Department of Children and Families

Public Hearing Summary

Proposed Rules Relating to Establishment of Birth Cost Orders Based on Child Support Guidelines

DWD 40
CR08-066

A public hearing was held in Madison on July 29, 2008. The following commented on the proposed rules:

1. Carol Medaris, Senior Legal Analyst
   Center for Family Policy and Practice (CFFPP)
   Madison
2. Bob Andersen, Attorney
   Legal Action of Wisconsin (LAW)
   Madison
3. Erin McBride, Attorney
   ABC for Health, Inc., and ABC for Rural Health (ABC)
   Madison

The following observed for information only:

1. M. Roulet, Program Director
   Center for Family Policy and Practice
   Madison
2. Pamela Kahler, Drafting Attorney
   Legislative Reference Bureau
   Madison
3. Mike Brown, Legal Intern
   ABC for Health, Inc., and ABC for Rural Health
   Madison

Comment Summary and Department Response

ABC: The proposed rules that take a father's ability to pay into account offer a more equitable assignment of cost recovery. Setting an unrealistic order just increases the amount of unpaid debt owed by parents, deters employment, reduces counties' collection rates and incentive payments, and increases administrative costs spent working unsuccessful cases. Setting a realistic order improves the chances that fathers will continue to pay over time.

CFFPP
and LAW: We generally oppose the assessment of birth costs to reimburse the state for Medicaid expenses. A federal advisory group, the Medical Child Support Working Group, submitted a report to the Department of Health and Human Services and the Department of Labor in June 2000 entitled *21 Million Children's Health: Our Shared Responsibility*. This report recommends that Congress amend Title IV-D of the Social Security Act to preclude state IV-D agencies from attempting to recover Medicaid-covered prenatal, birthing, and perinatal expenses from the noncustodial parent.

The report asserts that collecting birth costs runs counter to the public policy goal of encouraging mothers to seek prenatal care. In 1990, Congress eliminated the Medicaid child support cooperation requirement for women in the Poverty Level Pregnant Women Program because the cooperation requirement was deemed a potential barrier to prenatal care. States' practice of collecting expenses of the pregnancy and birth after a child is born runs counter to the intent of removing the cooperation requirement. If the mother is concerned about child support cooperation, that concern will be just as real after the birth as before it.

Collecting birth costs also discourages voluntary paternity establishment. It is more important to establish paternity and future child support and to encourage fathers to establish a relationship with their children-perhaps through joining a fatherhood program-than to recoup pregnancy-related Medicaid costs.

Furthermore, since the fathers of children receiving Medicaid are likely to be low income, the State usually cannot collect the assessed amounts anyway. Birthing costs thus artificially inflate the amount of arrears carried on the State's books and make program performance appear worse than it is. Moreover, to the extent that the State does collect the medical expenses as arrears owed to the State, this money reimburses the State at the expense of additional support that might go to the child.

LAW: The Office of Inspector General of the Department of Health and Human Services issued two reports in 2000, *The Establishment of Child Support Orders for Low Income Non-Custodial Parents* and *State Policies Used to Establish Child Support Orders for Low Income Non Custodial Parents*. These reports found that noncustodial parents who were charged front end costs were more likely to fail to make child support payments than were parents who were not charged with such costs. Front end costs can include retroactive support, *birth related medical costs*, service of process, court or attorney fees, and the costs for paternity testing.

ABC: While still controversial, national policy trends have been against recovering birth costs at all. A ban against recovering Medicaid birthing costs was part of H.R. 4678 (2000) that passed in the House 405 to 18, earlier versions of the TANF reauthorization bills, and S. 1626/H.R. 3395 (Bayh-Obama, 2007). The mission of the child support program is undergoing a basic shift from welfare cost recovery to helping parents support their children. The child support program's reimbursement-

driven policies have interfered with states' ability to implement policies supportive of families. By eliminating its cost recovery focus, a full distribution policy would convert the child support program into an income support program for low income working parents, simplify program administration, rationalize the program's message, and change its culture.

Department response: The recommendations of the Medical Child Support Working Group were never adopted by the federal Office of Child Support Enforcement. Nor has a clear link been established in Wisconsin that shows that setting birth cost orders is a deterrent to the voluntary acknowledgment of paternity. However, the number of non-marital births continues to rise and it is important for non-marital fathers to accept financial responsibility for the costs associated with the births of their children. These rule amendments are designed to tie the birth cost order more closely to the father's ability to pay and, as such, are likely in the vast majority of cases to significantly reduce the amount owed.

ABC: The state must recognize two-parent families. Many unmarried low income fathers live with and support their partner and child. Imposing birth cost recovery on these low income households only exacerbates a host of other economic and social challenges. Tax intercept of arrearages gets sent first to the state, so intercepting birth cost as an arrearage puts the state in line for collection before the mom and baby.

Department response: The Department agrees that it is not in the best interest of the family to establish birth cost orders when the father's income has been used to determine the family's eligibility for medical assistance.

When the mom and potential father of an unborn child do not have an older child in common, the father's income is usually not taken into consideration when determining medical assistance eligibility. However, when the couple has a second child in common, and there is an intact family situation, the potential father's income is usually taken into consideration in determining medical assistance eligibility for the household. In such cases, the Child Support Agency must not obtain an order for birth costs.

In October 2004, the Bureau of Child Support developed a policy that CSAs may not seek birth cost orders for father's to repay medical assistance benefits if all of the following apply:

- The parents have an older child in common.
- The parents live together at the time the child is born.
- The intact family situation has been reported to the economic support agency and is documented in their automated case system prior to the child's birth.

CFFPP and LAW: In the absence of a statutory change removing court authority to order birth costs, we agree that a father's ability to pay should be considered in setting the amount of his total birth cost obligation. Fathers with income below 200% of the federal poverty

level should not be ordered to pay for birth costs when those costs are paid by Medicaid.

Since 200% of the federal poverty level is the eligibility requirement for the Standard Plan in the new BadgerCare Plus program, this modification would exempt fathers from birth cost obligations in substantially similar circumstances as the children's mother, whose family income qualifies the household for Medicaid. In fact, pregnant women are eligible for the Benchmark Plan in BadgerCare Plus at 300% of the federal poverty level, which may be an even more appropriate level to begin assessing fathers for Medicaid birth costs.

Department response: The low-income scale for birth costs is currently capped at 125% of poverty. This cap is set at the same level as the low-income standard for setting child support orders. The Department will soon be proposing new amendments to DWD 40 to include mandated language related to medical support from the federal regulation issued July 21, 2008. During this rule-making process, the cap for low income child support and birth costs will also be reviewed.

LAW: There is nothing wrong with having the ability to estimate or impute income for child support because otherwise an individual who could work could defeat his or her responsibility simply by not working or by working at a lesser paying job.

There is something very wrong with imputing income for determining a birth cost order. Birth costs are an entirely different matter and serve only to reimburse governments for Medicaid costs, while child support is essential for the well being of children.

CFFPP: We oppose imputing income in all child support and birth cost cases in the absence of clear evidence of the father's ability to earn and his purposeful reduction of earnings. Without this additional criteria, the practice of imputing income penalizes "dead-broke" dads as well as "dead-beat" dads.

Using the chart at Appendix D, imputing income at the minimum wage would result in a debt of about $1700 (assuming that that did not exceed one-half the total birth costs). For fathers with ongoing child support and medical support obligations, and who lack regular, sufficient earnings in the first place, this is going to be an arrears amount that is likely to not only stay "on the books" forever, but result in steadily increasing arrears for those fathers who are discouraged from ever trying to keep up.

The reason the department is changing this rule is to ensure that a birth cost order is based on a father's ability to pay. Imputing income does not result in a real determination of ability to pay.

LAW: DWD 40 uses the term "monthly income available for child support" to describe the income on which child support and birth cost orders are based. This term lumps together actual income and estimated income. The rule should refer separately to actual earnings and earnings that are imputed so the reader can understand what is really being talked about.

Department response: A parent has a personal responsibility to a child, both for that child's ongoing support and for the costs associated with his or her birth. The inability to impute income to a parent for the purpose of setting a birth cost order can just as easily allow a parent to defeat that responsibility. The federal Office of Child Support Enforcement has instructed states that the establishment and enforcement of birth cost orders is an appropriate IV-D activity provided that the methodology for establishing those orders is included in the state's guidelines for setting support. Income under those guidelines is defined to include imputed income under certain circumstances. Because birth cost orders constitute a form of support, the department is using the same definition of income that it does for the calculation of all support orders.