordered to pay \$50 a month to reimburse the custodial parent for out-of-pocket medical costs not covered by insurance, the five percent reasonableness standard would be applied to the obligated parent's income. Therefore, since the facts of a particular case would vary from case to case, a State would need to determine at the time the order is entered to whose income the five percent standard is applied. States should establish guidelines for applying the five percent standard as appropriate.

In response to comments, we added “the cost of” before “private health insurance,” substituted the phrase “the parent responsible for providing medical support” for “obligated parent,” and added “in State law, regulations, or court rule having the force of law or” to recognize how States adopt such standards.

Section 303.31(b)(1) requires the State to petition the court or administrative authority to include private health insurance coverage in the support order if it is accessible to the child(ren), as defined by the State, and is available to the parent responsible for providing medical support at reasonable cost, as defined under paragraph (a)(3), in new or modified court or administrative orders for support.

Under § 303.31(b)(2), if private health insurance described in paragraph (b)(1) is not available at the time the order is entered or modified, the IV-D agency must petition to include cash medical support that is reasonable in cost, as defined in paragraph (a)(3), in new or modified orders until such time as private health insurance, that is accessible and reasonable in cost as defined under paragraph (a)(3), becomes available. In appropriate cases, as defined by the State, cash medical support may be sought in addition to health insurance coverage. It is not mandatory that a State petition to modify an order that includes cash medical support if the State learns that health insurance is now available. However, delaying petitioning for health insurance coverage for as long as three years would not be in the best interests of the children. If the order includes

language that requires health insurance be provided should it become available in the future, and that cash medical support is ordered until such time, the need to petition to modify the order and allow the State to take steps to immediately secure private health insurance coverage for the children would be avoided. Absent such a provision, the State would need to petition to modify the order to take advantage of the currently available coverage.

In response to comments, we added the term “private” before “health insurance” in § 303.31(b)(1) and (2) for clarity. We also substituted, in paragraph (b)(1) and (2), the phrase “the parent responsible for providing medical support” for “obligated parent” for consistency with the parallel change to § 303.31(a)(3). We also changed the word “ordered” to “sought” in paragraph (b)(2) for consistency with the concept that IV-D agencies petition the court or administrative authority to establish support orders. And finally, we added the phrase “that is reasonable in cost, as defined in paragraph (a)(3) of this section” after the term “cash medical support” in § 303.31(b)(2) for consistency with paragraph (b)(1).

Section 303.31(b)(3) requires a State agency to establish written criteria to identify orders that do not address the health care needs of children based on—

(i) Evidence that private health insurance that is accessible to the child(ren), as defined by the State, may be available to either parent at reasonable cost, as defined under paragraph (a)(3); and

(ii) Facts, as defined by State law, regulation, procedure, or other directive, and review and adjustment requirements under § 303.8(d), which are sufficient to warrant modification of the existing support order to address the health care needs of children in accordance with § 303.31(b)(1).

In response to comments we added the word “private” before health insurance and reference to accessibility and reasonable cost to subparagraph (i). We also removed reference to paragraph (b)(2) at the end of subparagraph (ii) in response to comments.

Section 303.31(b)(4) requires IV-D agencies to petition to modify support orders to include private health insurance and/or cash medical support in accordance with paragraphs (b)(1) and (2). In response to comments, we added “private” before “health insurance” for clarity.

Section 303.31(b)(5), under the proposed rule, required the IV-D agency to notify the Medicaid agency when a new or modified order includes health

insurance and/or cash medical support. In response to comments it was deleted and § 303.31(b)(6) was renumbered as (b)(5) and requires that the IV-D agency periodically communicate with the Medicaid agency to determine whether there have been lapses in health insurance coverage for Medicaid applicants and recipients.

Section 303.31(c) requires the IV-D agency to inform an individual who is eligible for services under § 302.33 that medical support services will be provided and to provide the services specified in § 303.31(b). In response to comments, “enforcement” is deleted from the subsection.

#### *Section 303.32—National Medical Support Notice (NMSN)*

Section 303.32(a) was amended to include reference to use of the NMSN to enforce the provision of health care coverage for children of custodial parents, at State option, in addition to noncustodial parents. A similar change was made to § 303.32(c)(6) to require employers to notify the State about the termination of employment of custodial parents if the State has opted to use an NMSN to enforce the custodial parent’s obligation to provide health care coverage for his/her children.

Proposed changes to § 303.32(c)(4), which would have prioritized employers withholding of various support obligations if there were insufficient wages to satisfy all obligations, were removed in response to comments received.

#### *Section 304.20(b)(11)—Services and Activities for Which FFP Is Available*

Under § 304.20(b)(11), FFP is available for services and activities under approved IV-D State Plans, including required medical support activities as specified in §§ 303.30, 303.31, and 303.32. We added “and 303.32.” after “§§ 303.30, 303.31.”

#### *Section 304.23(g)—Services and Activities for Which FFP Is Not Available*

In response to comments to correct an error in current regulations, the cross-reference in § 304.23(g) has been corrected to refer to FFP as not being available for costs associated with cooperative agreements with Medicaid agencies under section 1912(a)(2) of the Act. We replaced reference to “§§ 303.30, and 303.31” with “section 1912(a)(2) of the Act.”

#### *Section 305.63(c)(5)—Providing Services Required in 75 Percent of the Cases Reviewed During a Substantial Compliance Audit*

Under § 305.63(c)(5), for the purposes of optional Federal audits to determine substantial compliance with requirements, a State must provide certain medical support services, including all the requirements under § 302.32, and use of the NMSN in at least 75 percent of the cases reviewed. We added “and § 302.32” after “under § 303.31.”

#### *Section 308.2—Required Medical Support Compliance Criteria for State Self-Assessment*

Under § 308.2(e), for purposes of the State’s annual self-assessment review and report, a State must evaluate whether it has provided certain required medical support services including use of the NMSN in at least 75 percent of the cases reviewed as required in § 303.32.

Under § 308.2(e)(1), a State must determine whether the State is meeting its obligation to include medical support that is reasonable and accessible, in accordance with § 303.31(b), in at least 75 percent of new or modified support orders. Under § 308.2(e)(2), States are required to assess their own performance according to their criteria, whether the NMSN was used to enforce the order in accordance with the requirements in § 303.32, if reasonable and accessible health insurance was available and required in the order, but not obtained.

Proposed § 308.2(e)(3), which in the proposed rule required a State to determine whether the State Medicaid agency was informed that coverage had been obtained, was deleted in response to comments. Proposed paragraph (e)(4) (renumbered § 308.2(e)(3) in the final rule), is revised in response to comments, to read as follows. A State must “determine whether the State transferred notice of the health care provision, using the National Medical Support Notice required under § 303.32 of this chapter, where appropriate, to a new employer when a noncustodial parent, or under State option a custodial parent, was ordered to provide health insurance coverage and changed employment.” The reference to custodial parents was added in response to comments received.

#### **Response to Comments**

We received 36 letters from States, Tribes, advocacy groups, and other interested individuals. This section of the preamble describes the specific

aspects of the final regulations and identifies changes made to proposed rules. We received many thoughtful comments requesting clarification of aspects of medical support case processing that are not addressed in the Federal regulations, or asking for more specificity in requirements when the regulations allowed for State flexibility or did not agree with positions proposed in the regulation because the commenter's State had already implemented a policy, in the absence of Federal regulations, that was inconsistent with some of the proposed requirements. Since the Working Group's report was sent to Congress in 2000, many States have already moved forward to establish medical support services and approaches based on their recommendations in the absence of proposed Federal regulations in this area.

On the whole, comments were positive and welcomed the proposed update of medical support regulations, particularly with respect to the definition of reasonable cost and the authority to close cases in which an individual in a Medicaid only, child-only case is not cooperating with the IV-D agency. We also made a number of changes to the proposed regulations to accommodate practices already in place in States that are leaders in seeking medical support for children. For instance, we eliminated a proposed specific order of allocation satisfaction of child support and medical support which employers would have been required to follow. To impose a requirement now, when States have moved forward without Federal guidance or mandate, would be unfair to those States and contrary to our commitment to State flexibility. On the other hand, we did not agree with comments to expand States' authority to close Medicaid-only, child-only cases to include authority to close any Medicaid-only case, because the authority would be too broad and inappropriate when assignment and cooperation with the IV-D agency is required in such cases.

We believe States that have not taken the lead in medical support activities in the IV-D program can learn from the innovative approaches implemented in States that have already developed robust medical support programs. Therefore, changes to the regulations were not significant but rather technical in nature and consistent with our commitment to a longstanding partnership with State Child Support Enforcement programs.

#### *Section 302.56—Guidelines for Setting Child Support Awards*

**1. Comment:** An income shares child support guidelines schedule incorporates some medical costs within the guideline schedule itself (e.g., \$250 per year per child) and medical costs are considered as part of the basic child support obligation amount that is ordered to be paid by the obligated parent. Additionally, the costs of health insurance and/or medical costs not covered by insurance are apportioned between the parents based on the percentages of their respective shares of their combined net income. Since future out-of-pocket medical costs for each child are unknown and undeterminable at the time an order is being established or modified, it is virtually impossible for the courts to include a specific monthly dollar amount for cash medical support in support orders. Does this approach in a State's guidelines meet the cash medical support requirements in the proposed regulation?

**Response:** Yes. As indicated in the preamble to the proposed rule, § 302.56(c) is purposely broad, ensuring that child support guidelines consider not only health insurance coverage that may be available from either, or both parents, but also how the parents will meet the child's health care needs when no insurance is available, when the cost of insurance is beyond the reasonable means of the parents, or where the cost is extraordinary or unreimbursed by insurance. The regulation does not mandate that State guidelines label the payment of medical costs as a stand-alone item. However, it is possible that both health insurance coverage and cash medical support would be included in a support order. For example, where a custodial parent has access to health insurance coverage for the parties' child, the noncustodial parent may be required to pay a share of the premium's cost. Also, each parent may be ordered to pay a fixed sum or a percentage of the cost of treatments such as allergy shots, orthodontic work and/or psychological counseling, not covered by insurance.

**2. Comment:** If the final rule eliminates the words "other means" for providing for the child(ren)'s health care needs beyond health care coverage and cash medical support, it is unclear how alternative health care coverage such as the Defense Enrollment Eligibility Reporting System (DEERS) enrollment provided for dependents of military service members or Department of Defense employees or how Indian Health Services (IHS) coverage would fulfill the requirement of the IV-D agency to obtain a medical support

order. Definitions of DEERS and IHS coverage outside Title 45 of the Code of Federal Regulations make it clear that these are not forms of "insurance", and they may not require the payment of a premium or cash medical support contribution by either parent.

**Response:** We believe that the definition of health insurance in § 303.31(a)(2) is broad enough to encompass both DEERS and IHS coverage because it includes "other types of coverage \* \* \* under which medical services could be provided to the dependent child(ren)."

**3. Comment:** The proposed regulation requires that State child support guidelines "address how the parents will provide for the child(ren)'s health care needs through health insurance coverage and/or through cash medical support in accordance with § 303.31(b) of this chapter." Proposed § 303.31(b) places various medical support related duties on the IV-D agency, such as petitioning to establish and modify medical support orders. It also refers to accessibility of coverage "as defined by the State," and to ordering cash medical support in addition to health insurance coverage "in appropriate cases, as defined by the State." The commenter reads the proposed regulation as recognizing that medical support will inevitably be a guidelines issue but, since medical support affects the amount of support obligations, the regulation still provides States with the flexibility to define certain medical support standards by statute, regulation, or other appropriate means outside the guidelines, as the State determines. The commenter requests that OCSE confirm this reading.

**Response:** We agree with this assessment of the regulations.

**4. Comment:** Several commenters found the proposed § 302.56(c) unclear because the cross-reference to § 303.31(b) (medical support requirements for IV-D cases) creates confusion about the scope of the change. The guidelines regulation (§ 302.56) currently applies to all orders issued in the State, whether in IV-D or non-IV-D cases. However, § 303.31(b) specifically says, "The State IV-D agency must." If the reference to § 303.31(b) in § 302.56(c) means those requirements also apply in non-IV-D orders, we recommend the regulation not cross-reference § 303.31(b).

**Response:** While child support guidelines must be used in setting all support orders in the State, § 303.31(b) clearly only applies to IV-D cases by its reference to the IV-D agency. Therefore, the required IV-D activities in

§ 303.31(b) do not apply to non-IV-D cases.

5. *Comment:* The proposed rule asked for comments on whether the new requirements will require a change in a State's child support guidelines. This commenter indicated that it is likely guidelines will need to be revised because the new requirement is an addition to existing minimum requirements for guidelines in § 302.56. However, the commenter indicates that it is likely that amending the guidelines cannot be accomplished before the rule becomes final because a State will have to seek legislative authority in early 2007 in an attempt to comply, with the understanding that additional changes may be needed once the final rule is published. The commenter asks for confirmation of this assumption.

*Response:* States should plan to implement the medical support provisions of the DRA of 2005 in accordance with the statutory language by the appropriate effective date that applies to each State.

6. *Comment:* A person with available insurance coverage can also be a recipient of a state-funded medical insurance program, a form of public assistance. Generally, courts are unwilling to order that person to carry coverage and/or to enforce an order requiring them to carry coverage.

*Response:* Section 303.31(b) requires the IV-D agency to petition for health insurance coverage that is accessible and available at reasonable cost. Section 303.31(a)(3) defines reasonable cost as a cost that does not exceed five percent of the obligated parent's gross income or, at State option, a reasonable alternative income-based numeric standard defined in State law, regulations, or court rule having the effect of law or in State child support guidelines. We believe that these requirements allow States and courts flexibility to determine when it is appropriate to require an obligated person to carry health insurance.

7. *Comment:* One commenter indicated that in an obligor child support guidelines model, only income and resources of the noncustodial parent are gathered and considered. The commenter has concerns about how the income and resources of both parents can effectively be considered in such obligor-model guidelines. Proposed regulations which require States to look at the income and resources of both parents in determining medical support responsibility means a State with that model of guidelines would need to gather income and resource information from the custodial parent for this purpose alone. This will lead to the need for considerable legislative

changes, policy changes, and automated system changes. It also will be a significant human resource issue. Further, the commenter stated that States should be afforded flexibility in determining which parent shall provide medical support because, while Federal law clearly requires the establishment of medical support against either or both parents, it does not specify how States are to apply this provision and Federal law does not address reasonable cost.

*Response:* We believe that the Federal statute clearly takes into consideration the availability of health insurance to the custodial, as well as the noncustodial parent, at reasonable cost. These requirements will ensure that parents share primary responsibility for their children's health care needs, when appropriate. State child support guidelines must, at a minimum, "provide for the child(ren)'s health care needs through health insurance coverage and/or through cash medical support in accordance with § 303.31" [45 CFR 302.56(c)(3)]. The mechanism for accomplishing this mandate is determined by each State.

8. *Comment:* One commenter described a State guidelines statute as requiring allocation of responsibility for unreimbursed medical expenses between the parties based on each individual's respective proportion of combined income. The commenter requested clarification as to whether a specified amount must be ordered to be considered cash medical support. If so, the commenter believes that the term " \* \* \* medical costs not covered by insurance \* \* \*" is somewhat confusing as it cannot be addressed in an order until the amount of uncovered costs is identified.

*Response:* Section 303.31(a)(1) defines cash medical support as "an amount ordered to be paid \* \* \* for other medical costs not covered by insurance." An order that includes an allocation between the parents for responsibility for unreimbursed medical expenses based on each individual's respective proportion of combined income would meet this requirement.

9. *Comment:* One commenter was concerned that the proposed amendment to § 302.56(c) does not require any specific language be included in these medical support orders, leaving each State with a great deal of freedom on how to comply with this amendment. The proposed amendment adds an additional requirement that orders States to "address how the parents will provide for" the children's health care needs. However, the inclusion of these words alone provides little guidance to States

beyond what the current guidelines suggest. The Working Group recognized the importance of providing structured and equitable guidance. In their report, the Working Group proposed a "decision matrix" to provide guidance to decision-makers in deciding which health care coverage to order.

Additional requirements, even beyond the recommendations in the Working Group report, are needed so that States can draft their respective guidelines efficiently. Requiring specific provisions in each support order will allow the agencies to focus on enforcement rather than interpreting these regulations.

*Response:* We agree that the Working Group Report is a rich source of information for States in determining how best to proceed, given the flexibility allowed under these regulations. The Working Group Report may be found at: <http://www.acf.hhs.gov/programs/cse/pubs/2000/reports/medrpt>. However, we support State flexibility, within a context of broader Federal requirements, to determine the details of how best to proceed, and are confident States will implement the requirements in a way that protects children and families.

#### Section 303.11—Case Closure Criteria

1. *Comment:* A number of commenters supported the language in the proposed rule in § 303.31(b)(11) because the reference to § 302.33(a)(1) would allow closure of any Medicaid-only case, not just the "child-only" Medicaid cases, upon noncooperation of the custodian. These commenters favor a broad interpretation under which any non-TANF Medicaid cases may be closed for noncooperation of the custodian because it allows more flexibility for States to focus on providing services for custodial parents who want such services.

Other commenters believed the proposed change to § 303.11(b)(11) was too broad because assignment of support rights and cooperation with the IV-D agency is a condition of eligibility for individuals who are included with children in a Medicaid case, unless the adult recipient falls within certain statutory exemptions addressed in DCL-00-122. DCL-00-122 explains the Federal Medicaid assignment and cooperation requirements and exemptions, options pertaining to paternity and medical support and describes the child support enforcement services available to families receiving Medicaid. Since the regulation must be consistent with Federal statute, these commenters request that closure for noncooperation of the custodian be limited to non-TANF child-only

Medicaid cases only if the custodian is not required to assign his or her rights to medical support and cooperate with the IV-D agency pursuant to section 1912 of the Act (42 U.S.C. 1396k.)

**Response:** We agree with commenters that suggested the proposed revision to § 303.11(b)(11) was overly broad. The change was proposed because former § 303.11(b)(11) did not allow case closure for noncooperation in non-IV-A Medicaid cases and States indicated that there are custodial parents of children in child-only Medicaid cases who refuse to cooperate with the IV-D agency. However, in non-TANF Medicaid cases in which both the custodian and child(ren) are receiving Medicaid, all recipients must assign rights to medical support and cooperate with the IV-D agency as a condition of receipt of Medicaid. As stated in the letter to all Medicaid Directors shared with IV-D Directors in DCL-00-122:

"If parents or other adults apply for Medicaid on behalf of themselves and their children, they must assign medical support and payment rights to the State and cooperate in establishing paternity, obtaining medical support and payments, and providing information about liable third parties as a condition of their own eligibility, unless they are exempt. Pregnant women eligible under Section 1902(l)(1)(A) of the Act (poverty level pregnant women) are exempt from the requirements to cooperate in establishing paternity of a child born out of wedlock, and in obtaining medical support and payments for themselves and the child born out of wedlock. (These women must, however, assign the rights to medical support and payments.) In addition, individuals with good cause, as described by Federal regulation 42 CFR 433.147(c), are exempt from cooperating in establishing paternity, obtaining medical support and payment, and pursuing third party liability. Applicants must be effectively informed of these exemptions and told that the decision whether or not to cooperate will not affect their child's eligibility for Medicaid." § 303.11(b)(11) must be revised as follows: (b) In order to be eligible for closure, the case must meet at least one of the following criteria \* \* \* (11) In a non-IV-A case receiving services under § 302.33(a)(1)(i) or (iii), or under § 302.33(a)(1)(ii) when cooperation with the IV-D agency is not required of the recipient of services, the IV-D agency documents the circumstances of the recipient of services' noncooperation and an action by the recipient of services is essential for the next step in providing IV-D services.

**2. Comment:** Another commenter would support the approach of allowing States to close any Medicaid-only case in which the custodial parent is not cooperating. For example, States may close a case involving the following situation: A Medicaid-only case is referred to the State with a custodial parent and child receiving Medicaid. The custodial parent subsequently fails to cooperate, and Medicaid sanctions are put in place that result in only the child receiving Medicaid. The commenter wants to be able to close this case and is not clear as to whether this type of case would be considered a "child-only Medicaid-only" case.

**Response:** Once the custodial parent is denied receipt of Medicaid, the case would be considered a "child-only, Medicaid-only" case and could be closed under § 303.11(a)(11) because of the documented noncooperation and sanction.

**3. Comment:** It has been one commenter's experience that when a custodial parent is receiving Medicaid services/benefits and does not cooperate with the IV-D program, the IV-D program is forced to bring the custodial parent before the court. Once before a judge the custodial parent has clearly stated that he/she has no interest in obtaining child support from the noncustodial parent and the judges have ruled in the custodial parent's favor, thus causing the IV-D program to expend time and money without a positive result for the child(ren).

**Response:** If the custodial parent is not cooperating with the IV-D agency as required, the IV-D agency should notify the Medicaid agency and have them take steps to sanction the custodial parent accordingly. Threatened loss of Medicaid benefits may then encourage the custodial parent to cooperate. If he or she does not cooperate, the IV-D agency could choose to close the case under § 303.11(b)(11).

**4. Comment:** One commenter stated that, if OCSE will permit States to close child-only, Medicaid-only cases for noncooperation of a custodian, States should also be allowed to close cases on the request of the custodial person pursuant to § 303.11(b)(8). If § 303.11(b)(8) is not amended, the IV-D agency would be compelled to deny a request for IV-D case closure from a custodian in a non-TANF Medicaid case. However, if the custodian subsequently fails to cooperate because of the custodian's lack of interest in IV-D assistance, the IV-D case closure requested by the custodian would eventually result. The delay in accomplishing case closure would be inefficient.

**Response:** An amendment to § 303.11(b)(8) is inappropriate. Although the parent is not required to assign the child's rights to medical support, section 1902(a)(25)(H) of the Act requires States to have laws which automatically assign an individual's rights to payment for medical care by third parties, to the extent that Medicaid has made a payment. These laws assign to States an individual's, (e.g., a child's) rights whether or not an assignment was executed. When only the child is applying for Medicaid, under section 1902(a)(25)(A) the State must ask the parent whether the child has health insurance in order to identify legally-liable third party resources. Because there is an assignment of the child's rights to medical support as a condition of the child's receipt of Medicaid, a IV-D agency may not close the case at the request of the custodial parent or caretaker in such cases.

**5. Comment:** A commenter indicated that the IV-D agency receives child-only Medicaid-only referrals, but the Medicaid agency has not imposed an assignment or cooperation responsibility in those cases. Child support services, thus, have the appearance of a choice offered to the family; they can continue the services or not. Given that scenario, rather than documenting noncooperation, is it possible to send child-only cases a "continuation of services" letter to determine whether or not the family wants services to continue?

**Response:** Although the parent is not required to assign the child's rights in a child-only Medicaid case, section 1902(a)(25)(H) of the Act requires States to have laws which automatically assign an individual's rights to payment for medical care by third parties to the extent that Medicaid has made a payment. These laws assign to States an individual's rights whether or not an assignment was executed and if the case is referred to the IV-D agency, it is the IV-D agency's responsibility to seek medical support for that child. Therefore, it would be inappropriate to treat these cases like former TANF cases in which, in accordance with § 302.33(a)(4), States send a notice to the custodial parent indicating that IV-D services will be provided unless the agency is notified by the custodial parent to close the case.

**6. Comment:** Two commenters indicated that case processing would be facilitated if § 303.11(b)(10) was expanded to include child-only Medicaid cases. This would allow States to close child-only Medicaid cases in the same manner allowed for applications and former assistance cases

when the IV-D agency is unable to contact the custodial parent within a 60 calendar day period despite an attempt of at least one letter sent by first class mail to the last known address. One commenter suggested that we amend § 303.11(b)(10) to read as follows: "In a non-IV-A case receiving services under § 302.33(a)(1)(i) or (iii), or under § 302.33(a)(1)(ii) when cooperation with the IV-D agency is not required of the recipient of services, the IV-D agency is unable to contact the recipient of services within a 60 calendar day period despite an attempt of at least one letter sent by first class mail to the last known address."

**Response:** We agree with these commenters and have included the change to § 303.11(b)(10) as requested above. The IV-D agency would be required to meet the requirements of § 303.11(c) by sending the recipient of services or initiating a notice of the State's intent to close the case in writing 60 calendar days prior to closure of the case. The case should not be closed if contact is reestablished with the recipient of services within the 60 day timeframe.

**7. Comment:** One commenter requested clarification with regard to custodial or caretaker noncooperation with medical support requirements in any IV-D case including active IV-A or IV-E foster care cases or non-IV-A cases. The commenter's State has taken the position thus far that noncooperation with medical support would not extend to closing an active IV-A or IV-E case or non-IV-A case.

**Response:** Custodial or caretaker noncooperation with the IV-D agency in medical support requirements in a IV-D case, that is also an active IV-A, IV-E, or non-IV-A Medicaid-only case, would not authorize closure under § 303.11(b)(10) or (11).

**8. Comment:** One commenter was concerned that the proposed amendment to § 303.11(b)(11) seems to contradict the policy behind the regulation, to secure medical coverage for children. Instead of promoting the best interests of children, the closure of the case would leave the custodial parent and child without assistance in obtaining and enforcing child support orders. Moreover, the child support and health care coverage enforced by the IV-D agency ultimately benefits the child rather than the custodial parent. Therefore, it is the child who stands to lose additional protections because of his or her parent's actions.

**Response:** Case closure is optional for IV-D agencies and is allowed only under a limited set of specific circumstances in which there is little

chance of success. In addition, statutory limitations with respect to mandated cooperation of parents and other custodians often remove the primary source of critical information (the custodian) needed by IV-D agencies.

**9. Comment:** With regard to case closure for child-only Medicaid cases, is noncooperation with medical support services a basis for case closure in a non-IV-A case where the recipient of services has otherwise cooperated?

**Response:** The final regulation clarifies that case closure under paragraph (b)(11), is only authorized (although not required) if the recipient of services is not required to cooperate with the IV-D agency as a condition of receiving Medicaid services.

#### *Section 303.31—Securing and Enforcing Medical Support Obligations*

##### Section 303.31(a): Explanation of Terms Used in § 303.31

###### (1) Cash Medical Support

**Comment:** A commenter suggests that the term "cash medical support" be clarified, so that public coverage cases can be recognized, and that States be allowed to determine methods of reimbursement that align with each State's available programs.

**Response:** We believe the current language in § 303.31(a)(1), which defines cash medical support, does recognize public health coverage, such as Medicaid, State Child Health Insurance Program (SCHIP), the Indian Health Service, and Defense Enrollment Eligibility Reporting System. "Cash medical support" is defined as "an amount ordered to be paid toward the cost of health insurance provided by a public entity or by another parent through employment or otherwise, or for other medical costs not covered by insurance." This would include the cost of premiums or co-payments required in the SCHIP or Medicaid program, for example. In addition, the regulation, while defining what can be considered as cash medical support, leaves States discretion to determine methods of reimbursement that align with each State's available programs.

**2. Comment:** One commenter requested that we add two definitions to § 303.31(a) to read: "(4) Poverty line has the meaning given such term in section 673(2) of the Community Services Block Grant Act (42 U.S.C. 9902(2)), including any revision required by such section.

"(5) A child is considered eligible for medical assistance under the State Plan under title XIX of the Social Security Act (Act) or for child health assistance under the State Plan under title XXI of the Act if the child's family income is

below the income standard of the applicable State Plan in the State in which the child resides, regardless of whether the child has applied for or is enrolled in the program under either State Plan."

**Response:** We believe these decisions and definitions are best left to States unless specified under Federal statutes applicable to State IV-D programs.

**3. Comment:** One commenter indicated that, based on experience working with Medicaid and SCHIP agency program staff and having discussions regarding distributing cash medical support to those agencies, it is evident that those agencies need Federal guidance on accepting cash medical support from the child support agency and reconciling those amounts. Therefore, it is their recommendation that collaboration between child support and public health insurance entities take place on a Federal level. This concern was shared by many commenters concerned in particular that Medicaid agencies may refuse to accept assigned cash medical support from the IV-D agency.

**Response:** HHS has sponsored two sets of collaboration meetings over the past two years that brought together State program directors and staff from the IV-D, IV-E foster care, Medicaid, and SCHIP programs. States raised issues they face in securing health care for children and discussed possible solutions that would be needed to resolve them, through collaboration, regulations, or statutory change. A report on the 2005 meetings is at: <http://www.acf.hhs.gov/programs/cse/pol/DCL/2006/dcl-06-09>.

Some State IV-D agencies reported that State Medicaid agencies would not accept assigned cash medical support collections because they had no authority to do so. In discussing this issue with Federal Center for Medicare and Medicaid Services (CMS) participants, we learned that, for States that operate Medicaid programs as fee-for-service programs, there is no authority to accept assigned medical support unless the child to whom the medical support is owed has actually received Medicaid services and the Medicaid agency has paid the provider a fee for such services. In other words, without having expended funds on the health care of the particular child, the Medicaid agency has no authority to keep the assigned cash medical support. Of course, if fees for services have been paid, assigned medical support may be retained to reimburse the Medicaid program. While directly addressing this issue would require a change to the Federal Medicaid statute, this problem

will diminish over time as more States move to a managed-care approach, which eliminates the problem incurred in fee-for-service programs and allows Medicaid agencies to retain assigned cash medical support to reimburse the program for the cost per child for health care under a managed care system. We are aware of those concerns and continue to work with our Federal partners to address these issues.

**4. Comment:** A commenter asked if proposed § 303.31(a)(1) that states, in relevant part, that “Cash medical support means an amount ordered to be paid toward the cost of health insurance provided by a public entity” is intended to address costs associated with “managed care” Medicaid coverage only, or costs associated with “fee for service” Medicaid coverage as well? The preamble states this would include the cost of premiums when health insurance is provided through Medicaid or SCHIP.

**Response:** As explained in the response to the previous question, there is a Federal statutory impediment under the Medicaid program (title XIX of the Act) that prevents States using “fee-for-service” type Medicaid coverage from retaining assigned cash medical support collections if services have not been provided to the child(ren). The Medicaid agency has no authority to keep the assigned cash medical support.

**5. Comment:** A commenter asked for clarification as to what is meant by the use of the term “another parent” in § 303.31(a)(1), which defines “cash medical support” to include an amount ordered to be paid toward the cost of health insurance provided by a public entity *or by another parent* [emphasis added] through employment or otherwise, or for other medical costs not covered by insurance.” It is not clear what is meant by the term “another parent.”

**Response:** The term refers to a parent providing health insurance who is not the parent obligated to pay cash medical support.

**6. Comment:** A commenter was concerned that including the phrase “or for other medical costs not covered by insurance” in the definition of “cash medical support” could mean the IV-D agency would be responsible for recovering ongoing medical bills. However, the commenter indicated that it would be a huge concern and administrative burden if the local agencies would now be required to track the payment of unreimbursed medical bills and then develop cash orders to pay them.

**Response:** State IV-D agencies are not responsible for determining the amount

of unreimbursed or uncovered medical expenses if the support order only addresses how such unquantified expenses are to be shared by parents. However, we have a longstanding policy that IV-D agencies would be responsible for enforcing an obligated parent’s responsibility, under the support order, to pay for a portion or all of a medical expense if the custodial parent presents bills (i.e. for orthodontia), to the IV-D agency. See the first comment and response on § 302.50, Support Obligations, in the final rule on “Extension of IV-D Child Support Enforcement Services to Non-AFDC Medicaid Recipients and to Former AFDC, Medicaid and Title IV-E Foster Care Recipients,” AT-91-01: *Section 302.50—Support obligations* as follows:

**Comment:** One commenter requested clarification of whether the restriction in § 302.50(e), that no child support collected may be used to satisfy a medical support obligation unless the support order designates a specific dollar amount for medical purposes, includes one-time lump sum amounts (i.e., medical support judgments) or only monthly payments ordered in lieu of paying health insurance premiums.

**Response:** If the support order designates a specific dollar amount for medical purposes, whether it is expressed in monthly increments (e.g., \$50.00 per month) or as a lump sum amount (e.g., \$1,500.00 to pay for birth expenses), the IV-D agency must collect the medical support. If the support order does not designate a specific dollar amount for medical purposes (e.g., absent parent is ordered to pay for child’s orthodontia), enforcement of that aspect of the order is not a required IV-D function. We encourage States to develop procedures to determine when judgments for medical expenses for which the absent parent is responsible under the order should be pursued and to pursue such judgments when appropriate. Federal matching funds are available for these activities.

**7. Comment:** A commenter asked that States not be required to address payment of unanticipated medical costs or costs not reimbursable by insurance.

**Response:** States have discretion within the definition of “cash medical support” in § 303.31(a)(1) to determine what medical costs obligated parents are ordered to pay.

**8. Comment:** A number of commenters were concerned that the definition of cash medical support requires that medical support provisions must be a fixed amount ordered to be paid for health insurance or “other medical costs not covered by insurance” because the ordering of health insurance premiums or other medical costs not covered by the insurance could be an “either/or” proposition. For example, the proposed regulation provides that

“[in] appropriate cases cash medical support may be ordered in addition to health insurance coverage.” According to the commenter, many State child support guidelines include a provision to order the payment of future reasonable health care costs not covered by insurance which cannot be determined at the time of the hearing and may exist whether or not health care coverage is in place.

**Response:** Section 303.31(a)(1) allows cash medical support to be ordered, regardless of whether or not health insurance coverage is provided. It is up to each State to determine whether or not it is advisable to estimate a specific amount for cash medical support in the form of shared responsibility for medical costs not covered by insurance or, in the absence of health insurance, to set in the order a specific amount for cash medical support. For example: A medical support order could require that the custodial parent enroll in private health insurance, the noncustodial parent contribute to the cost of the health insurance premium (e.g., \$50 a month), and the parents proportionately share the cost of reasonable health care expenses not covered by insurance.

**9. Comment:** Many commenters were concerned that the responsibility for unreimbursed and unspecified future medical costs should not be included in the calculation of whether medical support is reasonable in cost to the obligated parent. Some commenters recommended clarifying the definition of cash medical support to ensure that the unreimbursed medical costs not covered by insurance (and that generally cannot be fixed at the time of the hearing) are excluded from the definition of cash medical support subject to the five percent cost-reasonableness standard. In addition, a number of commenters stated that including these unfixed, unreimbursed medical expenses in the definition of cash medical support subject to the reasonable cost limitations would unfairly place the burden for these costs on the custodial parent. And finally, a commenter asked whether, if future medical support expenses are not subject to the 5 percent cost-reasonableness standard, the cost in an order to pay a percentage of future uninsured medical expenses is always reasonable?

**Response:** We agree that it would not be appropriate at the time an order is established to include the cost of future, uncertain and, unspecified medical costs when applying the five percent cost-reasonableness standard (or at State option an allowable alternative

standard) under § 303.31(a)(3). However, we do not agree that responsibility for extraordinary medical costs set in a subsequent medical support order, should be ordered without any consideration of the obligated parent's ability to pay at the time the cost is incurred or reimbursement is sought.

The Federal statute at section 467 of the Act requires each State to have and use child support guidelines as a rebuttable presumption in setting child support awards in the State. Federal regulations at § 302.56(c)(1) require State guidelines to take into consideration all earnings and income of the noncustodial parent in determining the amount of the support order. A child or medical support order may deviate from the amount the guidelines would otherwise require if there is a written finding or specific finding on the record that the application of the guidelines would be unjust or inappropriate in a particular case, as determined by criteria established by the State and taking into considering the best interests of the child. Findings that rebut the guidelines must state the amount of support that would have been required under the guidelines and include a justification of why the order varies from the guidelines. Therefore, a State may, on a case-by-case basis, deviate from its guidelines in setting responsibility for extraordinary, uncovered medical costs incurred if the requirements of § 302.56(f) and (g) are met.

10. *Comment:* One commenter indicated that the State's guidelines give a credit to the parent providing the private health insurance which is deducted from the child support amount calculated under the formula. Under these guidelines, a parent who provides private health insurance for a child receives a credit of 50 percent of the cost of the insurance from the other party. When the obligor provides the coverage, the child support order is reduced by the amount of the credit. When the obligee provides the coverage, the child support order is increased by the amount of the credit. These amounts are not captured as a stand-alone amount. While the credit appears as a line item on the worksheets used to calculate the guidelines, this amount is not identified as a separate medical support item in actual orders. Is this acceptable?

*Response:* We believe that this approach to medical support is acceptable because the definition of cash medical support is an amount ordered to be paid toward the cost of health insurance. The order generated

by these guidelines does not include a sum certain in the order language itself, but the guidelines worksheet would provide documentation and clearly indicate that medical support was ordered.

11. *Comment:* A commenter described the situation in which a noncustodial parent is ordered to pay an amount that the IV-D agency sends to the Medicaid agency. The commenter urged that this approach needs to be implemented carefully to avoid conflict with existing rules for cost-sharing in public insurance programs. Both Medicaid and SCHIP regulations authorize cost-sharing based on different standards. For both programs, these standards are applied to the custodial parent's household, not to the combined income of both parents. Therefore, in States where these costs are assessed, the custodial parent is in effect contributing cash medical support to the public entity, which may or may not be considered in ordering cash medical support against the noncustodial parent.

*Response:* If a family is receiving SCHIP or Medicaid services, that fact should be explored at the time an order is entered and taken into consideration when establishing the cash medical support obligation. Whether or not a custodial parent is contributing toward the cost of Medicaid services, if there is an assignment of support rights in effect, the State has the authority to retain assigned cash medical support to reimburse the cost of medical services provided to the family. In SCHIP programs, where there is no Federal requirement for an assignment of rights to medical support as a condition of receipt of SCHIP, the receipt of SCHIP and the custodial parent's contribution to SCHIP should be raised at the time the order is being set to ensure appropriate distribution of any cash medical support the noncustodial parent is required to pay. For example, if a custodial parent is required to contribute to the cost of SCHIP, the support order could require that a noncustodial parent's cash medical support payments be forwarded to the custodial parent to contribute to, or cover, the cost of the SCHIP contribution.

12. *Comment:* A commenter asked whether cash medical support arrears can be recorded on the OCSE 157 report.

*Response:* Yes, cash medical support arrearages should be reported with other child support arrearages on the OCSE 157.

13. *Comment:* A commenter indicated the preamble of the proposed rule states that "the custodial parent could enroll the child(ren) [in private coverage] and

the State could order the noncustodial parent to pay cash medical support towards the cost of the employee's share of health insurance coverage by the custodial parent. It would be up to the State to determine how the premium is paid, directly by the noncustodial parent to the plan administrator or as reimbursement to the custodial parent should he or she have premiums withheld from his or her income." The commenter suggested that it is not workable for States to allow the noncustodial parent to make the cash payment directly to the plan administrator. States will not be able to effectively monitor and enforce such payments.

*Response:* We agree with the commenter that the noncustodial parent paying a cash premium amount directly to the plan administrator is inappropriate. All cash medical support payments must be sent to the State Disbursement Unit for distribution. However, if the obligated parent is providing private health insurance available through his or her employer, the employer must withhold any obligation of the employee for employee contributions necessary for coverage of the children and send any amount withheld directly to the plan, as required in § 303.32(c)(4).

14. *Comment:* Two commenters wanted confirmation that unpaid cash medical support may be enforced with the same remedies as unpaid child support, such as Federal and State tax refund intercepts, credit bureau reporting, passport denial, seizure of personal and real property, and the like.

*Response:* That is correct.

15. *Comment:* The proposed rule uses as an example that if a custodial parent of a child enrolled in Medicaid is required to pay co-pays or premiums, the cash medical support obligation could be used to reimburse the parent for the co-pay or premium. Under existing Federal rules, if a parent is on Medicaid, any medical support is assigned to the State to reimburse the State for what it is paying to vendors. Is this the proposed change?

*Response:* This regulation does not change the requirements for assignment to the State under 42 CFR 433.154 or distribution of assigned medical support under 45 CFR 302.51(c). Therefore, it may be more appropriate for a medical support order to direct the noncustodial parent to reimburse the custodial parent for any premiums or co-payments for SCHIP rather than Medicaid coverage.

16. *Comment:* A commenter asked what happens when a custodial parent's medical support obligation exceeds the

child support obligation he or she is supposed to be receiving?

*Response:* It is up to the State to decide how to proceed in such a situation either in accordance with State law and child support guidelines, or on a case-by-case basis by rebutting the presumption under State law and guidelines of the support order amounts.

17. *Comment:* If the State adopts the five percent test for determining whether health insurance coverage is available at reasonable cost, does the State then have to apply the same definition of reasonable cost to cash medical support? To allow the States flexibility in this area is important because of the interplay between the State's child support guidelines (cash child support) and medical support orders as well as the wide range of medical support orders that are issued in the absence of required health insurance coverage, and the unpredictability of children's future medical expenses that are not covered by private health insurance.

*Response:* A State may establish a reasonable alternative income-based numeric standard that includes a five percent standard of cost reasonableness for private health insurance and a different definition of cost reasonableness for cash medical support.

## (2) Health Insurance

1. *Comment:* In § 303.31(a)(2), health insurance is defined as HMO, PPO, or "other type under which medical services can be provided." Would vision, dental, or prescription only policies be included in the definition of "other type under which medical services can be provided" and count as medical support provided for purposes of the OCSE-157 report?

*Response:* Yes.

2. *Comment:* Some employers have self-insured (i.e., self-funded) health care plans that pay the health care claims of their employees, rather than purchasing health insurance from an insurance company. These may not be considered "insurance plans" in the traditional sense. For this reason, the commenter asked if the definition of "health insurance" found in § 303.31(a)(2) should specifically address these plans to remove any doubt that they are included in the definition.

*Response:* We believe the language in § 303.31(a)(2), "other types of coverage which is available to either parent, under which medical services could be provided to the dependent child(ren)," covers this type of plan.

3. *Comment:* Does the definition of health insurance requiring that the IV-D agency look to either parent for available coverage, mean the IV-D agency may not proceed with an establishment until it has located and joined both parents to the establishment proceeding? Often children live with a nonparent relative. In this circumstance, may the State seek a support order against only one parent? We recommend even if the IV-D agency has cases to seek support against both parents, the agency have the flexibility to proceed against one parent at a time, if that is what is most expedient.

*Response:* If the custodial caretaker is not a parent of the child(ren) and the location of both parents is known, the State must determine whether private health insurance, that is reasonable in cost and accessible to the child(ren), is available to either parent. Should the State be unable to locate one of the parents, the State may proceed against the other parent.

### (3) Cash Medical Support or Private Health Insurance That Is Considered Reasonable in Cost

1. *Comment:* A number of commenters asked for clarification with respect to § 303.31(a)(3) as to which parent's income is subject to the five percent affordability standard. The proposed language indicates that the income of the "obligated parent" is compared to the five percent standard. However, it is unclear whether that is the parent obligated to provide coverage, or the parent obligated to contribute toward that coverage, or both. In addition, it is unclear whether the proposed regulation applies the five percent standard to the premium cost, or whether it applies to each parent's proportional share of the premium cost. If the five percent is compared to the premium cost paid by the parent providing insurance before reimbursement from the other parent, many health care plans will be deemed not affordable.

*Response:* We believe that § 303.31(a)(3), as written, is clear that States must determine to whose income (the custodial or noncustodial parent or both) the five percent standard applies. A State would compute the five percent standard based on the income of the parent being ordered to secure, or pay for private health insurance coverage. The five percent reasonableness standard would be applied to the parent who is ordered to pay cash medical support for the premium of health insurance, whether it is provided by the obligated parent or another parent. If both parents are ordered to contribute to

the cost of the premium, then the individual cost could not be more than five percent of each parent's income (or the alternative standard adopted by the State). Similarly, if a noncustodial parent is ordered to pay \$50 a month to reimburse the custodial parent for out-of-pocket medical costs not covered by insurance, the five percent reasonableness standard would be applied to the obligated parent's income. Therefore, since the facts of a particular case would vary from case to case, a State would need to determine at the time the order is entered to whose income the five percent standard is applied. States should establish guidelines for applying the five percent standard as appropriate.

2. *Comment:* A commenter indicated that proposed § 303.31(a)(3) uses the term "gross income," but does not define "gross income." In this commenter's State, "gross income" is a term of art in the new child support guidelines, meaning income received from wages and salaries, but also including income such as spousal maintenance received, and excluding income such as spousal maintenance or child support ordered. The commenter recommended that the language should be clarified to define gross income, or provide the appropriate cross-reference if the term is already defined for child support purposes.

*Response:* Neither title IV-D of the Act nor Federal IV-D regulations define "gross income." That definition of "gross income" is currently left to the States and we believe it is appropriate that States define the term for internal consistency with other possible uses of the term in the State.

3. *Comment:* A commenter indicated that § 303.31(a)(3) is unclear as to the impact of insurance not being "reasonable" in cost and assumes that the result would be that the insurance would no longer be considered by the court. Again, if that is the result, then the regulation needs to be clearly drafted to avoid situations where parents remain on public coverage when private insurance is available.

*Response:* We believe that § 303.31(b)(2)–(4) provides rules for the required steps States must take if private health insurance is not available at the time the order is entered. For new or modified orders, under § 303.31(b)(2), a State must petition to include cash medical support. For existing orders not currently subject to review, a State must use the criteria established in § 303.31(b)(3) to identify orders that do not address the health care needs of children but for which there is evidence that health insurance may be available

or facts which are sufficient to warrant modification of the existing support order to address the health care needs of children. Under paragraph (b)(4), States are required to petition to modify those support orders that meet the conditions in the State's criteria.

4. *Comment:* One commenter praised the income-based standard of cost reasonableness for health insurance because it will benefit the agencies responsible for enforcing these regulations. Instead of making inquiries regarding the availability of employer-sponsored insurance for each individual case, the agency personnel would have a clear standard to apply. However, the commenter stated that some exception is needed to the minimum requirement for families with incomes below 150 percent of the Federal poverty level. Where families fall below 150 percent of the Federal poverty level, the commenter believes that it is necessary that the Government assist them by providing health coverage so that their resources can be used elsewhere. This exception should also be uniform in every State, with the same income requirement enforced in each State.

*Response:* Under § 303.31(a)(3), cash medical support or private health insurance is considered reasonable in cost if the cost to the obligated parent does not exceed five percent of his or her gross income or, at State option, a reasonable alternative income-based numeric standard defined in State law, regulation, or court rule having the effect of law or in child support guidelines. This language allows States the option of adopting an alternate standard, that is reasonable, income-based, and numeric. Using this option, States would have flexibility to adopt an exception to the minimum requirement for families with incomes below 150 percent (or some other percentage) of the Federal poverty level. Some States, for example New Jersey and Minnesota, already have variations of such an approach in State law and/or child support guidelines. We support State flexibility to make decisions that are appropriate for families and children within each State.

5. *Comment:* A number of comments requested clarification of whether, in the event that the obligor has health insurance available but has not previously opted to enroll in the coverage, the "reasonable cost" determination is to be applied to the difference between the cost of coverage for the employee only and coverage for the child(ren) in the IV-D case or whether it would also apply to the cost of enrolling the obligor, if the employee must be enrolled to obtain dependent

coverage. Others asked whether the cost is only the difference in cost to the obligated parent between single coverage and family coverage or whether it means a *pro rata* amount of premium for the child, taking into consideration all other dependents covered by that family coverage premium.

Commenters explained that this issue arises because, in most employment-based coverage, the employee must enroll in order to cover his/her dependents. Thus, if an employee has not enrolled, he/she will have to do so in order to obtain ordered coverage for the children. Since there may be a substantial difference between the cost for an individual and the cost for covering the individual plus dependents, this could be an issue. This commenter urged that there be a uniform standard and that this decision not be left up to the States because similarly situated parents should be treated similarly. Only then will they perceive that the system treats them fairly.

Other commenters stated that the regulation should specify that the five percent limit applies to the total cost of coverage, not just the child's coverage for the following reasons. Many low income workers forgo coverage for themselves, because of the cost. Coverage for a dependent is typically an additional increment. Requiring coverage where the increment for the dependent is five percent of gross income, but the coverage for the obligor/ee is an additional amount, will significantly burden low income parents and erode the income available for contribution toward child support. Most commenters, however, favored excluding the cost of the coverage for the obligor for the purpose of applying the "reasonable cost" test because including the overall cost might preclude ordering coverage when the combined cost exceeds the cost-reasonableness standard.

*Response:* We appreciate the wide range of comments and specified concerns with respect to application of the five percent or alternative State standard. We believe it is appropriate to establish a unified approach to determining the cost-reasonableness of available private health insurance based on these comments and the consequences to parents and children of whether the five percent or alternative State standard is applied to the entire cost of insurance as opposed to the incremental cost of adding children to an insurance policy. Therefore, § 303.31(a)(3) has been revised to apply the standard to the incremental cost of

all children or the difference between self-only or family coverage. The standard would NOT be applied to the cost of adding *each* child to the insurance plan but rather the cost of family vs. individual coverage. However, in accordance with § 302.56(f) and (g), States would still have the ability to rebut the presumption that the cost of available health insurance is reasonable by including a written or specific finding on the record for the award of child support stating that the guidelines amount would be unjust in a particular case.

We also agree with commenters that it is important to make it clear that there are very different financial consequences to parents and children, depending on which route results in health insurance coverage. If the reasonable cost standard were applied to the entire cost of a family plan for a parent ordered to provide available health insurance who had previously had not signed up for such insurance, we agree that the child in effect would be subsidizing the individual coverage for the responsible parent. In addition, we agree that the full cost of a family plan is more likely to exceed the reasonable cost standard, making it considerably less likely that the responsible parent will provide coverage through health insurance. As a result, cash medical support would become more prevalent. This may not be the best outcome for children, who may benefit more from health care coverage than from a cash contribution that is insufficient to permit the custodial parent to purchase coverage. Finally, we believe that to condition coverage on the entire cost of the insurance, rather than to the incremental cost, might encourage obligated parents not to seek individual coverage in hopes that the cost of family coverage would exceed the five percent or alternative State standard. However, as stated above, States retain the authority under § 302.56(f) and (g) to deviate from the determination that available health insurance is reasonable in cost, on a case-by-case basis.

6. *Comment:* A number of commenters asked the Office of Child Support Enforcement (OCSE) to clarify that the five percent reasonable cost test (or State alternative) is applied at the time the order is established, not at the time that the medical support is enforced by sending an employer a National Medical Support Order (NMSN). Commenters indicated that it would be difficult or impossible for IV-D agencies to monitor and track the five percent standard on an ongoing basis and take modification or enforcement action based on this criterion alone.

**Response:** We agree that IV-D agencies should not be required to revisit the application of the five percent standard every time the NMSN is sent. The five percent or alternative State standard must be applied at the time the order is established and when judgments for medical costs are sought, as discussed earlier. It is reasonable for a IV-D agency to enforce a medical support order by sending the NMSN without reevaluating the cost-reasonableness of the ordered health insurance. Should the cost or availability of health insurance change, the obligated parent would be expected to seek modification of the order if conditions in the State for modification are met.

**7. Comment:** Another commenter stated that, if the five percent or alternative State standard must be applied each time that the IV-D agency enforces health insurance deductions through the employer, then the two-day requirement to send the NMSN after a new hire hit should be addressed in this proposed rule. Is the IV-D agency still required to meet the two business day time standard set forth in 303.32(c)(2)?

**Response:** The IV-D agency is required to meet the two business day time standard in § 303.32(c)(2). A determination of whether health insurance is available at reasonable cost is not made between the time of receipt of information from the New Hire Directory and when the NMSN is issued two days later.

**8. Comment:** One commenter stated that the regulations should allow the IV-D agency to also petition for private insurance coverage even if the cost exceeds five percent of the obligated parent's gross income as long as that parent wants to provide or continue to provide such coverage.

**Response:** This would be allowable using the State's discretion under § 302.56(f) and (g) to rebut the presumption that the amount of support that would be ordered under the State's guidelines is the appropriate amount of support to be ordered.

**9. Comment:** A commenter asked, if there is an exception to having medical support in a IV-D support order if both parents are very low income, that this discretion be clearly stated in the regulation.

**Response:** We believe the regulation is adequately drafted. If both parents have low or no income, the State's option to establish an alternative to the five percent cost-reasonableness standard could cover this situation.

**10. Comment:** A number of commenters believe that the requirement set forth in § 303.31(a)(3) is

too restrictive by offering only a guidelines alternative to the Federal five percent standard. The commenters stressed that, since guidelines nationwide are adopted variously as statute, regulation, or court rule, the regulatory language should be expanded by inserting the phrase "under State law, regulation, or court rule having the force of law, or" in § 303.31(a)(3) after the word "support."

**Response:** We agree that States adopt guidelines in various ways and have inserted the language in § 303.31(a)(3) to recognize that the cost-reasonableness standard may be addressed in "State law, regulation, or court rule having the force of law or" in State guidelines.

**11. Comment:** A commenter was concerned that the imposition of a "reasonable" numeric standard may decrease the number of children receiving health insurance because States already have a numeric standard in place to limit the amount of total support paid by the parent responsible: the Consumer Credit Protection Act (CCPA) limits. Using another standard for reasonable cost, one that is presumably lower than the CCPA limits, establishes inequities in parents' responsibilities to their children.

**Response:** The CCPA limits apply to the maximum amount that may be withheld from an employee's paycheck to meet that employee's responsibility to meet any obligations. It is not a substitute for a cost-reasonable quantitative standard as addressed in these regulations.

**12. Comment:** A commenter asked how the State is expected to obtain information regarding the cost of health insurance premiums when setting a medical support order that is reasonable in cost.

**Response:** States require parents to provide information at the time a support order is established. Information on private health insurance availability and the cost of that health insurance are reasonable components of that requirement.

**13. Comment:** A commenter asked, if a parent fails to provide income and/or the cost of obtaining health insurance information, are States to assume coverage is or is not available at reasonable cost?

**Response:** Under section 466(a)(19) of the Act, States are required to enact laws and use procedures under which support orders include medical support as part of any child support order. Should a parent fail to provide income or health insurance cost information upon request, the State must take independent steps to determine this information, including actions to

compel a parent to disclose this information.

**14. Comment:** A commenter suggested that the five percent of gross income recommendation of the Working Group may be outdated and should be adjusted to a higher percentage. The commenter indicated that, according to 2004 statistics provided by Kaiser Family Foundation's State health facts, the average cost of family coverage in New York is \$10,397 with \$8,307 paid by employers and \$2,090 paid by the employee. Based on the five percent rule, a parent would need to have gross income equal to or greater than \$41,800 for such cost to be considered reasonable. The commenter also suggested that a self support reserve for parents whose incomes fall below 135 percent of the Federal poverty level be established as a low income protection in consideration of the increasing cost of health insurance borne by the employee.

**Response:** States have discretion under § 303.31(a)(3) to set a reasonable alternative income-based numeric standard that could include both suggestions.

**15. Comment:** A commenter suggested that, because cash medical support is defined by the proposed amendments to § 303.31(a)(1) to include "an amount ordered to be paid toward the cost of health insurance \* \* \*", the reference in paragraph (a)(3) to "or private health insurance" after 'cash medical support' appears to be unnecessary.

**Response:** We believe it is important to include the phrase "private health insurance" in the paragraph because the definition of cash medical support only addresses amounts ordered to be paid toward the cost of health insurance provided by a public entity or by another parent but does not address the responsibility of a parent to secure private health insurance him or herself and pay any premium required by that insurance policy. We have added "the cost of" before that phrase "private health insurance" for additional clarity.

**16. Comment:** A commenter indicated that use of the term "considered to be reasonable in cost" in § 303.31(a)(3), appears to create a *per se* rule, not subject to rebuttal. If the regulation was intended to create a rebuttable presumption, then it should read "Cash medical support or private health insurance is *presumed* reasonable \* \* \* According to the commenter, allowing the five percent of gross income rule (or alternative State standard) to be rebutted would be consistent with § 302.56(f), which states that child support guidelines set by the States must create a rebuttable presumption that the guideline amount is correct.

**Response:** We believe the existing authority in § 302.56(f) and (g) to rebut the presumption that the amount of the order that would result from application of the guidelines is the correct amount to be awarded would apply to the five percent or alternative State standard on a case-by-case basis. Even if the standard for setting medical support orders is adopted by statute, regulation, or court rule having the force and effect of law, the cross-reference in § 302.56(c)(3) to § 303.31 includes the cost-reasonableness standard as an element of setting support orders that is rebuttable on a case-by-case basis. While the proposed rule only cross-referenced § 303.31(b), we believe that changing the cross-reference to the entire § 303.31 ties the cost-reasonable standard into the guidelines calculation, and therefore, the rebuttable presumption exception.

17. **Comment:** A commenter asked how the five percent reasonable cost limit is applied when the noncustodial parent has more than one case? For example, what if the noncustodial parent is ordered to pay cash medical support to the custodial parent of that child and, in the noncustodial parent's second case, the noncustodial parent is ordered to carry health insurance for the child of the relationship with the second custodial parent. Is the five percent or alternative State reasonable cost limit applied to each of the noncustodial parent's individual cases, or is it applied to all of the noncustodial parent's cases in the aggregate? If the limit is applied to each case individually, then what would be the limit if the noncustodial parent has more than one case?

**Response:** While Federal regulations do not impose requirements on application of guidelines in multiple cases involving the same noncustodial parent, State guidelines often provide guidance on imposing support obligations in cases involving a second or third family. We assume States would develop guidance for the suggested scenarios as well, as is appropriate, either as part of setting orders or as a rebuttable presumption to the ordered-amount on a case-by-case basis under § 302.56(f) and (g).

18. **Comment:** A commenter expressed concern about the option for States to implement an income-based numerical standard, without any limitation. The commenter recommends a Federal regulation implementing a limit on contribution toward the cost of coverage from low-income individuals. The proposed regulation commentary sites the New Jersey grant approach that "no parents whose net income is at or below 200 percent of the Federal

poverty level should be ordered to provide health care coverage, unless the coverage is available at no cost to the parent." The commenter recommends a similar limitation be enacted in the Federal regulations.

**Response:** The New Jersey grant project endorsed a standard of reasonableness measured against five percent of the net income of the person ordered to provide coverage. However, no coverage would be required from "parents whose net income is at or below 200 percent of the Federal poverty level," unless the coverage is available at no cost to the parent. See A Feasibility Study for Review and Adjustment for Medical Support and SCHIP Collaboration (Feasibility Study). New Jersey's report is available at <http://www.acf.hhs.gov/programs/cse/pol/dcl/dcl-03-10.htm>. While we recognize the commenter's concern, we believe it is appropriate and consistent with State flexibility concepts to allow States to adopt a reasonable income-based numeric standard to the five percent standard. We are confident that States will turn to other States' adopted alternative standards for guidance in setting their own alternative standard.

19. **Comment:** A commenter asked if State statute that provides that a premium payment that is 20 percent or more of a parent's gross income is considered unreasonable would be acceptable as a State's "reasonable alternative income-based numeric standard" for whether health insurance is considered to be reasonable in cost.

**Response:** It is acceptable under the final regulation for a State to provide that a payment of 20 percent or more of a parent's gross income is unreasonable if that is the amount needed to add the child(ren) to existing coverage, or that is the amount of the difference between the cost of self-only and family coverage.

20. **Comment:** A couple of commenters pointed out that in the context of child support enforcement, the term "obligated parent" is almost universally used to refer to the person responsible for paying cash child support. A commenter stated that, while the commenter supports the new requirement under the Deficit Reduction Act (DRA) of 2005 that custodial parents may be ordered to provide health insurance, States are not required to enforce a medical support order against the custodial parent. Referring to the custodial parent as "obligated parent" is likely to cause confusion. The commenter recommends replacing "obligated parent" with "the parent responsible for providing medical support" or similar language.

**Response:** We agree with the commenter and, for clarity, we have substituted the phrase "the parent responsible for providing medical support" for "obligated parent" in § 303.31(a)(3).

21. **Comment:** Another commenter asked if the "obligated parent" means the parent ordered to provide private health insurance, the parent ordered to provide cash medical support, or both.

**Response:** The term "obligated parent" has been changed to "the parent responsible for providing medical support." There could be multiple individuals ordered to provide medical support, including both the custodial and noncustodial parent. One parent could be ordered to provide health insurance and the other to pay or contribute to the cost of the premium, for example.

22. **Comment:** The proposed regulation does not discuss how medical costs will be divided if there are multiple children. Would the combined total for medical support be five percent, or would a separate percentage be indicated for each child (i.e., 2.5 percent for each child)?

**Response:** The five percent standard in § 303.31(a)(3) is linked to the obligated parent's gross income and not to the number of children. However, a State has the option of adopting a reasonable alternative income-based numeric standard defined by the State.

#### Section 303.31(b)—IV-D Agency's Responsibilities

##### 1. Petitioning for Medical Support in Child Support Orders—§ 303.31(b)(1) and (2)

1. **Comment:** Under § 303.31(a)(1) and (2), health insurance can be either private or public insurance. If the definition of health insurance includes both public and private coverage, it should be clear that the evaluation for accessibility and affordability under § 303.31(b)(1) and (2) applies only to private health insurance. Each of those proposed rules uses the term "health insurance." However, the preamble regarding these proposed rules unmistakably maintains that the court order should include "private health insurance" if it is accessible and affordable. That same language should be used in § 303.31(b)(1) and (2).

**Response:** We agree and have added the term "private" before "health insurance" in § 303.31(b)(1) and (2) of the regulations.

2. **Comment:** A commenter agreed that the new definition of reasonable cost mitigates the possibility that the cost of health insurance would reduce cash

child support awards for those with high-priced employer-sponsored insurance. However, the commenter expressed concern about the proposed rule's requirement that the IV-D agency must petition for a cash medical support order when private health insurance is not available at reasonable cost to either parent. The commenter believes that petitioning for cash medical support should be left to the discretion of the IV-D agency to enable States to strike the right balance on a case-by-case basis between the family's needs for cash child support and for cash medical support. Those without insurance have a range of different circumstances—some are self-employed with sufficient income to purchase insurance but have chosen not to get coverage, while others simply do not have enough money to pay for premiums.

The commenter also indicated that ordering a noncustodial parent to make a cash contribution toward public insurance expenses is likely to reduce the cash child support available to the poor families who need it most, with the result that some may seek Temporary Assistance for Needy Families (TANF) benefits. It also will impose a higher financial burden on noncustodial parents who are unemployed or underemployed in low-wage jobs that do not offer insurance at a reasonable cost, if at all.

**Response:** Section 466(a)(19) of the Act requires State laws and procedures which include a provision for medical support for the child be provided by either or both parents in all child support orders enforced under title IV-D of the Act. We believe it is more appropriate, as stated earlier, that States use current authority under § 302.56(f) and (g) to rebut the presumption that cash medical support be provided in the absence of private health insurance available to either parent on a case-by-case basis. In addition, a State is authorized to establish an alternative cost-reasonableness standard for cash medical support as well as the cost of private health insurance under § 303.31(a)(3).

**3. Comment:** A commenter suggested the last sentence of § 303.31(b)(2) be changed to provide that cash medical support "may be sought," instead of "may be ordered," since this section applies to the IV-D agency, not the entity setting child support orders.

**Response:** We agree with the commenter and have revised § 303.31(b)(2) as suggested.

**4. Comment:** A commenter asked for confirmation that § 303.31(b)(1)–(4) would not mandate a requirement to modify every order where insurance is

not being provided to include a provision for cash medical support.

**Response:** These regulations do not apply retroactively to orders established prior to the implementation date; the requirements apply to new or modified orders established or modified after the date of publication.

**5. Comment:** A commenter explained that IV-D staff who act as local "decision-makers," should not be required to review, evaluate, and select the appropriate coverage in accordance with the Federal regulations because it would require the IV-D staff to have a thorough understanding of the health needs of the children to be covered, a comparison of multiple insurance policy to meet the needs, determining if the insurance providers serve a specific area, and continual review every time health insurance coverage changes.

**Response:** The final regulations focus on two aspects of health insurance coverage: whether the insurance is reasonable in cost and accessible to the child(ren). We believe these two criteria are critical to ensuring children benefit from private health insurance coverage and parents providing it when appropriate. Health insurance has little or no value if the child does not have geographic access to the services provided by the coverage. Extensive scrutiny of various insurance plans is not mandated by the regulations.

**6. Comment:** Two commenters discussed the Working Group's suggestions that health insurance coverage is comprehensive if it includes at least medical and hospital coverage and provides for preventative, emergency, acute, and chronic care and that in deciding between two plans, the decision-maker consider factors such as basic dental coverage, orthodontics, eyeglasses, mental health services, and substance abuse treatment. The commenter indicated that, although the Working Group provided some interpretations of this term, the proposed regulations do not adopt any of these interpretations. The commenters indicated that the regulations should offer a specific definition of "availability" and "comprehensiveness" because the regulations essentially leave the definitions of these terms completely to the discretion of the State.

**Response:** The Working Group Report includes a wealth of information on medical support and is a valuable resource to States in determining how to establish procedures that meet Federal requirements but that may go well beyond the requirements in areas addressed in the Report and not mandated in the regulation. We believe

it provides ample guidance for determining appropriate health care that is accessible, comprehensive, and affordable. The Federal regulation contain requirements for critical aspects of the medical support process but appropriately leave discretion to States to fine tune their medical support processes. We have encouraged State innovation and experimentation with respect to medical support initiatives and the knowledge gained from those projects as well as the results from independent State activities should be helpful to all States.

**7. Comment:** A commenter suggested that OCSE clarify that the order state the specific dollar amount cap or limit for the premium (which would be equivalent to five percent of the parent's gross income, or the alternative numeric definition adopted by the State) because nonspecific orders are very difficult for other States to monitor and enforce.

**Response:** We agree that States should consider establishing medical support obligations that state the specific dollar amount limit for a health insurance premium, whenever possible, to make enforcement of that order easier.

**8. Comment:** A commenter recommended that the regulation allow States to consider additional components of appropriateness as defined by the State, such as comprehensiveness or special needs of the child, when petitioning the court to include health insurance.

**Response:** States are free to consider additional components of appropriateness beyond those specified in the regulation.

**9. Comment:** The proposed rule requires States to petition for cash medical support until reasonably-priced health insurance becomes available. Does this mean States must develop automated means of tracking health insurance available to both parents? Such a proposal would require extensive reprogramming, especially since States would then have to track employment data for the custodial parent. If States are to use locate and tracking systems already in place, do they now have to submit data on the custodial parent to these resources?

**Response:** Section 303.31(b)(2) requires States to petition for cash medical support if health insurance is not available at the time the order is entered or modified and until such time as health insurance, that is accessible and reasonable in cost becomes available to either parent. Private health insurance, if available at reasonable cost and accessible to the child(ren), remains the preferred method of providing medical support for children.

There is no specific requirement for States to develop automated means of tracking health insurance available to both parents. However, States should currently have the capability to seek information from State and Federal sources on custodial parent's income, assets, and location for various IV-D program results and, States should be capturing the fact that a parent is providing health insurance or that the employee's employer does not offer health insurance. OCSE currently matches names in the Federal Case Registry, which includes custodial as well as noncustodial parents, with the National Directory of New Hires, and returns successful matches to each State.

**10. Comment:** The same commenter asked if the State learns, through current locate and tracking methods (i.e., New Hire Reporting, medical support vendor), that health insurance coverage is available, whether the State should initiate action to modify the order?

**Response:** When a State establishes a child support order, if the State does not include language ordering health insurance coverage, and only includes a cash medical support order, the State would have to petition to modify the order to require that health insurance coverage be provided before the new employee can be required to provide the insurance if it is reasonable in cost and accessible to the child. If the order already includes a requirement to provide health insurance that is reasonable in cost and accessible to the child when it becomes available, there would be no need to modify the order and the State could send the NMSN to the new employer within two days of receipt of the new hire information in the State Directory of New Hires.

**11. Comment:** A commenter asked, if the parent ordered to provide health insurance changes employment and the cost of the health insurance premiums at the new employer exceeds the reasonable cost standard, is the State required to take an action or is it incumbent upon the obligated parent to request a modification of the order? Please note, in this situation, the medical insurance was reasonable when the order was entered.

**Response:** As indicated earlier in response to a concern about the two-day timeframe to send a NMSN, it is reasonable for a IV-D agency to enforce a medical support order by sending the NMSN without reevaluating the cost-reasonableness of the ordered health insurance. Should the cost or availability of health insurance change, the obligated parent would be expected to seek modification of the order if

conditions in the State for modification are met.

**12. Comment:** A commenter opined that, while one of the goals of the proposed changes to the regulation is to increase the number of children covered by private health insurance, the Federal five percent standard may actually result in fewer children being covered than are covered today. As current orders, where the children are already covered, are reviewed and modified to include the five percent standard, States may actually be required to terminate existing coverage where the existing premium does not meet the five percent standard.

**Response:** States have authority to set a reasonable alternative income-based numeric standard that is higher than the five percent standard. Or, a State may rebut the presumption in such a case that health insurance is not unreasonable in cost and order that private health insurance be provided.

**13. Comment:** A commenter suggested that "at reasonable cost" be added immediately after the phrase, "petition to include cash medical support" in § 303.31(b)(2) to be consistent with § 303.31(b)(1) that requires health insurance to be reasonable in cost.

**Response:** We agree and have revised § 303.31(b)(2) to add this condition as follows: "If health insurance described in paragraph (b)(1) of this section is not available at the time the order is entered or modified, petition to include cash medical support that is reasonable in cost, as defined in paragraph (a)(3) of this section, in new or modified orders \* \* \*."

**14. Comment:** Several commenters indicated that the proposed rule inserted into § 303.31(b)(2) an additional requirement beyond the requirement to petition for orders for cash medical support. The phrase, "until such time as health insurance, that is accessible and reasonable in cost as defined under paragraph (a)(3) of this section, becomes available" may require IV-D agencies, which had already obtained an order for cash medical support, to seek modification to stop the order for cash medical support and to start an order for health insurance. This goes beyond the mandate in

§ 303.31(b)(3) and (4) to petition to include medical support in orders that do not address medical support if certain state-adopted criteria are met. We do not believe IV-D agencies have the resources to repeatedly modify orders that already contain provisions for medical support, in addition to the current IV-D mandates to review and adjust or modify support orders. We believe existing requirements to review

orders under 42 U.S.C. 666(a)(10), and the proposed rule to re-evaluate medical support at every modification under § 303.31(b)(1), are sufficient. We recommend the proposed phrase and any such mandate be removed.

**Response:** We do not read § 303.31(b)(2) to mandate that a State petition to modify an order that includes cash medical support if the State learns, for example, through NDNH or SDNH data, that health insurance is now available. However, delaying petitioning for health insurance coverage for as long as three years would not be in the best interests of the children. If the order includes language that requires health insurance be provided should it become available in the future, and that cash medical support is ordered until such time, the need to petition to modify the order and allow the State to take steps to immediately secure private health insurance coverage for the children would be avoided. Absent such a provision, the State would need to petition to modify the order to take advantage of the currently available coverage.

**15. Comment:** One commenter stated that the proposal will delete § 303.31(b)(2) under which the IV-D agency must petition the court to include medical support whether or not health insurance was available to the parent at the time the order was entered. Is it the regulation's intent to weaken that requirement or is it assumed that other sections of the proposed regulation continue the mandate to include medical support whether or not it is available at the time the order is entered? Another commenter indicated that it is preferable to include language in all orders to require the obligors to carry health and dental insurance if it is available for a certain amount per month or to pay a specific amount per month in cash medical support if insurance is not available. The commenter said he/she had been using this language for almost two years now in an attempt to reduce the workload by needing fewer modifications of orders for medical insurance language.

**Response:** The mandate to include health insurance in a support order whether or not it is available at reasonable cost at the time the order is entered is eliminated in the revision to § 303.31(b)(2). However, as stated above by the second commenter, we believe it would be prudent for States to consider continuing to include such language to avoid the need to revise the order should the State learn that health insurance, that is accessible and reasonable in cost, becomes available

through a change of employment or otherwise.

16. *Comment:* If cash medical support goes unpaid, would arrears accrue? If so, this seems inequitable because if the premium were to go unpaid due to CCPA limits and the priority for employer allocation of funds withheld, arrears aren't accrued. This will negatively impact arrears.

*Response:* Cash medical support that is unpaid becomes an arrearage just like any other ordered payment of support. If a health insurance premium is unpaid in the circumstances mentioned above, a State might consider reevaluating the support order to ensure that it is set at an amount the obligated parent can afford, based on his or her current ability to pay.

17. *Comment:* A State's guidelines that currently provide adjustment of the basic support obligation based on which party is providing coverage/paying the premium seems to be consistent with the intent of the proposed rule. It does not seem worthwhile to order a cash medical amount to be paid toward the cost of health insurance provided by another parent. If this were to become a mandate, it would seem more worthwhile to mandate a cash medical amount to be paid only toward the cost of health insurance provided by a public entity.

*Response:* While the definition of cash medical support includes payments toward health insurance provided by a public entity or another person, States are not required to include in every order an amount to be paid toward the cost of health insurance provided by another parent, or by a public entity for that matter. How the State meets the requirement to provide for medical support in every order depends on State law and child support guidelines, including the type described in the question.

18. *Comment:* It appears from the proposed rule that a State would have to differentiate between cash medical support owed to Medicaid, SCHIP, and the custodial parent. This will require significant technical enhancements, as we need to develop an interface with SCHIP, and our automated system would require a major allocation of resources and time to accommodate cash medical.

*Response:* Section 303.31(b)(2) does not require a State to order cash medical support to be paid to a Medicaid or SCHIP agency. These options are included as possibilities because some families may best receive health care, in the absence of private health insurance, through receipt of Medicaid or SCHIP services should those families be

determined to be eligible for those programs' services. It is up to a State to determine how best to provide medical support consistent with the Federal requirements in § 303.31.

19. *Comment:* A cash contribution toward medical support is potentially a simple surcharge for the support obligations of all low income obligors. The contribution will not purchase insurance, which cannot be purchased piecemeal. Contributions toward unpaid medical expenses are better obtained after the fact, with proof of such expenses. Otherwise, there could be a demand for accounting of how the "medical contribution" is expended. Such a requirement would be detrimental. It would take valuable court time, foster a battleground to refuel old resentments, and require proof that is unlikely to exist, given the way many households, especially those with very limited incomes, operate. The medical cash contribution would likely open the door to further calls for child support accounting. For this reason, cash contributions toward medical costs should be based on actual expenditures.

*Response:* We agree that requiring custodial parents to account for how ordered support is expended is detrimental in the ways described. We believe it is inappropriate to consider such an approach absent clear evidence that this is an identified problem. It is up to a State to determine how cash medical support will be ordered in appropriate cases.

20. *Comment:* The requirement that IV-D agencies petition for medical support when there is evidence that either parent may have coverage available at reasonable cost, should be limited to situations where there is no SCHIP coverage. SCHIP coverage may be available to families at higher incomes in some States than in some other States. For example, families with incomes between 135 and 185 percent of poverty can qualify for SCHIP coverage with co-payments but no premiums. Under the proposed rule, a custodial parent in this situation could conceivably have access to coverage for five percent of gross income or less and the noncustodial parent could be ordered to contribute toward the capitated cost of the SCHIP coverage. States should be afforded leeway not to pursue the custodial parent for employer-sponsored insurance in this situation, especially where there is a mechanism in place for the recovery of the cost of the SCHIP payments.

*Response:* States have discretion under these regulations and existing child support guidelines to rebut the presumption that the result of an

application of the State's law and guidelines would not be appropriate in a particular case, as long as there is a specific written finding on the record in accordance with § 302.56(f) and (g).

21. *Comment:* If private health insurance is not available, States are required to ensure orders are entered for cash medical support until private health insurance is available. The courts in various jurisdictions prohibit the IV-D agency from unilaterally enforcing orders to secure health insurance if reasonable in cost through employment without a review under the support guidelines. These restrictive orders have posed a quandary for the IV-D agency's ability to use automation fully. Currently a State must review each and every order prior to enforcing the medical support provision. This would definitely be the case under the new regulation. States will most likely use the review and adjustment process to review the parties' income and availability of private health coverage and require adjustment to the child support cash award to account for the private health insurance. This will potentially have significant impact on workload associated with constant review and adjustment activities as custodial and noncustodial parent employment and insurance coverage change.

*Response:* Children need appropriate health care and their parents should be the first source of available health care for their children. States should do everything possible to ensure coverage when private health insurance is available at reasonable cost and accessible to the children.

22. *Comment:* When health insurance is not available at a reasonable cost and/or is not accessible under the State's definition, if the court enters an order requiring each parent to pay 50 percent of medical expenses without ordering a specific dollar amount, is that considered "medical support provided" for purposes of the OCSE 157 report?

*Response:* It would only be considered "medical support provided" on the OCSE form 157 if the State received from one parent a bill for medical expenses for the child and then recovered 50 percent of the bill amount or any portion thereof from the other obligated parent.

23. *Comment:* A commenter indicated that § 303.31(b)(2) appears to require States to seek orders for cash medical support that are contingent upon the unavailability of medical insurance. For the order to be a judgment by operation of law, as required by 42 U.S.C. 666(a)(9), the order must be final and in a fixed amount that is clear on the

record. OCSE should encourage States to ensure that both requirements are observed in applying the new regulation.

**Response:** Section 466(a)(9) of the Act does not require medical support orders to be in a fixed amount that is clear on the record. Rather, that section requires in part that any payment of support under any child support order is a judgment by operation of law, with the full force, effect and attributes of a judgment of the State, including the ability to be enforced. This regulation provides States with a number of options for ensuring medical support is provided for children by their parents whenever possible. The various methods allowed by the regulations and discussed in many of these comments and responses are consistent with the requirements of title IV-D of the Act.

24. **Comment:** One commenter stated that the Working Group recommended that geographic access be determined by a 30 miles/30 minutes standard. The commenter also recommended that coverage be sought only if, based on the obligated parent's work history, coverage was likely to be in place for at least one year. Under the Working Group's proposal, States would have the option to adopt different standards if they felt it appropriate. The commenter recommended that the Federal regulations adopt the Working Group's approach rather than leave the definition of accessibility up to States. While recognizing the need for some State flexibility, the commenter also believes that Federal guidance on the standards to be used is appropriate. Another commenter indicated that the description of accessibility in the Working Group Report is somewhat problematic in rural America as there are numerous places where it would be further than 30 minutes or 30 miles to a doctor, but health insurance coverage would still be worthwhile to the custodian.

**Response:** The Working Group's Report is full of recommendations States should consider in determining the appropriate approach to securing medical support from parents. The 30 mile/30 minute standard for accessibility in the Report seems to be a good benchmark. We are unaware of any strong reason, however, to place an additional requirement on States unless there is evidence that it is needed. Therefore, we encourage States to consider the 30 mile/30 minute standard if appropriate. However, it is up to the State to define "accessible" and therefore, a different definition is acceptable.

25. **Comment:** A commenter requested regulatory guidance with respect to interstate cases. How will States be audited when enforcing support collection in a responding case with respect to medical support enforcement? Is it the responsibility of the initiating State to modify its medical support order requirement when the noncustodial parent obviously resides where services and providers are unavailable to the child in the initiating State?

**Response:** If a responding State has been asked by an initiating State to establish a medical support order, the responding State must determine if private health insurance is accessible to the children and available to the noncustodial parent at reasonable cost. If health insurance is not accessible or available at reasonable cost to the noncustodial parent, the responding State should inform the initiating State and the initiating State should determine if private health insurance is available to the custodial parent. If private health insurance is available to the custodial parent at reasonable cost and accessible to the children, the initiating State should require the custodial parent to secure the health insurance coverage and inform the responding State. If the initiating State requires the custodial parent to secure private health insurance, the responding State should determine whether or not to require the noncustodial parent to provide cash medical support to the custodial parent. If private health insurance is not accessible to the child(ren) or available at reasonable cost to the custodial parent, the initiating State should notify the responding State so that the responding State may seek cash medical support from the noncustodial parent.

In response to the question about how States will be audited in a responding State with respect to medical support enforcement, States are required to report information regarding the enforcement of cash medical support obligations, including interstate case activity, on the OCSE-157 in accordance with OCSE AT-05-09 dated September 6, 2005. Additionally, information related to the enforcement of medical support obligations reported on several lines of the OCSE-157 for Intrastate and Interstate IV-D cases is subject to the Data Reliability Audit in accordance with the document entitled "Data Reliability Guide for Auditing" issued by the Federal Office of Child Support Enforcement. And finally, medical support enforcement activities are included as part of a State's self-assessment under 45 CFR 308.2(e).

26. **Comment:** A commenter requested a more thorough definition of what is included in "medical care." Federal guidance would prove helpful to more than just the IV-D program. The draft rule mentions allergy shots, orthodontic treatment, and psychological counseling as covered medical care costs. Would this also include routine dental preventive care, fillings, root canals, crowns, etc. performed by licensed dentists, endodontists, or oral surgeons?

**Response:** We believe that States are in a better position to define comprehensive health care coverage. However, a definition of comprehensive dental insurance that provides for the suggested services could be adopted by the State.

27. **Comment:** If the court orders the custodial parent to pay cash medical support to the noncustodial parent, the IV-D agency may have to open a second case for the cash medical support obligation because there are multiple payers and payees. Would OCSE reaffirm or re-state its position on whether or not:

(1) The IV-D agency is responsible for recording (in the statewide computer system) certain obligations that have been placed on the custodial parent;

(2) The IV-D agency is responsible for monitoring compliance with certain obligations that have been placed on the custodial parent; or

(3) The IV-D agency is responsible for enforcing certain obligations that have been placed on the custodial parent.

**Response:** A State is responsible for monitoring support obligations, even if the State opts not to enforce them because the State needs to know if the custodial parent has covered the children or not, if ordered to do so. This information is important for Medicaid purposes or for purposes of modifying the order. It could also help a State determine if enforcement against custodial parents is needed or not, to make an informed decision as to whether or not to enforce orders against custodial parents using the NMSN.

28. **Comment:** The proposed rule's preamble states, "For example, if a custodial parent of a child enrolled in SCHIP is required to pay a co-payment or premium for SCHIP, the cash medical support obligation of the noncustodial parent could be used to pay or reimburse the custodial parent for any co-payment or premium owed to SCHIP." In the sentence, it is unclear who "required" the custodial parent to pay a co-payment (is it a reference to a court order or is it a reference to a SCHIP agency's payment expectation?).

**Response:** It is a reference to a SCHIP agency payment expectation.

29: *Comment:* Is the IV-D agency expected to: (1) Establish a cash medical support obligation against a custodial parent receiving Medicaid (an amount presumably payable to the Medicaid agency) if appropriate? (2) Establish a health insurance obligation against a custodial parent receiving Medicaid, if appropriate?

*Response:* If after taking all steps required to determine if health insurance is available to either parent, application of the State's guidelines, and a determination that the health insurance available to the custodial parent is reasonable in cost and accessible to the child(ren) are met, it would be appropriate to require the custodial parent to secure such health insurance for the child(ren), unless the State rebuts the presumption that the results of these calculations would be inappropriate in a particular case, as authorized in § 303.56(f) and (g). Similarly, with respect to cash medical support, a State would need to go through the steps of determining appropriate medical support requirements to be included in the order, and an order against the custodial parent for cash medical support might be appropriate.

2. Petitioning To Modify Existing Orders To Include Medical Support Based on Criteria Established by the State  
§ 303.31(b)(3)–(4)

1. *Comment:* A commenter stated that the "written criteria" in § 303.31(b)(3)(i) should be re-written as follows: "Establish written criteria to identify orders that do not address the health care needs of children based on \* \* \*. Evidence that health insurance *that is accessible to the child(ren), as defined by the State*, may be available to either parent at reasonable cost, as defined under paragraph (a)(3) of this section \* \* \*." This would ensure the concepts of accessibility and reasonable cost are consistently brought into the written criteria requirement.

*Response:* We agree and have made the change to § 303.31(b)(3)(i).

2. *Comment:* The proposed § 303.31(b)(3)(ii) should be clarified by deleting the last phrase: "and (2) of this section". Clause (i) requires the criteria include evidence that health insurance may be available. This seems appropriate. However, by adding the last phrase in clause (ii) the rule would require, in addition to evidence health insurance may be available, that "health insurance \* \* \* is not available", which is what (b)(2) specifies.

*Response:* We agree and have removed reference to paragraph (b)(2) in § 303.31(b)(3)(ii).

3. *Comment:* The proposed § 303.31(b)(3)(i) requires States to establish criteria to identify when health insurance may be available. Because health insurance can include health insurance provided by a public entity, the regulation should be clarified to remove any mandate the IV-D agency must identify when a child might be eligible for Medicaid or SCHIP.

*Response:* We agree and this result was not our intent. Therefore, we have inserted "private" before the words "health insurance" in § 303.31(b)(3)(i).

3. Providing Notice of Health Insurance Policy Information to the Custodian—Former § 303.31(b)(5) and Notice to the Medicaid Agency—Proposed  
§ 303.31(b)(5)

1. *Comment:* Two commenters suggested that deleting former subsection (b)(5), which required the IV-D agency to provide the custodian with health insurance policy information, may result in custodial persons not receiving notice regarding health coverage from plans that are not sponsored by employers or if the IV-D agency did not provide the custodian's address on the NMSN because of security concerns, such as domestic violence. While employers are required to provide information to the Alternate Recipient pursuant to a NMSN, no such requirement exists if the health coverage is provided through nonemployer sponsored plans. State IV-D agencies should retain responsibility for advising parents of the health care coverage that has been secured.

*Response:* While we agree that in some instances, such as those mentioned above, custodial parents may not get notice of health plan information from the plan administrator, we believe the IV-D agency will be well aware of those instances in which notice to the custodial parent remains necessary and provide notice in those instances, without a Federal mandate to do so.

2. *Comment:* Several commenters indicated that proposed § 303.31(b)(5) states that the IV-D agency should inform the Medicaid Agency when a new or modified court order for child support includes health insurance and/or cash medical support. Rather than mandating that child support notifies the Medicaid Agency every time health insurance or cash medical support is ordered, it is more worthwhile to institute this requirement on cases where the children are enrolled in health coverage and/or cash medical support payments have actually been collected.

*Response:* Based on these comments and upon review of §§ 303.31(b)(5),

303.30(a)(7) and 302.51(c)(1), we believe § 303.31(b)(5) is unnecessary and have deleted it from the regulation. We agree that it is preferable to provide the Medicaid agency with health insurance coverage information at the time the insurance is provided. Section 303.30(b) requires the IV-D agency to inform the Medicaid agency whether the noncustodial parent has a health insurance policy and, if so, the policy names and number(s) and name(s) of person(s) covered, in accordance with § 303.30(a)(7). In addition, § 302.51(c)(1) requires the IV-D agency to send assigned cash medical support collections to the Medicaid agency. Therefore, since these two existing requirements already require appropriate notice to the Medicaid agency, § 303.31(b)(5) is redundant and has been removed.

3. *Comment:* We recommend that § 303.31(b) be modified to include language requiring that custodial parents provide evidence of enrollment of the child(ren) in a health care plan if receiving cash medical support for premiums from the noncustodial parent.

*Response:* As indicated, States are not required to enforce orders requiring the custodial parent to provide medical support. However, State should require custodial parents ordered to provide health insurance to provide proof of the children's coverage whether or not a noncustodial parent is ordered to contribute to the cost of the insurance and whether or not the State opts to enforce the order against the custodial parent should he or she fail to provide the ordered coverage. Without requiring such notice, a State would not be able to meet its requirement to notify the Medicaid agency of the health insurance information or would not be able to report on the 157 statistical report that medical support is ordered and provided.

4. Notice That Medical Support Services Will Be Provided in All IV-D Cases—  
§ 303.31(c)

1. *Comment:* Section 303.31(c) would require the IV-D agency to inform the non-IV-A applicant for IV-D services that "medical support enforcement services" will be provided. We would suggest that "medical support services" be used instead. Including the word "enforcement" has a limited connotation and may be construed as not including establishment of medical support obligations.

*Response:* We agree and have deleted "enforcement" from § 303.31(c). However, as discussed above, a State may opt not to enforce medical support orders against custodial parents.

5. Distribution and Disbursement of Cash Medical Support

**1. Comment:** May the State Disbursement Unit (SDU) distribute a cash medical support collection to an SCHIP agency? What if this is a State in which SCHIP is not a Medicaid expansion program, but distinct from Medicaid? We note under 42 U.S.C. 657, 654(5) and 654(11), collections under the IV-D program may be retained by the State if assigned under IV-A or IV-E or Medicaid programs, or must be distributed to the family. (There is no assignment of medical support to the SCHIP program in States which do not have the Medicaid expansion program.)

**Response:** There may be circumstances under which the SDU may send support payments to an address other than that of the obligee, for example, if a Tribe operates a Tribal TANF program, requires as a condition of eligibility for Tribal TANF that an individual assign support rights to the Tribe and the individual is receiving IV-D services from the State; or if an obligee provides an address other than a home address to the SDU and directs the SDU to send support payments to that address; or if a State SCHIP program opted to require an assignment of support rights, and cooperation with the IV-D program as a condition of receiving SCHIP in the State.

**2. Comment:** One commenter asked for clarification that all types of cash medical support should be paid to the IV-D agency and then distributed and disbursed by the SDU.

**Response:** All child, spousal, and cash medical support payments collected by the IV-D program must be paid to the SDU in accordance with section 454B of the Act.

**3. Comment:** A commenter indicated that distribution of cash medical support paid to a public entity needs to be clarified. The preamble states that a "health insurance premium or cash medical support obligation is current support for purposes of distribution and allocation between cash child support and cash medical support." This distribution issue is not addressed in the body of the proposed regulation. However, if cash medical support is always treated as current support, the IV-D agency would, in some instances, distribute money to the State Medicaid agency as cash medical support before it distributes money owed to the family as cash child support. This would appear to be contrary to the family first distribution rules in 42 U.S.C. 657.

**Response:** The preamble language was unclear. A cash medical support collection would be considered current

support only if the support was paid timely and in the specific amount required in the order to be paid periodically. Should that amount not be paid timely, the unpaid obligation becomes past-due just like any unpaid current child support obligation. In addition, if a family is receiving Medicaid and has assigned rights to cash medical support but is no longer receiving TANF, current cash child support would be paid to the family and assigned current cash medical support would be paid to the Medicaid agency.

Section 454(5)(B) of the Act requires that "in any case in which support payments are collected for an individual pursuant to the assignment made under section 1912 [of the Act], such payments shall be made to the State for distribution pursuant to section 1912, except this clause shall not apply to such payments for any month after the month in which the individual ceases to be eligible for medical assistance." These requirements are also addressed at § 302.51(c)(1) which requires the IV-D agency to forward assigned medical support payments to the Medicaid agency for distribution under 42 CFR 433.154. Under § 302.51(c)(2), when a family ceases receiving Medicaid, the medical support assignment terminates, "except with respect to any unpaid medical support obligation that has accrued under the assignment." The subsection further requires the IV-D agency to attempt to collect any unpaid specific dollar amounts designated in the support order for medical purposes and forward amounts collected to the Medicaid agency for distribution under 42 CFR 433.154.

**4. Comment:** If States elect to pass through support in accordance with revised section 457(a)(1) of the Act, as amended by the DRA of 2005, what will be the distribution scheme for pass-through States that also elect to have a cash contribution requirement for Medicaid cases, if the payment cannot cover both or all?

**Response:** OCSE-AT-98-24, <http://www.acf.dhhs.gov/programs/cse/pol/AT/1998/at-9824.htm>, states:

**ANSWER 22:** Section 457 of the Act does not address specifically distribution of medical support collections. However, distribution of assigned medical support is addressed under section 1912(b) of the Act and 42 CFR 433.154, statute and regulations governing the Medicaid program. In addition, section 459(i)(2) of the Act defines child support to include orders which provide "for monetary support, health care, arrearages or reimbursement \* \* \*." And, Federal regulations at 45 CFR 302.51 address disbursement of

assigned medical support and require that:

(1) Amounts collected by the IV-D agency which represent specific dollar amounts designated in the support order for medical purposes that have been assigned to the State under 42 CFR 433.146 shall be forwarded to the Medicaid agency for distribution under 42 CFR 433.154.

(2) When a family ceases receiving assistance under the State's title XIX plan, the assignment of medical support rights under section 1912 of the Act terminates, except for the amount of any unpaid medical support obligation that has accrued under such assignment. The IV-D agency shall attempt to collect any unpaid specific dollar amounts designated in the support order for medical purposes. Under this requirement, any medical support collection made by the IV-D agency under this paragraph shall be forwarded to the Medicaid agency for distribution under 42 CFR 433.154.

Federal distribution regulations at 45 CFR 302.51 apply to both child and medical support payments which are ordered to be paid in specific dollar amounts. In the preamble to the final regulations published in the **Federal Register** on February 26, 1991 (56 FR 7988) and issued by OCSE-AT-91-01 on March 8, 1991, we stated that: "When less than the total amount of the obligation is collected, the IV-D agency should allocate the amount collected between the child support and the medical support specified in the order in proportionate shares. Current support must be given priority over past-due support, except with respect to collections made through the Federal income tax refund offset process." The allocation of collections between child support and medical support would apply to payments on arrearages as well as current support. See also OCSE-PIQ's-93-03 and 93-06.

Once a State allocates the amount collected between child support and medical support designated in the support order, distribution of any medical support collection must be in accordance with 45 CFR 302.51, section 457 of the Act and OCSE-AT-97-17, including the order in which assigned financial and medical support collections are distributed and the forwarding to the title XIX agency of any amount of assigned medical support.

6. National Medical Support Notice (NMSN)—§ 303.32

**1. Comment:** Changes to the NMSN are not included in the proposed rule changes. However, § 303.32(a) directs the use of the NMSN specifically for noncustodial parents. The proposed rules allow the custodial parent to be ordered to carry health insurance, so it seems appropriate to allow agencies to

use the NMSN to enforce that obligation. Some changes also need to be made to the notice itself to make it appropriate for use for custodial parents. For example, the NMSN often uses the term “noncustodial parent/participant.” With the rule changes, the custodial parent could be the participant.

**Response:** Necessary changes to the NMSN will be made before February 2008, when approval for the NMSN must be renewed. However, States may use the current version of the NMSN to enforce an order requiring a custodial parent to provide health insurance coverage through her employment. Changes to § 303.32(a) to include reference to use of the NMSN when the responsible parent is the custodial parent are addressed later in this preamble.

**2. Comment:** OCSE received the greatest number and disparity of comments on the proposed requirement in § 303.32(c)(4)(ii) that establishes a priority in which different types of child and medical support obligations must be satisfied if there are insufficient funds available to meet the employee’s contribution necessary for coverage of the child(ren) and to also comply with any withholding orders received by the employer with respect to the same employee. Rather than list and respond separately to all comments received on the proposed priority order, the following paragraphs summarize the many, varied positions and rationale expressed by commenters and the response that follows explains the conclusion drawn from these widely divergent preferences. We believe it is important to consider the body of comments provided and to then explain the conclusions drawn from the comments as a whole, and changes made to the proposed regulation based on the comments.

Only a couple of commenters were satisfied with the proposed priority order for satisfying various obligations. However, these commenters had concerns about the possible conflict with child support distribution requirements, discussed in more detail below. A number of commenters preferred that States continue to be allowed to set a priority among health insurance premiums, current child support, current cash medical support, spousal support, and arrearages in situations in which all obligations cannot be satisfied because of the Consumer Credit Protection Act limits on the amount of money that may be withheld from an employee’s wages. Other commenters preferred a priority that would satisfy health care premiums

before current child support because unless the entire health insurance premium is paid, the policy would be cancelled and the child(ren) would lose coverage. Several others, citing good social policy, preferred to satisfy all current child and medical support obligations before satisfying any spousal support obligation, because securing child support is the IV-D program’s primary goal. Still others preferred to satisfy all child support before applying any withheld amount to health insurance premiums or cash medical support.

Some of these latter commenters opposed the priority set out in the proposed rule because in their view it was contrary to “family first” distribution authorized under the DRA of 2005 and would result in some families receiving less child support that is critical to their self-sufficiency. Several of these commenters argued that any child support owed to the family should be satisfied before any portion of the amount withheld is applied to cash medical support assigned to the State as a condition of receipt of Medicaid. Still others wanted all child support, current and arrearages, to be satisfied before any health insurance premium or cash medical support obligation. Others requested that employers be directed to follow the directive of a custodial parent in a nonassistance case if there are insufficient funds to provide both current child support and health insurance coverage, and the custodial parent prefers to receive health insurance coverage over child support, or vice versa.

A number of commenters were concerned that the priority set forth in § 303.32(c)(4)(ii) was inconsistent with and violated the Federal requirements for distribution of child support collections in section 457 of the Act, § 302.51 and guidance issued by OCSE. One commenter liked the proposed priority but was concerned that it is in conflict with the established distribution hierarchy which the commenter believes places current child support and medical support above spousal support. Others proposed that the priority language be included in § 303.100, which contains Federal requirements for withholding income. And still others did not object to the priority order that applied to employers because once the withheld amounts are received by the IV-D agency, the Federal distribution rules would apply and, in fact, the amounts withheld may not be applied to satisfy obligations in the same sequence that employers are required to follow.

There were a number of commenters concerned with the phrase “Other child support obligations” which appears in proposed § 303.32(c)(4)(ii)(D) because the phrase is unclear and leaves a number of unresolved potential issues about what is included or excluded from that phrase. Among those listed were: What is a State to do if there is more than one child support order? Does the reference to “other child support obligations” include child support orders with respect to different child(ren) of the same obligated parents? Or does the priority of satisfying arrearages before “other child support obligations” violate the Federal distribution requirement to pay current support before arrearages? What if a State integrates day care, education, long distance transportation, and other child rearing costs into the cash child support amount? Does the regulation intend that these awards are all examples of “other child support obligations?”

Some commenters wanted OCSE to clarify that the priority applied in both IV-D and non-IV-D cases while others asked for clarification that the priority applied only to IV-D cases. Another asked if the priority applied only to payments from employers or if all payments would be subject to this prioritization. Another commenter objected to the option, in § 303.32(c)(4)(ii), to allow courts or administrative decision-makers to set a different priority in a support order than that laid out in the regulation because it would be confusing to employers and, if allowed, any alternative to the general priority order must be determined to be in the best interest of the child(ren) involved. Another commenter favored this flexibility provided in the proposed regulation to allow deviation from the prescribed priority if included in the court or administrative order. A commenter also raised the possibility of employers receiving multiple income withholding orders for multiple custodial parents and child(ren) against a single employee, each with a different priority.

One commenter stated that the proposed priority scheme imposes a new requirement on States, and that, while well intended, this provision is problematic in that it may conflict with State law, regulation or procedure that have been in place for some time in the absence of a federally-imposed priority, as to the treatment of health care costs under the State’s support guidelines or otherwise. For example, some States’ guidelines may require that health insurance premium costs must be considered as mandatory and are netted

out of income prior to the calculation of the support amount. In this example, placing current child support withholding as a priority over withholding for health insurance would conflict with other State law. Employers will have difficulty in determining amounts to be withheld in the circumstance wherein there is sufficient income to withhold current support, not enough to withhold for the health insurance premium (which must be paid in full) but enough that support could be withheld to address arrears. The current regulation does not set a Federal priority and thus has allowed States flexibility in consideration of health insurance costs and State policy choices. This commenter believes that the election of priorities between current support, medical support, and payment of arrears for the support of the children implicates significant policy issues and concerns. And, according to the commenter, such choices are made by Congress or State legislatures.

And finally, a commenter argued that, as part of the NMSN requirements, States were given the flexibility and the option of deciding the respective priority scheme for the payment of current child support, child support arrearages, and medical support. Each State carefully considered its options, and made its respective decision of the appropriate priority scheme, in its implementation of the NMSN requirements. The commenter requests that the final regulation continue to afford States with this much needed flexibility in order to meet the needs of each individual State as to the priority of withholding with respect to current child support, child support arrears, and medical support or health insurance.

**Response:** We have found the body of comments to be compelling in its diversity, conviction, and expressed concerns with the approach contained in the proposed regulation. While there are a number of issues raised in the comments summarized above that would warrant explanation or correction were we to retain the proposed priority, we have concluded that for a number of reasons, including many articulated by commenters above, it is inappropriate at this time (six years after final regulations governing the NMSN were issued), to impose a mandated priority where States to date have been afforded flexibility.

There is no evidence of which we are aware that compels setting a federal-level priority for employers to use in circumstances in which the CCPA limits preclude satisfaction of all obligations. States, in good faith, considered this issue, and as allowed under the NMSN

regulations, determined the best approach to take given the circumstances in the particular State, including, as suggested above, the different ways that State guidelines calculate child support and determine parental responsibility for the health care needs of children. There was no general consensus in comments about an alternative priority, or suggestions for resolving some of the more complex scenarios set out in the comments, for example, multiple NMSNs and withholding orders received by the same employer for the same employee but for different families and from different States. While such situations are possible, articulating in Federal regulations how States are to resolve such issues goes far beyond the level of detail addressed in Federal regulations. These issues are best resolved on a case-by-case basis, if and when they occur and States have many years experience with such circumstances, however rare they may be.

Had Federal regulations governing the NMSN that were published in late 2000, shortly after the Working Group's Report was sent to the Congress in August of 2000, contained a mandated priority order for employers to use when faced with inadequate wages to satisfy all support orders, States would not have proceeded to determine the appropriate priority order. Some may have adopted a portion or most of the priority order recommended in that Report and proposed in these regulations. However, we are convinced by commenters that to do so at this time, more than six years after States have used the flexibility accorded to them in the NMSN regulations, would be inappropriate and ill-timed. Therefore, we have removed the changes proposed in § 303.32(c)(4) and that regulation will remain as in current regulations as follows: Employers must withhold any obligation of the employee for employee contributions necessary for coverage of the child(ren) and send any amount withheld directly to the plan.

We do believe, however, that it is important to address some misconceptions States have with respect to various distribution requirements in Federal regulations with respect to child support and cash medical support collections, including those assigned to the State and owed to families. And we intend that, as requested by some commenters, the Distribution Workgroup will further consider the intersection of distribution requirements for child and medical support, beyond the clarifications articulated later in this preamble.

**3. Comment:** Several commenters expressed concern that, even if IV-D agencies substitute the agency addresses on the NMSN, noncustodial parents receive information about family doctors and medical issues on the explanation of benefits forms that they receive as policyholders. One commenter indicated that when the IV-D agency explains this to custodial parents with safety concerns, many of those who have relocated due to family violence would rather forgo enforcement of medical support than take the risk that the noncustodial parent could discover their location. Certain custodial parents with compelling safety concerns therefore choose to take on the responsibility and cost required to provide health insurance for their children so that they can retain control of their personal information. Yet noncustodial parents who may present a danger to their families should remain accountable for medical support for their children whenever possible. The commenter believes that cash medical support can be an appropriate option in these situations and asked that States be permitted to tailor medical support orders in this way, when appropriate for cases that have critical safety needs.

**Response:** We believe it would be appropriate in the circumstances described above for a State to rebut the presumption that the noncustodial parent should be ordered to provide health insurance, in accordance with § 302.56(f) and (g) if supported by a written finding or specific finding on the record that the application of the guidelines would be unjust or inappropriate in a particular case, as determined under criteria established by the State. The State's criteria for rebutting the guidelines presumption must take into consideration the best interests of the child, and therefore, allow an exception to order cash medical support in the circumstances described by the commenter.

**4. Comment:** One commenter stated that the DRA of 2005 makes enforcement of medical support order against custodial persons optional. Therefore, the commenter suggested that the language in § 303.32 be clarified to provide that the NMSN is only mandatory against employers of noncustodial parents.

**Response:** We agree that addressing the option to enforce an order against a custodial parent using the NMSN in § 303.32 would be appropriate, as well as making a parallel conforming change to § 308.2(e)(3). Therefore, we have made a change to § 303.32(a), which requires use of the NMSN to enforce the

provision of health care coverage of children of noncustodial parents, to include reference to “and, at State option, custodial parents” after reference to “noncustodial parents”. For conformity, we also added reference to “custodial parent’s, at State option,” after the term “noncustodial parent’s” in § 303.32(c)(6), so that employers must notify the State agency promptly whenever a noncustodial parent’s or custodial parent’s, at State option, employment is terminated.

**5. Comment:** Several commenters expressed concern that the proposed priority order of satisfaction of cash medical support vs. child support would, in some circumstances result in the State being paid cash medical support first before the family receives its arrearages. Commenters were concerned that satisfying assigned cash medical support before satisfying child support arrearages owed to the family in former assistance cases would violate distribution requirements under section 457 of the Act, § 303.51, and guidance issued by OCSE.

**Response:** Although we have removed the proposed revision to § 303.32(c)(4) in response to comments addressed earlier in this preamble, we believe it is important to respond to State concerns about violation of child support distribution rules in Federal statute and regulations if an employer withholds payments to satisfy assigned cash medical support before withholding amounts to satisfy child support arrearages, and a State retains assigned cash medical support collections when child support arrearages are owed to a former assistance family. Title IV-D of the Act contains requirements for distribution of child support collections under section 457 of the Act and distinct requirements for distribution of assigned cash medical support collections under section 454(5) of the Act. Under section 454(5)(B) of the Act, “in any case in which support payments are collected for an individual pursuant to the assignment made under section 1912 [the Medicaid program assignment requirement], such payments shall be made to the State for distribution pursuant to section 1912, except that this clause shall not apply to such payments for any month after the month in which the individual ceases to be eligible for medical assistance.” Federal regulations at § 302.51(c)(1) require that the “amounts collected by the IV-D agency which represent specific dollar amounts designated in the support order for medical purposes that have been assigned to the State under 42 CFR 433.146 shall be forwarded to the

Medicaid agency for distribution under 45 CFR 433.154.”

Therefore, if, in accordance with a support order, amounts are collected which represent both child support (whether assigned to the State or owed to a family), and cash medical support assigned to the State, Federal statute and regulations specify how such amounts are to be distributed. A cash medical support collection in accordance with a support order is not child support and therefore, not subject to child support distribution requirements. Removing the proposed priority for employers to use to satisfy various support obligations does not impact the employer’s responsibility to meet the requirements under § 303.100(a)(5) for dealing with multiple withholding notices or the State’s responsibility to meet all distribution requirements addressed above.

**6. Comment:** A commenter asked whether a change was needed to § 302.32(a) because it mentions “health care coverage,” in light of the inclusion of a definition for “health insurance” (rather than “health care coverage”) in the new § 303.31(a).

**Response:** No. The term “health care coverage” is used in section 466(a)(19) of the Act. The term “health insurance”, as defined in § 303.31(a)(2), and “cash medical support” as defined in § 303.31(a)(1) are each a type of health care coverage.

#### Part 304

##### Section 304.20—Availability and Rate of Federal Financial Participation (FFP)

**1. Comment:** A commenter agreed with the change to § 304.20(b)(11) to add reference to § 303.32 on use of the NMSN, but pointed out an inconsistency between § 304.20(b)(11) which allows FFP for required medical support activities under §§ 303.30, 303.31, and 303.32, and § 304.23(g) that prohibits FFP for the medical support activity performed under cooperative agreements in accordance with §§ 303.30 and 303.31. The commenter indicated his State had interpreted § 304.20(b)(1)(ix), which allows FFP for the cost of the establishment of agreements with Medicaid agencies necessary to carry out required IV-D activities with respect to the Medicaid program, and § 304.23(g), to require an agreement between the IV-D and XIX agencies to be funded by Title XIX incentives.

**Response:** Section 304.23(g) is referring to optional cooperative agreements with Medicaid programs under section 1912(a)(1) of the Act, for which no FFP under the IV-D program

is available. The reference in § 304.23(g) to §§ 303.30 and 303.31 is no longer accurate because former §§ 303.30 and 303.31, governing optional cooperative agreements with Medicaid agencies to provide services not mandated under title IV-D of the Act or IV-D program regulations, were eliminated many years ago. Therefore, we have corrected the reference in § 304.23(g) to cross-reference cooperative agreements with Medicaid agencies under section 1912(a)(2) of the Act.

#### Part 305

##### Section 305.63—Standards for Determining Substantial Compliance With IV-D Requirements

**1. Comment:** A commenter asked if, in an interstate case, § 303.7(c)(7)(iii) and State option, under section 452(f) of the Act, to enforce health insurance orders against custodial parents, means that, if a responding State opts as its intrastate policy not to enforce orders for health insurance against custodial parents, that it need not enforce such an order if requested to by an initiating State that has opted to enforce such an order?

**Response:** The answer is yes: if a responding State does not opt to enforce medical support orders against a custodial parent, that State is not required to do so in interstate cases, in accordance with the introductory phrase in § 303.7(c)(iii), under which, the “IV-D agency must provide any necessary services as it would in intrastate IV-D cases \* \* \*.” However, in considering this comment, we realized that a conforming change is necessary to include reference to § 303.32, after § 303.31 in § 303.7(c)(7)(iii) when referring to processing and enforcing orders referred by another State. We have made that conforming change to cross-reference § 303.32 in this final rule.

**2. Comment:** A commenter requested that we delay paying incentives and imposing penalties on medical support audit requirements for as long as possible because of the frequent change in obligated parents’ employment and employers’ health insurance carriers, as well as the fact that the whole issue of medical support is very time consuming and frustrating.

**Response:** There is currently no legislative authority to pay incentives for medical support performance under the IV-D program, although States do benefit from cash medical support collections with respect to earning incentives. In addition, while the Federal government has authority, under 45 CFR Part 305 to conduct audits and impose penalties if appropriate for

a State's failure to meet Federal IV-D requirements, in accordance with § 305.60(c)(2), such discretionary audits would only be conducted under specific circumstances. Audits to determine substantial compliance would be initiated based on substantiated evidence of a failure by the State to meet IV-D requirements. Evidence, which could warrant a substantial compliance audit, includes: "(i) The results of two or more State self-reviews conducted under section 454(15)(A) of the Act [and 45 CFR Part 308] which: Show evidence of sustained poor performance; or indicate that the State has not corrected deficiencies identified in previous self-assessments, or that those deficiencies are determined to seriously impact the performance of the State's program; or (ii) Evidence of a State program's systemic failure to provide adequate services under the program through a pattern of noncompliance over time."

In FY 2004, OCSE and State partners developed two possible performance measures addressing medical support. While not currently subject to incentives or penalty, lines on the OCSE-157 that will be used for the proposed medical support establishment measure and the medical support enforcement measure will be subject to FY 2006 data reliability audits. Medical support audit related findings are for management purposes only.

## Part 308

### Section 308.2—Required Program Compliance Criteria Paperwork Reduction Act

1. *Comment:* The proposal requires that for the purposes of the annual self-assessment audit and report, States must have in place and use procedures that ensure that the issuance of the NMSN meets a 75 percent compliance rate. The commenter asked whether cases involving coverage provided through the Defense Manpower Data Center (DMDC) should not be included in the audit sample, since PIQ-06-02 instructs IV-D agencies to "not send the NMSN to the DMDC for dependents of active duty and retired military personnel?"

*Response:* That is correct.

2. *Comment:* A commenter asked whether, under proposed § 308.2(e)(4), the NMSN is only necessary if the agency knows that " \* \* \* the new employer provides health care coverage." Is knowledge of the employer's benefits really necessary or is the State required to issue the NMSN if it doesn't know the employer's benefit package? Another commenter suggested

the following changes to proposed paragraph (e)(4):

"Determine whether the State transferred notice of the health care provision, using the National Medical Support Notice required under § 303.32 of this chapter *where appropriate*, to a new employer when a noncustodial parent, or *under State option a custodial parent*, was ordered to provide health insurance coverage and changed employment and the new employer provides health care coverage." The commenter indicated that this language would correct a cite (in the NPRM, the cite, § 302.32, was incorrect), bring in the "where appropriate" language from § 303.32, and reflect the State option to enforce medical support against a custodial parent.

*Response:* In response to the first commenter, under § 303.32(c)(2), the State agency must send the NMSN to the employer within two business days after the date of entry of an employee who is an obligor in a IV-D case in the State Directory of New Hires. There is no exception provided if the State does not know the employer's benefit package. To reflect this clarification and because we agree with the proposed revision to proposed § 308.2(e)(4) (renumbered § 308.2(e)(3)) to reflect the State's option to enforce an order requiring the custodial parent to provide health insurance coverage, renumbered § 308.2(e)(3) is revised to read: "Determine whether the State transferred notice of the health care provision, using the National Medical Support Notice required under § 303.32 of this chapter where appropriate, to a new employer when a noncustodial parent, or under State option a custodial parent, was ordered to provide health insurance coverage and changed employment."

3. *Comment:* Two commenters asked if proposed § 308.2(e)(2) requires a State to determine the State has issued an NMSN to enforce an order to provide health coverage against the custodial person.

*Response:* If the State opts to enforce orders requiring custodial parents to secure health insurance coverage for their children, the State must determine if the State issued a NMSN to enforce the order.

4. *Comment:* A commenter requested that the words "and accessible" be stricken from proposed § 308.2(e)(2) because there is no way a State could evaluate "accessibility" of health insurance and still meet the two-day time requirement to send the NMSN to an employer in § 303.32(c)(2).

*Response:* Section 308.2(e)(2) requires a State to: "If reasonable in cost and

accessible health insurance was available and required in the order, but not obtained, determine whether the National Medical Support Notice was used to enforce the order in accordance with requirements of § 303.32 of this chapter." That requirement only requires a State, if the support order requires reasonable in cost and accessible health insurance, and the health insurance was not obtained, to determine if the order was enforced by sending the NMSN. It does not require a State to look behind the support order or to determine if health insurance was in fact accessible at the time an order was entered.

5. *Comment:* A commenter asked whether, with respect to proof of issuance of the NMSN for either § 303.8(e)(2) and proposed (4), the recordation of issuance and information obtained as provided on the State's automated system is sufficient or must the State be able to also provide a copy of the NMSN as proof? The commenter's State has issued more than half a million NMSNs and would appreciate Federal guidance as to the retention of the documents. The commenter prefers that a State not be required to retain a copy of each NMSN as long as the State's automated system reflects the issuance of the NMSN to the employer and includes any information obtained from the NMSN's response from the employer.

*Response:* We agree that no further documentation than that suggested would be required for purposes of a self-assessment under § 303.8(e)(2) and proposed (e)(4) which has been renumbered as paragraph (e)(3).

## General Comments

1. *Comment:* A number of commenters were concerned about the major impact of the final regulations on the IV-D program's operation and systems. One commenter requested at least two years after publication of the final rule and enactment of any required State law change to implement the new requirements. Another commenter recommended that States be given sufficient lead time to implement these new regulatory requirements especially since some of the requirements may require the enactment or amendment of State laws, regulations, or procedures including modifications to the State's automated system. And finally, a commenter referred to preamble language in the proposed regulations that indicated that "States will be required to submit an amended page providing assurances that laws and procedures require inclusion of medical support provisions in new and modified

orders." The commenter pointed out that the proposed regulations do not mention the grace period provided by section 7311 of the DRA of 2005, *Exception to General Effective Date for State Plans Requiring State Law Amendments*, that indicates that if a change in law is needed, States will have an extended period in which to secure legislative changes through the State General Assembly.

**Response:** The commenter is correct that section 7311 of the DRA of 2005 includes an exception to the general effective date. However, this NPRM was published in September of 2006; seven months after the passage of the DRA of 2005. By the time this final regulation is published, the effective delay date for this provision will have passed. We have consistently said that States will not be penalized for implementation of the DRA provisions based on their best interpretation of the statute. As indicated in the preamble, this regulation is effective upon publication.

**2. Comment:** Several commenters indicated that these regulations will result in increased expenditures of more than \$100 million per year. One State commenter indicated that the State anticipates substantial expenditures to fully implement the requirements of the regulations. That commenter indicated that there will be numerous system changes, to both the Child Support and Medicaid automated systems, in order to modify guidelines calculations, account for cash medical support payments, and effectuate an accurate means of advising Medicaid of cash medical support payments. The commenter assumes that similar costs will be incurred in each State and Territory in the Nation, which could exceed \$100 million nationally as implementation occurs. The same commenter who was concerned about the impact of the new requirements to consider health insurance available to either parent indicated that meeting the requirements will require considerable legislative changes, policy changes and automated systems changes, as well as a significant human resource issue.

**Response:** As indicated in the section of the preamble addressing section 202 of the Unfunded Mandates Reform Act, that Act requires that a covered agency prepare a budgetary impact statement before promulgating a rule that includes any Federal mandate that may result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year. The Department has determined that these proposed regulations would not impose a mandate that will result in the

expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of more than \$100 million in any one year.

Many of the requirements in this final rule are not new, including child support guidelines that provide for the child(ren)'s health care needs, through health insurance coverage or other means; providing information, and forwarding assigned cash medical support, to the Medicaid agency; petitioning to include health insurance available to noncustodial parents in support orders; and establishing criteria to determine when to modify an order to include health insurance and seeking modification of the order if the appropriate criteria are met. States have been required to meet certain medical support requirements in Federal regulations for as long as 20 years and to use the NMSN to enforce orders since 2000.

States also are authorized to include, and many already do include, a cash medical support obligation, whether or not health insurance is ordered. This practice has increased over the years as reasonable-cost health insurance became less and less available. According to the Working Group's Report, about half of the States already consider health insurance available to either parent in seeking a medical support obligation. Additions to State case closure authority in § 303.11, as well as elimination of a number of requirements under previous and the proposed medical support regulation, will reduce the burden and cost on State Child Support Enforcement programs. And, finally, only one State that uses percentage-based child support guidelines raised the issue of securing financial information from custodial parents, despite the fact that, according to two reports identifying how many States employ each model guidelines for determining child support, *Dollars and Sense: Improving the Determination of Child Support Obligations for Low-Income Mothers, Fathers and Children of 2002*, and *Evaluation of Child Support Guidelines* (1994),

approximately 15 States base their child support guidelines on the Percentage-of-Income Model. Therefore, most States will not face large costs to meet the Federal requirements.

**3. Comment:** Several commenters supported a centralized search of health insurance databases to locate coverage. One commenter indicated that the centralized approach has worked quite well with the DMDC matches and believes that centralization of this function is far more efficient than each State conducting an individual match.

**Response:** Federal legislation would be required to allow a match with health insurance databases.

**4. Comment:** A commenter states that HIPAA (The Health Insurance Portability and Accountability Act) has made it difficult to gain cooperation for insurance companies to obtain sufficient details and information to enable State Child Support Enforcement agencies to enforce medical and dental insurance orders and requested that the Federal government do more education with employer and insurance markets.

**Response:** OCSE has an Employer Liaison group that provides extensive technical assistance to, and education of employers. This unit also deals with health insurance issues raised by employers and employer groups. OCSE has issued policy guidance to States that permits a covered entity to disclose protected health information to a "law enforcement official" for law enforcement purposes in compliance with court orders, grand jury subpoenas, or certain written administrative requests. An employee of a IV-D agency who is acting, in accordance with State or Federal law, to enforce a medical child support order meets the definition of a law enforcement official. The National Medical Support Notice which is sent by the IV-D agency to the employer and health plan administrator for completion would constitute a written administrative request by a law enforcement official (see PIQ-04-03 at <http://www.acf.hhs.gov/programs/cse/pol/PIQ/2004/piq-04-03.htm>). Additional assistance will be provided as appropriate and requested in the future.

**5. Comment:** The proposed regulations use the terms "must" and "shall" to describe a mandatory condition. Is there a distinction between the two terms, or are they to be considered interchangeable?

**Response:** The terms "must" and "shall" are considered interchangeable when used in Federal child support regulations and guidance.

**6. Comment:** A commenter suggested that there should be a national conference for child support enforcement personnel within a year after the implementation of these policies. This would allow the workers to discuss some issues faced as well as successful strategies for implementation. This would prove invaluable to the workers responsible for enforcing these provisions, ultimately ensuring a smooth transition to implementing the proposed amendments.

**Response:** There are multiple, existing opportunities every year for child

support workers to discuss medical support issues, including those raised by Federal regulations. In addition to State and OCSE Regional child support meetings and conferences, there are large annual training conferences held by the National Child Support Enforcement Association, Eastern Regional Interstate Child Support Association, and Western Interstate Child Support Enforcement Council.

#### Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995, Public Law 104-13, all Departments are required to submit to the Office of Management and Budget (OMB) for review and approval any reporting or recordkeeping requirements inherent in a proposed or final rule. Interested parties may comment to OMB on these reporting requirements as described below. This Final rule

contains changes to reporting requirements in Part 308, which the Department has submitted to OMB for its review.

Section 308.1(e) contains a requirement that a State report the results of annual self-assessment reviews to the appropriate OCSE Regional Office and to the Commissioner of OCSE. The information submitted must be sufficient to measure State compliance with Federal requirements for expedited procedures and to determine whether the program is in compliance with title IV-D requirements and case processing timeframes. The results of the report will be disseminated via "best practices" to other States and also be used to determine whether technical assistance is needed. The preprint page for this requirement (page 2.15, State Self-assessment and Report) was

approved by OMB on January 18, 2001, under OMB Number 0970-0223, and periodically as required thereafter.

The revisions to § 308.2(e), which address securing and enforcing medical support, will slightly reduce the paperwork burden on States, by eliminating three information collection and reporting requirements because, under these final regulations, medical support will be included in all new and modified support orders, but the reduced paperwork burden would be negligible.

Respondents: State child support enforcement agencies in the 50 States, the District of Columbia, Guam, Puerto Rico, and the Virgin Islands.

This information collection requirement will impose the estimated total annual burden on the agencies described in the table below:

Information collection	Number of responses per respondent	Average burden hours per response	Total annual burden hours
Section 308.1 .....	54/1	3,866	208,764

The Administration for Children and Families (ACF) will consider comments by the public on the information collection in order to evaluate the accuracy of ACF's estimate of the burden of the collection of information. Comments by the public on this collection of information will be considered in the following areas:

Evaluating the accuracy of the ACF estimate of the burden of the collection[s] of information, including the validity of the methodology and assumptions used;

Enhancing the quality, usefulness, and clarity of the information to be collected; and

Minimizing the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technology, e.g., permitting electronic submission of responses.

OMB is required to make a decision concerning the collection of information contained in these regulations between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. Comments to OMB for the proposed information collection should be sent directly to the following: Office of Management and Budget, Paperwork Reduction Project, 725 17th Street, NW., Washington, DC 20503, Attn: Desk

Officer for the Administration for Children and Families.

#### Regulatory Flexibility Analysis

The Secretary certifies, under 5 U.S.C. 605(b), and enacted by the Regulatory Flexibility Act (Pub. L. 96-354), that this final regulation will not result in a significant impact on a substantial number of small entities. The primary impact is on State governments. State governments are not considered small entities under the Act.

#### Regulatory Impact Analysis

Executive Order 12866 requires that regulations be reviewed to ensure that they are consistent with the priorities and principles set forth in the Executive Order. These rules provide solutions to problems in securing private health care coverage for children who live apart from one or both of their parents and the Department has determined that they are consistent with the priorities and principles set forth in the Executive Order.

These regulations implement section 7307 of the Deficit Reduction Act of 2005, the requirement that States consider medical support available to either parent in establishing a medical support obligation, and to enforce medical support at their option when the obligated parent is the custodial parent. They also address certain recommendations of the Medical Child Support Working Group, which

included public deliberation, and additional input from State and local IV-D administrators and other child support enforcement stakeholders.

These rules do not introduce new requirements for including medical support in child support orders, a long-standing program requirement, but rather broaden States' options for addressing the availability and accessibility of health care coverage. For example, by focusing on health insurance coverage available to either parent, these rules recognize that untapped employer-sponsored insurance through custodial mothers and their spouses might reduce the share of children without private health insurance. An HHS study, Health Care Coverage Among Child Support-Eligible Children, 2002, found that half of child support-eligible children living with their mother are currently covered by employer-sponsored insurance.

These regulations are significant under section 3(f) of the Executive Order because they raise novel policy issues and therefore have been reviewed by the Office of Management and Budget.

#### Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act requires that a covered agency prepare a budgetary impact statement before promulgating a rule that includes any Federal mandate that may result in the expenditure by

State, local, and Tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year. The Department has determined that these regulations would not impose a mandate that will result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of more than \$100 million in any one year.

#### Congressional Review

These proposed regulations are not a major rule as defined in 5 U.S.C., chapter 8.

#### Assessment of Federal Regulations and Policies on Families

Section 654 of the Treasury and General Government Appropriations Act of 1999 requires Federal agencies to determine whether a policy or regulation may affect family well-being. These regulations will have a positive impact on family well-being as defined in the legislation, by providing greater access to health care coverage.

#### Executive Order 13132

Executive Order 13132 on federalism applies to policies that have federalism implications, defined as "regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on the States, or on the distributions of power and responsibilities among the various levels of government." These regulations do not have federalism implications for State or local governments as defined in the Executive Order.

#### List of Subjects

##### 45 CFR Part 302

Child support, Grant programs/social programs, Reporting and recordkeeping requirements.

##### 45 CFR Parts 303 and 304

Child support, Grant programs/social programs, Reporting and recordkeeping requirements.

##### 45 CFR Part 305

Child support, Grant programs/social programs, Accounting.

##### 45 CFR Part 308

Auditing, Child support, Grant programs/social programs, Reporting and recordkeeping requirements.

(Catalog of Federal Domestic Assistance Programs No. 93.563, Child Support Enforcement Program)

Dated: September 6, 2007.

**Daniel C. Schneider,**

*Acting Assistant Secretary for Children and Families.*

Approved: March 28, 2008.

**Michael O. Leavitt,**

*Secretary, Department of Health and Human Services.*

**Editorial Note:** This document was received at the Office of the Federal Register on July 8, 2008.

- For the reasons discussed above, title 45 CFR chapter III is amended as follows:

#### PART 302—STATE PLAN REQUIREMENTS

- 1. The authority citation for part 302 continues to read as follows:

**Authority:** 42 U.S.C. 651 through 658, 660, 664, 666, 667, 1302, 1396a(a)(25), 1396b(d)(2), 1396b(o), 1396b(p), 1396(k).

- 2. In § 302.56 revise paragraph (c)(3) to read as follows:

##### § 302.56 Guidelines for setting child support awards.

\* \* \* \* \*

(c) \* \* \*

(3) Address how the parents will provide for the child(ren)'s health care needs through health insurance coverage and/or through cash medical support in accordance with § 303.31 of this chapter.

\* \* \* \* \*

#### PART 303—STANDARDS FOR PROGRAM OPERATIONS

- 3. The authority citation for part 303 continues to read as follows:

**Authority:** 42 U.S.C. 651 through 658, 660, 663, 664, 666, 667, 1302, 1396a(a)(25), 1396b(d)(2), 1396b(o), 1396b(p), and 1396k.

##### § 303.7 [Amended]

- 4. Amend § 303.7 by inserting in paragraph (c)(7)(iii) "§ 303.32," after "303.31".

##### § 303.11 [Amended]

- 5. Section 303.11 is amended by:
  - a. Amending paragraph (b)(10) by inserting "or under § 302.33(a)(1)(ii) when cooperation with the IV-D agency is not required of the recipient of services," after "§ 302.33(a)(1)(i) or (iii).".
  - b. Amending paragraph (b)(11) by inserting "or under § 302.33(a)(1)(ii) when cooperation with the IV-D agency is not required of the recipient of services," after "§ 302.33(a)(1)(i) or (iii).".
- 6. Revise § 303.31 to read as follows:

#### § 303.31 Securing and enforcing medical support obligations.

- (a) For purposes of this section:

(1) Cash medical support means an amount ordered to be paid toward the cost of health insurance provided by a public entity or by another parent through employment or otherwise, or for other medical costs not covered by insurance.

(2) Health insurance includes fee for service, health maintenance organization, preferred provider organization, and other types of coverage which is available to either parent, under which medical services could be provided to the dependent child(ren).

(3) Cash medical support or the cost of private health insurance is considered reasonable in cost if the cost to the parent responsible for providing medical support does not exceed five percent of his or her gross income or, at State option, a reasonable alternative income-based numeric standard defined in State law, regulations or court rule having the force of law or State child support guidelines adopted in accordance with § 302.56(c) of this chapter. In applying the five percent or alternative State standard for the cost of private health insurance, the cost is the cost of adding the child(ren) to the existing coverage or the difference between self-only and family coverage.

(b) The State IV-D agency must:

(1) Petition the court or administrative authority to include private health insurance that is accessible to the child(ren), as defined by the State, and is available to the parent responsible for providing medical support at reasonable cost, as defined under paragraph (a)(3) of this section, in new or modified court or administrative orders for support;

(2) If private health insurance described in paragraph (b)(1) of this section is not available at the time the order is entered or modified, petition to include cash medical support in new or modified orders until such time as health insurance, that is accessible and reasonable in cost as defined under paragraph (a)(3) of this section, becomes available. In appropriate cases, as defined by the State, cash medical support may be sought in addition to health insurance coverage.

(3) Establish written criteria to identify orders that do not address the health care needs of children based on—

(i) Evidence that private health insurance may be available to either parent at reasonable cost, as defined under paragraph (a)(3) of this section; and

(ii) Facts, as defined by State law, regulation, procedure, or other directive,

and review and adjustment requirements under § 303.8(d) of this part, which are sufficient to warrant modification of the existing support order to address the health care needs of children in accordance with paragraph (b)(1) of this section.

(4) Petition the court or administrative authority to modify support orders, in accordance with State child support guidelines, for cases identified in paragraph (b)(3) of this section to include private health insurance and/or cash medical support in accordance with paragraphs (b)(1) and (b)(2) of this section.

(5) Periodically communicate with the Medicaid agency to determine whether there have been lapses in health insurance coverage for Medicaid applicants and recipients.

(c) The IV-D agency shall inform an individual who is eligible for services under § 302.33 of this chapter that medical support services will be provided and shall provide the services specified in paragraph (b) of this section.

#### **§ 303.32 [Amended]**

■ 7. Amend § 303.32 by inserting in paragraph (a) the words “and, at State option, custodial parents”, after the words “noncustodial parents” and by inserting in paragraph (c)(6) the words “and, at State option, custodial parent’s” after the words “noncustodial parent’s.”

### **PART 304—FEDERAL FINANCIAL PARTICIPATION**

■ 8. The authority citation for part 304 continues to read as follows:

**Authority:** 42 U.S.C. 651 through 655, 657, 1302, 1396a(a)(25), 1396b(d)(2), 1396b(o), 1396b(p), and 1396k.

#### **§ 304.20 [Amended]**

■ 9. Amend § 304.20(b)(11) by removing “§§ 303.30 and 303.31” and adding “§§ 303.30, 303.31, and 303.32” in its place.

#### **§ 304.23 [Amended]**

■ 10. Amend § 304.23(g) by removing “§§ 303.30 and 303.31 of this chapter” and adding “section 1912(a)(2) of the Act”.

### **PART 305—PROGRAM PERFORMANCE MEASURES, STANDARDS, FINANCIAL INCENTIVES, AND PENALTIES**

■ 11. The authority citation for part 305 is revised to read as follows:

**Authority:** 42 U.S.C. 609(a)(8), 652(a)(4) and (g), 658A and 1302.

#### **§ 305.63 [Amended]**

■ 11a. Amend § 305.63(c)(5) by adding “and § 302.32” after “under § 303.31”.

### **PART 308—ANNUAL STATE SELF-ASSESSMENT REVIEW AND REPORT**

■ 12. The authority citation for part 308 continues to read as follows:

**Authority:** 42 U.S.C. 654(15)(A) and 1302.

#### **§ 308.2 [Amended]**

■ 13. In § 308.2 revise paragraph (e) to read as follows:

#### **§ 308.2 Required program compliance criteria.**

\* \* \* \* \*

(e) Securing and enforcing medical support orders. A State must have and use procedures required under this paragraph in at least 75 percent of the cases reviewed. A State must:

(1) Determine whether support orders established or modified during the review period include medical support in accordance with § 303.31(b) of this chapter.

(2) If reasonable in cost and accessible private health insurance was available and required in the order, but not obtained, determine whether the National Medical Support Notice was used to enforce the order in accordance with requirements in § 303.32 of this chapter.

(3) Determine whether the State transferred notice of the health care provision, using the National Medical Support Notice required under § 303.32 of this chapter, to a new employer when a noncustodial parent, or at State option a custodial parent, was ordered to provide health insurance coverage and changed employment.

\* \* \* \* \*

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