



DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

45 CFR Part 305

RIN 0970-AC95

Modifications to Performance Standards During Natural Disasters and Other Calamities

AGENCY: Office of Child Support Services (OCSS), Administration for Children and Families (ACF), Department of Health and Human Services (HHS or the Department).

ACTION: Notice of proposed rulemaking.

SUMMARY: OCSS proposes to provide temporary relief to states from certain child support program performance requirements and penalties during natural disasters and other calamities which have a negative impact on state child support program operations. The proposed rule would provide ACF with ongoing authority to modify performance measure requirements when states are affected by natural disasters and other calamities that have resulted, or are expected to result, in the failure of state child support programs to achieve performance standards for paternity establishment, support order establishment, and current collections. The proposed rule will enable states to avoid the imposition of penalties due to adverse data reliability audit findings during, and subsequent to, natural disasters and other calamities, including pandemics and declared public health emergencies.

DATES: Consideration will be given to written comments on this notice of proposed rulemaking (NPRM) received on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by [docket number and/or Regulatory Information Number (RIN) number(0970-AC95)], by one of the following methods:

- *Federal e-Rulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Mail:* Written comments may be submitted to: Office of Child Support Services, *Attention:* Director of Policy and Training, 330 C Street SW, Washington, DC 20201.

Instructions: All submissions received must include the agency name and docket number or RIN for this rulemaking. All comments received will be posted without change to <https://www.regulations.gov>, including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Tricia John, Division of Policy and Training, OCSS, telephone (202) 260-7143. Email inquiries to ocse.dpt@acf.hhs.gov. Deaf and hearing-impaired individuals may call the Federal Dual Party Relay Service at 1-800-877-8339 between 8 a.m. and 7 p.m. Eastern Time.

SUPPLEMENTARY INFORMATION:

Submission of Comments

Comments should be specific, address issues raised by the proposed rule, and explain reasons for any objections or recommended changes. Additionally, we will be interested in comments that indicate agreement with the proposal. We will not

acknowledge receipt of the comments we receive. However, we will review and consider all comments that are relevant and are received during the comment period. We will respond to these comments in the preamble to the final rule.

Statutory Authority

This NPRM is published under the authority granted to the Secretary of Health and Human Services by section 1102 of the Social Security Act (the Act) (42 U.S.C. 1302). Section 1102 of the Act authorizes the Secretary to publish regulations, not inconsistent with the Act, as may be necessary for the efficient administration of the functions with which the Secretary is responsible under the Act. The proposed relief from the support order establishment and current support collections performance measures may be waived, modified, or suspended through rulemaking under section 409(a)(8)(A)(i)(I) of the Act (42 U.S.C. 609(a)(8)(A)(i)(I)). The proposed relief from the paternity establishment percentage (PEP) performance measure and data reliability audit requirements related to the PEP under this NPRM is based on statutory authority granted under section 452(g)(3)(A) of the Act (42 U.S.C. 652(g)(3)(A)).

Justification

The purpose of this proposed rule is to authorize the Secretary to provide targeted and time-limited relief to states from certain performance penalties due to the impact of natural disasters and other calamities when such events have a negative impact on state child support program operations.

Through this proposed rule, ACF will have the authority to modify the requirements for states to meet the following performance standards: the Paternity Establishment Percentage (PEP) performance standard of 90 percent under 45 CFR

305.40(a)(1), the support order establishment standard of 40 percent under 45 CFR 305.40(a)(2), and the current collections performance standard of 35 percent under 45 CFR 305.40(a)(3). ACF may adjust these performance standards to a lower level to avoid imposing financial penalties on states and may also modify the requirements to avoid the imposition of penalties due to adverse data reliability audit findings. This would provide ACF with the flexibility to modify the performance requirements for a time-limited period during, and subsequent to, natural disasters and other calamities.

The need for rulemaking under the discretionary authority provided to the Secretary to modify performance penalty requirements became apparent during the COVID-19 pandemic. Due to disruptions to state child support program operations and to court operations during the COVID-19 pandemic, states experienced significant workload burdens and service backlogs. Since the start of the pandemic in early 2020, states have appealed for relief from program requirements in order to support their operations during the crisis. OCSS is able to provide certain flexibilities for administrative requirements under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5170) (See OCSS Dear Colleague Letter 20-04: Flexibilities for State and Tribal Child Support Agencies during COVID-19 Pandemic¹). However, these flexibilities do not extend to relief for financial penalties related to performance or adverse data reliability audit findings. States are concerned that performance-related financial penalties, which are imposed in the form of a reduction to state TANF grants, place an undue burden on state budgets and threaten funding that supports the very families who are most in need during a time of crisis.

¹ <https://www.acf.hhs.gov/css/policy-guidance/flexibilities-state-and-tribal-child-support-agencies-during-covid-19-pandemic>

To address penalty relief due to the impact of the COVID-19 pandemic, ACF issued a final rule (87 FR 32090) on May 27, 2022, which provides states relief from performance penalties by modifying the PEP performance requirement from 90 percent to 50 percent for fiscal years 2020, 2021, and 2022. While the COVID-19 relief rulemaking was expedited due to the emergency created by the pandemic, the rulemaking effort required over 200 days from the time the NPRM was published in 2021 until the final rule was published in 2022. Due to the time required to accomplish rulemaking, ACF seeks the authority to provide relief in similar circumstances through a more streamlined approach, not requiring additional rulemaking during each event.

Without this NPRM, there is no general authority in title IV-D (or in other statutory authority) to relieve states from these penalties similar to the flexibility provided to the TANF program. The TANF program's authority to promulgate such a regulation derives from the TANF program statute (42 U.S.C. 609(b)). Without statutory authority providing such flexibility to the Secretary regarding IV-D requirements, it is not possible to issue a regulation similar to 45 CFR 262.5 for relief from title IV-D penalties.

This proposed regulation seeks to provide ACF ongoing authority to grant time-limited, targeted flexibilities, allowing ACF to provide timely relief to states when natural disasters or other calamities significantly affect program operations without having to engage in separate rulemaking, and will apply to Federal fiscal year periods subsequent to September 30, 2022. This relief would support states who might otherwise face penalties for not meeting specific performance measure standards or which may fail the data reliability audits.

Background: State Child Support Program Performance Requirements

Under Title IV-D of the Act, states are required to achieve performance levels in paternity establishment, support order establishment, and current support collections. Failure to achieve required performance levels may lead to penalties assessed as a percentage against the state's TANF grant.

The PEP, support order establishment, and current collections performance measures, which are part of the overall performance, audit, penalties, and incentives for the child support program, are established under 452(g) of the Act and 45 CFR 305.40. Section 452(a)(4)(C)(i) of the Act requires the Secretary to determine whether state-reported data used to determine the performance levels are complete and reliable. Additionally, section 409(a)(8)(A) of the Act and 45 CFR 305.61(a)(1) include the assessment of a financial penalty if there is a failure to achieve the required level of performance or an audit determines that the data is incomplete or unreliable.

The required levels of performance for the PEP, support order establishment, and current collections performance measures are set out in 45 CFR 305.40:

- The PEP performance level must be at least 90 percent or an improvement of 2 to 6 percentage points over the previous year's level of performance, below which a state will incur a penalty.
- The support order establishment performance level must be at least 40 percent, below which a state will be penalized unless an increase of 5 percent over the previous year is achieved.
- The current collections performance level must be at least 35 percent, below which a state will be penalized unless an increase of 5 percent over the previous year is achieved.

Section 409(a)(8)(A)(ii) of the Act and 45 CFR 305.61(a)(2) impose automatic corrective action for the subsequent fiscal year. A state also must submit complete and reliable data used in the performance measure calculations, which will be audited according to 45 CFR 305.60.

If a state fails to meet the annual performance measure standards, or to show improvement in the subsequent year (2 to 6 percentage points for the PEP), the amount of the initial penalty will be equal to one to two percent of the adjusted State Family Assistance Grant for the state's TANF program in accordance with 45 CFR 305.61(c) and (d). A penalty against the state's TANF grant will also be imposed if the state fails to submit complete and reliable performance measure data and there is an adverse data reliability audit finding for a performance measure in the subsequent year. The penalty will continue to be assessed in accordance with section 409(a)(8)(B) of the Act and 45 CFR 305.61 until the state is determined to have submitted complete and reliable data and achieved the required performance measure standards. In accordance with 45 CFR 262.1(e)(1), the state must expend additional state funds equal to the amount of the penalty (which will not count toward the maintenance-of- effort requirement under TANF) the year after the TANF grant penalty is assessed.

Section-by-Section Discussion of the Provisions of This Proposed Rule

Section 305.61: Penalty for Failure To Meet IV-D Requirements.

We propose to add a new provision to Part 305 (Program Performance Measures, Standards, Financial Incentives, and Penalties), to provide the Secretary with the authority to provide short-term relief from performance requirements related to the PEP, support order establishment, and current collections performance standards, when states are unable to meet those requirements due to the impact of natural disasters or other calamities on state child support program operations. We propose adding a new

paragraph (f) to § 305.61, Penalty for failure to meet IV-D requirements, to provide the Secretary with the authority, during and subsequent to natural disasters and other calamities, to temporarily modify the performance requirements for states to meet the paternity establishment percentage standard of 90 percent under 45 CFR 305.40(a)(1), the support order establishment standard of 40 percent under 45 CFR 305.40(a)(2), and the current collections standard of 35 percent under 45 CFR 305.40(a)(3), to a lower level to avoid imposing the financial penalty on states. The proposed rule would also authorize the Secretary to set aside adverse data reliability audit findings under section 452(g) of the Act during the same time period.

The proposed rule would require individual states and territories to initiate the request to modify the performance requirements specified under section 452(g) of the Act (42 U.S.C. 652(g)) and 45 CFR 305.40(a)(1), under 45 CFR 305.40(a)(2), or under 45 CFR 305.40(a)(3) when a state has experienced a natural disaster or other calamity that has or will make compliance with the performance standards impracticable. The state may also ask the Secretary to set aside adverse data reliability audit findings under section 452(g) of the Act (42 U.S.C. 652(g)) and 45 CFR 305.61(a)(1)(ii) for the same time period as the time period for which a modification of performance requirements is sought.

A natural disaster or other calamity includes state chief executive officer-declared states of emergency, pandemics, events designated by the President under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5170), and declared public health emergencies under section 319 of the Public Health Service Act (42 U.S.C. 247d). The state's chief executive (or his or her designee, this title is illustrative only and reflects the position determined by the state which holds this authority) must

demonstrate, based on available data, that such emergency has made the state's ability to attain one or more of the performance standards impracticable. The request for relief must include a narrative statement which describes both the circumstances and justification for the request. The statement should also provide information substantiating the impracticability of compliance with the standards, including a description of the specific conditions caused by the natural disaster or other calamity, including preliminary data provided by the state, as required under 45 CFR 305.32(f), showing reduced performance.

The request must also include information on the expected duration of the conditions that make compliance impracticable and include any other documentation or other information that the Secretary may require to make a determination regarding relief. The state must demonstrate to the satisfaction of the Secretary that the natural disaster or other calamity has directly resulted in a reduction in performance or is expected to result in a reduction in performance, based on data provided by the state.

The statement and other documentation must demonstrate that the state: has not or will not meet one or more existing performance requirements, such that a performance penalty would apply; has submitted preliminary data to support the statement; and has provided all required information. Any additional information must be submitted as soon as the adverse effect of the natural disaster or other calamity giving rise to the request is known to the state.

The Secretary will make a determination of the modified performance requirements based on preliminary data provided by the state under 45 CFR 305.32(f) and shall provide written communication to the state of the decision and the period for

which any modified standards shall apply. Relief from the performance requirements will be time-limited, based on the data presented by the state, and the Federal fiscal year period in which conditions are expected to make compliance impracticable.

We propose providing the Secretary with the authority to provide temporary relief to align with the Federal fiscal year timeframes which align with the expected duration of the conditions that make compliance with the performance requirement impracticable. After the relief period, the performance requirements will revert back to the levels described under section 452(g) of the Act (42 U.S.C. 652(g)) and 45 CFR 305.40(a)(1), under 45 CFR 305.40(a)(2), or under 45 CFR 305.40(a)(3), and the state will once again be subject to penalties for adverse data reliability audit findings related to the performance measures after an automatic corrective action year as specified in 45 CFR 305.42. This proposed rule will apply to Federal fiscal year periods subsequent to September 30, 2022.

Paperwork Reduction Act

No new information collection requirements would be imposed by this proposed regulation.

Regulatory Impact Analysis

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule meets the standards of Executive Order 13563 because it creates a short-term public benefit, at minimal cost to

the Federal Government, by not imposing penalties against a state's TANF grant, during a time when public assistance funds are critically needed.

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget (OMB) will review all significant rules. OIRA has determined that this NPRM is significant and was accordingly reviewed by OMB.

Regulatory Flexibility Analysis

The Secretary proposes to certify that, under 5 U.S.C. 605(b), as enacted by the Regulatory Flexibility Act (Pub. L. 96-354), this proposed rule, if finalized, 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 Regulatory Flexibility Act.

Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4) requires agencies to prepare an assessment of anticipated costs and benefits before issuing any rule that may result in an annual expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation). That threshold level is currently approximately \$177 million. This rule does not impose any mandates on state, local, or tribal governments, or the private sector, that will exceed this threshold in any year.

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 proposed policy or regulation may affect family well-being. If the agency's determination is affirmative, then the agency must prepare an impact assessment addressing seven criteria specified in the law. ACF believes it is not necessary to prepare a family policymaking assessment (see Pub. L. 105-277) because this regulation does not impose requirements on states or families and thus will not have any impact on family well-being.

Executive Order 13132

Executive Order 13132 prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial direct compliance costs on state and local governments and is not required by statute, or the rule preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. This rule does not have federalism impact as defined in the Executive Order 13132.

January Contreras, Assistant Secretary of the Administration for Children & Families, approved this document on March 15, 2023.

List of Subjects in 45 CFR Part 305

Child support, Program performance measures, standards, financial incentives, and penalties.

Dated: July 6, 2023.

Xavier Becerra,
Secretary,
Department of Health and Human Services.

For the reasons stated in the preamble, the Department of Health and Human Services proposes to amend 45 CFR part 305 as set forth below:

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

1. The authority citation for part 305 continues to read as follows:

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

2. Amend § 305.61 by adding new paragraph (f) to read as follows:

§ 305.61 Penalty for failure to meet IV-D requirements.

* * * * *

(f) *Authority to modify state requirements to meet paternity establishment percentages, support order establishment, or current collections performance measure standards during natural disasters and other calamities.* During, and subsequent to, natural disasters and other calamities (e.g., state chief executive officer-declared states of emergency, pandemics, events designated by the President under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5170), and declared public health emergencies under section 319 of the Public Health Service Act, 42 U.S.C. 247d), the Secretary may temporarily modify the performance measure requirements for a state to meet the paternity establishment percentage standard of 90 percent under section 452(g) of the Act (42 U.S.C. 652(g)) and 45 CFR 305.40(a)(1), the support order establishment standard of 40 percent under 45 CFR 305.40(a)(2), and the current collections standard of 35 percent under 45 CFR 305.40(a)(3), to lower levels to avoid imposing financial performance penalties on states, and may set aside adverse data reliability audit findings under section 452(g) of the Act (42 U.S.C. 652(g)) and 45 CFR 305.61(a)(1)(ii) during the same time period.

For Federal fiscal years subsequent to September 30, 2022, the performance requirements for paternity establishment under section 452(g) of the Act (42 U.S.C. 652(g)) and 45 CFR 305.40(a)(1), for support order establishment under 45 CFR 305.40(a)(2), and for current collections under 45 CFR 305.40(a)(3)— may be modified by the Secretary to a lower level under the conditions described in this section.

(1) If a state experiences a natural disaster or other calamity (e.g., state chief executive officer-declared states of emergency, pandemics, events designated by the President under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5170), and declared public health emergencies under section 319 of the Public Health Service Act, 42 U.S.C. 247d),, the state’s chief executive officer (or his or her designee) may submit to the Secretary a request to modify one or more of the performance requirements specified under section 452(g) of the Act (42 U.S.C. 652(g)) and 45 CFR 305.40(a)(1), under 45 CFR 305.40(a)(2), or under 45 CFR 305.40(a)(3).

(2) The state may also ask the Secretary to set aside adverse data reliability audit findings under section 452(g) of the Act (42 U.S.C. 652(g)) and 45 CFR 305.61(a)(1)(ii) for the same time period as the time period for which a modification of performance requirements is sought.

(3) The request for a modification to the performance requirements must be submitted in accordance with the procedures specified in paragraphs (f)(4), (5) and (6) of this section. Any request other than one submitted with the initial application must be submitted as soon as the adverse effect of the natural disaster or other calamity giving rise to the request is known to the state.

(4) A request for a modification of one or more of the performance requirements must include the following:

(i) A narrative statement describing the circumstances and justification for the request to modify the state’s performance requirement;

(ii) Information substantiating the impracticability of compliance with the standards, including a description of the specific conditions caused by the natural disaster or other calamity which make compliance impracticable, including preliminary data provided by the state, as required under 45 CFR 305.32(f), showing reduced performance;

(iii) Information on the expected duration of the conditions that make compliance impracticable; and

(iv) Any other documentation or other information that the Secretary may require to make this determination.

(5) The state must demonstrate to the satisfaction of the Secretary that the natural disaster or other calamity has directly resulted in a reduction in performance or is expected to result in a reduction in performance, based on data provided by the state. In its request for a temporary modification to one or more performance requirements, the state must be able to demonstrate that it:

(i) Has not or will not meet one or more existing performance requirements, such that a performance penalty would apply;

(ii) Has submitted preliminary data supporting this statement; and

(iii) Has provided all required information requested by the Secretary.

(6) The Secretary shall provide written communication of the decision to modify or decline to modify the performance standards, and the period for which any modified standards shall apply, after receipt of appropriate written communication from the chief executive officer.

(i) If approved, a temporary modification in a performance requirement will expire on the last day of the Federal fiscal year for which it was approved.

(ii) Adverse findings of data reliability audits of the state's performance data under 45 CFR 305.60 as reported during the period in which the performance requirement

modification is approved will not result in a financial penalty pursuant to the state's request as specified in paragraph (f)(2) of this section.

(iii) Unless the state receives a written approval of its performance requirement modification request, the performance requirements under section 452(g) of the Act (42 U.S.C. 652(g)) and 45 CFR 305.40(a)(1), under 45 CFR 305.40(a)(2), and under 45 CFR 305.40(a)(3) remain in effect.

(iv) If the request for a performance requirement modification is denied, the denial is not subject to administrative appeal.

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