

**State of Wisconsin
Department of Workforce Development
Division of Family Supports**

EMERGENCY RULE

The Wisconsin Department of Workforce Development orders the creation of ss. DWD 40.02 (12m), 40.05, and DWD 40 Appendix D, relating to establishment of birth cost orders based on child support guidelines.

Finding of Emergency

The Department of Workforce Development finds that an emergency exists and that the attached rule is necessary for the immediate preservation of the public peace, health, safety, or welfare. A statement of facts constituting the emergency is:

The federal Office of Child Support Enforcement (OCSE) has notified Wisconsin that OCSE will not certify the state's request for federal income tax refund offset for birth cost orders that have not been set in accordance with the child support guidelines in Chapter DWD 40, which take into consideration the payer's ability to pay.

Federal income tax refund offset is one of the primary tools for collection of birth cost orders owed to the State of Wisconsin. In calendar year 2007, the child support program collected \$11,481,000 in birth costs through federal income tax refund offset. Of the nearly \$11.5 million collected, approximately \$6.62 million was returned to the federal government to reimburse Medicaid costs, \$1.72 million was used by county child support agency programs to benefit children in the state, and the remaining \$3.14 million was returned to the state Medicaid program.

Analysis Prepared by the Department of Workforce Development

Statutory authority: Sections 49.22 (9) and 227.11 (2) (a), Stats.

Statutes interpreted: Section 767.89 (3) (e), Stats.

Related statutes or rules: 45 CFR 302.33, 302.56, 303.31, 303.72(a)

Explanation of agency authority. Section 49.22 (9), Stats., provides that the department shall promulgate rules that provide a standard for courts to use in determining a child support obligation based upon a percentage of the gross income and assets of either or both parents. According to OCSE, medical support is a subset of child support.

Summary of the emergency rule. Under s. 767.89 (3) (e), Stats., the content of a paternity judgment shall include an order establishing the amount of the father's obligation to pay or contribute to the reasonable expenses of the mother's pregnancy and the child's birth. The amount established may not exceed one-half of the total actual and reasonable pregnancy and birth expenses. The order shall specify the court's findings as to whether the father's income is at or below the federal poverty line and specify whether periodic payments are due on the obligation, based on the father's ability to pay or contribute to those expenses. If the father has no present ability to pay, the court may modify the judgment or order at a later date to require the periodic payments if the father has the ability to pay at that time.

If the birth costs were paid by the Medicaid program, the order for payment of birth costs under s. 767.89 (3) (e), Stats., will be to the State of Wisconsin. An unmarried mother who applies for or receives Medicaid is required to cooperate with the local child support agency in establishing paternity (if necessary), obtaining medical support, and assigning the rights to payment of medical support to the state. There are exceptions to the child support cooperation requirement for good cause and for women during pregnancy and 60 days post-partum.

Federal and state income tax refund offset is one of the primary tools for collection of birth cost orders owed to the state. OCSE recently notified Wisconsin that it will not certify the state's request for federal income tax refund offset for birth cost orders that have been determined using the methodology in s. 767.89 (3) (e), Stats. This provision requires the court to make a finding based on the father's ability to pay before *setting a periodic payment* on birth costs. OCSE's interpretation of federal regulations as issued in Policy Interpretation Question PIQ-07-01 provides that the *judgment amount* must be set according to guidelines that take into consideration the father's ability to pay.

This emergency rule creates a procedure in the child support guidelines in Chapter DWD 40 that allows a court to take into consideration the father's ability to pay in determining the birth cost judgment amount. The court may order a judgment that is the lowest of the following:

- An amount that does not exceed one-half of the actual and reasonable cost of the pregnancy and child's birth as provided under s. 767.89 (3) (e), Stats.
- An amount that does not exceed 5% of the father's income over 36 months.
- If a father's child support obligation was determined under s. DWD 40.04 (4) and the father's monthly income available for child support is between 75% and 125% of the federal poverty guidelines, the court may use the maximum birth cost judgment amount provided in the schedule in Appendix D.
- If a father's child support obligation was determined under s. DWD 40.04 (4) and the father's monthly income available for child support is less than 75% of the federal poverty guidelines, the court may order a birth cost judgment at an amount appropriate for the father's total economic circumstances.

Although the primary impetus for this rule is to comply with federal child support regulations to ensure that OCSE will certify birth cost orders owed to the State of Wisconsin in cases under Section IV-D of the Social Security Act, the rule will also apply to other parties, such as a private insurance company seeking recovery of birth costs under s. 767.89 (3) (e), Stats.

Summary of related federal requirements. In PIQ-07-01, OCSE states that medical support is a subset of child support, and child support orders must be set under state guidelines that comply with 45 CFR 302.56. State guidelines must:

- Take into consideration all earnings and income of the noncustodial parent.
- Be based on specific descriptive and numeric criteria and result in a computation of the support obligation.
- Provide for the child's health care needs through health insurance coverage or other means.
- Provide a rebuttable presumption that the amount determined using the guidelines is the correct child support to be awarded.

The circumstances in which past-due support qualifies for federal income tax refund offset are listed in 45 CFR 303.72(a). The list includes cases where the child support agency is providing services to a Medicaid recipient.

Comparison with rules in adjacent states. All states are required to comply with the OCSE interpretation that birth cost judgment amounts must be set under the state's child support guidelines.

Summary of factual data and analytical methodologies. OCSE has notified states that birth cost judgment amounts must be set according to child support guidelines that take into consideration the father's ability to pay. This rule provides that the amount of a birth cost judgment may not exceed 5% of the father's income over 3 years, with a graduated scale of lower amounts for fathers with income below 125% of the federal poverty guidelines. The 5% limit is based on a proposed federal rule on medical support in child support cases. The proposed federal rule provides that cash medical support or private health insurance is considered reasonable in cost to the obligated parent if it does not exceed 5% of his or her gross income. *Child Support Enforcement Program; Medical Support*, 71 Fed. Reg. 549965, (proposed September 20, 2006)

Agency contact person. Attorney Connie Chesnik, Office of Legal Counsel, (608) 267-7295, connie.chesnik@dwd.state.wi.us.

SECTION 1. DWD 40.02 (12m) is created to read:

DWD 40.02 (12m) “Federal poverty guidelines” means the poverty guidelines updated periodically in the Federal Register by the U.S. department of health and human services under the authority of 42 USC 9902 (2).

SECTION 2. DWD 40.05 is created to read:

DWD 40.05 Medical support. (2) BIRTH COST JUDGMENT. (a) In this subsection, “birth cost judgment” means an order establishing the amount of the father’s obligation to pay or contribute to the reasonable expenses of the mother’s pregnancy and the child’s birth under s. 767.89 (3) (e), Stats.

(b) The court may order a birth cost judgment amount that is the lowest of the following:

1. An amount that does not exceed one-half of the actual and reasonable cost of the pregnancy and child’s birth as provided under s. 767.89 (3) (e), Stats.
2. An amount that does not exceed the sum of 5% of a father’s monthly income available for child support for 36 months.
3. If a father’s child support obligation was determined under s. DWD 40.04 (4) and the father’s monthly income available for child support is between 75% and 125% of the federal poverty guidelines, the court may use the maximum birth cost judgment amount provided in the schedule in Appendix D.
4. If a father’s child support obligation was determined under s. DWD 40.04 (4) and the father’s monthly income available for child support is less than 75% of the federal poverty guidelines, the court may order a birth cost judgment at an amount appropriate for the father’s total economic circumstances.

(c) The department shall revise the schedule in Appendix D every year based on changes in the federal poverty guidelines. The department shall publish revisions to the schedule in the Wisconsin Administrative Register.

SECTION 3. DWD 40, Appendix D is created to read:

Chapter DWD 40
APPENDIX D
2008 Maximum Birth Cost Judgment Amounts for Low-Income
Payers at 75% to 125% of the Federal Poverty Guidelines

Monthly Income Up To:	Percent	Number of Months	Maximum Birth Cost Judgment Amount*
\$650	3.28%	36	\$768
\$675	3.38%	36	\$821
\$700	3.49%	36	\$879
\$725	3.60%	36	\$940
\$750	3.71%	36	\$1,002
\$775	3.81%	36	\$1,063
\$800	3.92%	36	\$1,129
\$825	4.03%	36	\$1,197
\$850	4.14%	36	\$1,267
\$875	4.25%	36	\$1,339
\$900	4.35%	36	\$1,409
\$925	4.46%	36	\$1,485
\$950	4.57%	36	\$1,563
\$975	4.68%	36	\$1,643
\$1,000	4.78%	36	\$1,721
\$1,025	4.89%	36	\$1,804
\$1,050	5.00%	36	\$1,890

*The maximum birth cost judgment amount may not exceed the identified percentage of the father's monthly income available for child support over 36 months.

SECTION 4. EFFECTIVE DATE. This rule shall take effect upon publication as provided in s. 227.24 (1) (c), Stats.