

receipting of payments, the allocation of payments between the IV-D child support program cases in which support is distributed and disbursed through Fuller's Alabama Location, Enforcement and Collection System (ALECS) automation, and payments made by income withholding in non-IV-D cases which are disbursed through Defendant Hobson's Administrative Office of the Courts.

On December 19, 2002, Ms. Clapp testified:

1 When you talk about that,
2 are you talking about recoupment procedures?

3 A. Yes.

4 Q. Okay. What is the status of the issue of
5 getting funds back that have been received by
6 recipients in error? Was Tier involved in that?

7 A. Not to the -- we -- not to the extent for
8 misposted funds. We do for insufficient funds.

9 Q. Someone, a company or person, pays with a bad
10 check for the non-custodial parent's obligation
11 and it comes back. What do y'all do? Tell me
12 -- explain how you're involved.

13 A. When we receive the insufficient funds check,
14 attempts are made by Tier to collect the money
15 from the payer. If the payer refuses to make
16 good on the check, then from a regular payment
17 we would recoup the funds until the NSF check
18 was -- funds were recouped for the State.

(Susan Clapp deposition, page 135, lines 1 to 18)

(Plaintiffs' Exhibit 1, Excerpt of page 134-135, Susan Clapp deposition)

B. Defendant Fuller's Policy

Defendant's policy for recoupment for Agency errors and bad checks is found in its Policy Manual which states in pertinent part:

660-3-5-.04 Action On Erroneous Payments. An erroneous payment may be the result of an agency error. The department has the responsibility to collect all erroneous payments. Collection methods which may be utilized to recover the payments are through voluntary repayment plans, income tax offset, recoupment from future support payments, referral to a collection agency and/or through legal action. Repayment may be accepted in a lump sum or in negotiated payments. These may be in the form of cash, income tax intercepts or money orders. The use of tax intercept for cases involving agency error will be done as permitted under the Code of Alabama for collection of debts owed to the department.

DHR has both civil and criminal remedies available to recover money for bad checks. *Ala. Code* § 6-5-285 (1975) and *Ala. Code* § 13A-9-13.1 to § 13A-9-13.2 (1975). Rather than use these remedies, Fuller takes money from children to repay their parents' bad checks. Fuller should demonstrate how he is legally entitled to transform a debt of the non-custodial parent owed to his Agency into a debt of the custodial parent.²

C. FEDERAL LAW PROHIBITS FULLER'S RECOUPMENT FROM SUPPORT PAYMENTS MADE TO THE STATE DISTRIBUTION UNIT.

The federal statute, 42 U.S.C. § 657, controls the distribution of IV-D child support payments in great detail. The opening sentence of Section 657 provides: "Subject to subsections (d) and (e) of this section, an amount collected on behalf of a family as support by a State pursuant to a plan approved under this part [IV-D] shall be distributed as follows: . . ." The language of this section is complex because Congress

² It is doubtful that the custodial parent would have standing to bring a civil action or the evidence to pursue a criminal complaint to recover for a bad check given to and cashed by DHR, because all the evidence necessary to pursue these claims would be in the custody and control of DHR or TIER. See, ALA Code §

allowed the States two options to implement a “first to families” distribution of past due support (arrears). However, the cognate regulation states the rule more simply -- support is to be distributed first to satisfy the obligation for current support for the month, then to past due support under court order or the income withholding notice,³ then to arrears for earlier months. The regulation provides:

“Distribution of support collections.

The state plan shall provide as follows:

(a)(1) For purposes of distribution in a IV-A case, amounts collected, except as provided under paragraph (a)(3) of this section, shall be treated first as payment on the required support obligation for the month in which the support was collected and if any amounts are collected which are in excess of such amount, these excess amounts shall be treated as amounts which represent payment on the required support obligation for previous months.” 45 C.F.R. § 302.51(a)(emphasis added).

The regulation is specific that “amounts collected” shall be applied first to current support and then to past due support. Explicitly, no other debt or claim may be taken from a collection before the payment is applied to satisfy the current support for the month and all past due support for the current month and for all prior months are fully paid.⁴

Subsection (b) of the regulation emphasizes the point that all support due and owing must be satisfied before any amount can be applied to pay any other charge or obligation. This regulation provides that *even if a payor designates a payment to go toward future support, the state agency must first distribute support to satisfy any current or past due support owing:*

(b) If an amount collected as support represents payment on the required support obligation for future months, the amount shall be applied to such future months. However, no such amounts shall be applied to future months unless amounts have been collected which fully satisfy the support obligation assigned

³ Every income assignment order must have an amount to be paid toward arrears each month. 45 C.F.R. § 303.100(a)(2).

⁴ That all funds received must first be applied to satisfy current support for a month is emphasized by 45 C.F.R. § 302.33(d)(3) which does not permit Fuller to apply funds collected to repayment of costs before the current support obligation is satisfied.

under section 403(a)(8) [42 U.S.C. § 603(a)(8)] for the current month and all past months.

42 C.F.R. § 302.51(b).

Fuller's practice of recoupment for bad checks was explicitly rejected in Action Transmittal 97-13, issued by the Federal Office of Child Support Enforcement on September 15, 1997.⁵ Specifically, this Transmittal discusses a state's desire to recoup bad checks and erroneous agency payments from future collections of support, stating:

Q13: When custodial parents are overpaid, or warrants [checks from employers or obligated parents] are returned by the bank to the SDU as insufficient funds, are States allowed under federal regulations to offset the overpayment from custodial parent's next monthly support check?

A13: No. All collections must be distributed in accordance with the requirements of section 457 of the Act⁶ [42 U.S.C. 657]. However, a State may recoup the overpayment to the parent if the custodial parent agrees to allow the State to do so.

(Plaintiffs' Exhibit 2)

A federal agency's interpretation of a statute and regulations for a program it administers is due substantial deference. *Rust v. Sullivan* 500 U.S.173 (1990); *Blum v. Bacon*, 457 U.S. 1132, 72 L. Ed. 2d 728, 102 S. Ct. 2355 (1982); *State of Wisconsin Dept. of Health v. Bowen*, 797 F.2d 391 (7th Cir. 1986).⁷ Federal OCSE Action Transmittals have been explicitly recognized as binding on state IV-D agencies.

⁵ See Plaintiff's Exhibit 2, Action Transmittal 97-13

⁶ The Social Security Act is codified in Title 42 of the United States Code. Title IV-D is codified beginning with Section 651. The codified sections of the original Act correspond to the codified sections of the U.S.C. by adding a constant of 200 to the Act's original section number, e.g., Section 457 of the Act is codified as 42 U.S.C. § 657 (457 + 200).

⁷ In *State of Wisconsin Department of Health & Human Services v. Bowen*, involving an Action Transmittal in the Medicaid program the Court of Appeals ruled:
"An agency's interpretation of the statute it is charged to administer is entitled to a presumption of regularity. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 91 S. Ct. 814, 823, 28 L. Ed. 2d 136 (1971) and may not be disturbed unless it is arbitrary, capricious, or constitutes an abuse of discretion. *Id.* at 416, 91 S. Ct. at 823. . . .
But the District Court was [still] bound to defer to his interpretation if reasonable and statutorily permissible. See, e.g. *Commonwealth of Massachusetts v. Department of Health and Human Services*, 749 F.2d 89, 95-96 (1st Cir. 1984)."
State of Wisconsin Department of Health & Human Services v. Bowen, 797 F.2d 391, 398 (7th Cir. 1986).

Vanscoter v. Sullivan, 920 F.2d 1441 at 1449 (9th Cir. 1990).

Even when Title IV-D allows a State to set its own guidelines for support, the guidelines must be followed and non-custodial parents may enforce this requirement in an action under 42 U.S.C. § 1983. As the Eighth Circuit Court of Appeals ruled when Missouri's child support program contended it had a right to set child support orders based on a debt to the state resulting from the payment of aid rather than the support guideline:

Here, Missouri participates in a federal program and receives federal funds. As a condition of receiving such funds, Missouri must comply with program requirements and cannot refuse to comply with federal regulations governing the program by simply stating that the monies it seeks to recover are governed by state law. *Jackson v. Rapps*, 947 F. 2d 332, 337 (8th Cir. 1991).

The Jackson Court cited the U.S. Supreme Court's holding that:

"There is of course no question that the Federal government, unless barred by some controlling constitutional prohibition, may impose the terms and conditions upon which its money allotments to the States shall be disbursed, and that any state law or regulation inconsistent with such federal terms is invalid." *King v. Smith*, 392 U.S. 309, 20 L.Ed. 2d 1118 , 88 S.Ct. 2128 (1968). *Jackson* at 335-336.

Defendant Fuller's practice of recouping monies from incoming child support payments, rather than distributing all amounts collected under 42 U.S.C. § 657 and 45 C.F.R. § 302.51(a), violates the federal child support distribution statute, which has supremacy within the child support program over any state laws upon which Defendant may rely to justify the practice.⁸

The federal courts have universally recognized that Section 657 controls the distribution of all amounts collected in IV-D child support cases. The only disputes have arisen over specific distributions within the language of the statute, e.g. *Vanscoter v. Bowen*, 706 F. Supp. 1432 (W.D. Wash. 1988), *aff'd in part, rev'd in part, sub nom Vanscoter v. Sullivan*, 920 F.2d 1441 (9th Cir. 1990). *Albiston v. Maine*

⁸ OCSE policy on recoupment is set out in AT 97-13, Q & A 11. Immediately following this text OCSE states: "At this point we consider the statute to be self-implementing and we do not anticipate issuing regulation on the SDU provision [42 U.S.C. § 654B] . . . Q & A 12.

Commissioner of Human Services, 7 F.3d 258 264 (1st Cir, 1993).

Accordingly, 42 U.S.C. § 657 and 45 C.F.R. § 302.51, govern the distribution of child support collected by IV-D agencies and prohibit Fuller's recoupment practices.

D. PLAINTIFFS MAY ENFORCE THEIR RIGHT TO CHILD SUPPORT DISTRIBUTIONS SPECIFIED IN SECTION 657 AND 45 C.F.R. § 302.51(a) IN AN ACTION UNDER 42 U.S.C. § 1983

As Chief Judge Albritton has previously ruled, the custodial parents plaintiffs here have a right to distribution of support in compliance with 42 U.S.C. § 657 which may be enforced in this action under 42 U.S.C. § 1983. (Memorandum Opinion, Order and Preliminary Injunction filed November 13, 2002, pp 5-13.) Plaintiffs' arguments may be found in Plaintiff's memorandum in support of motion for preliminary injunction on the distribution of support collected by the interception of state income tax refunds, (Docket item 75, filed July 26, 2002) and plaintiffs reply to Defendant Fuller's opposition to that motion (Docket item 99, filed September 18, 2002).

Section 657 carefully defines the custodial parent's right to the support distributed and limits the government's claim to reimbursement of current and past aid. The section says that the custodial parent's claim to current and past due support is paramount when he or she is not on aid. The custodial parent is entitled to past due support collected to satisfy arrears owed her for the period she has not been on aid as first priority for such collections. The section makes no allowance for "recoupment."

Here, Fuller's IV-D program has secretly short circuited the entire distribution scheme by charging the custodial parent with the bad debt of a non-custodial parent or the non-custodial parent's employer, without prior notice or informed consent depriving custodial parents whose support is conveyed through the State Disbursement Unit. Plaintiffs are entitled to preliminary injunctive relief prohibiting the violation of the distribution statute and regulations by Fuller.

E. DUE PROCESS REQUIRES PRIOR NOTICE TO CUSTODIAL PARENTS AND AN OPPORTUNITY TO CONTEST DEFENDANT'S CLAIM TO RECOUPMENT

When the government claims a citizen owes it a debt to be collected by a reduction of future benefit payments a detailed due process notice is prerequisite to the determination as to what, if anything, is owed:

Any repayment from OASDI, whether voluntary or involuntary, made without knowledge of the legal defenses is fictitious and therefore not a choice at all." . . . "a notice which merely advises OASDI [Old Age, Survivors and Disability Insurance] recipients of the fact and amount of alleged SSI overpayments offers the aggrieved plaintiffs no tangible information for them to dispute. . . Notices require: 1) the time periods during which the SSI overpayments arose; 2) the amount of overpayments in each time period; 3) the amount of any prior repayment; 4) the reason for the overpayment; 5) the right to appeal; 6) the right to waiver of the overpayment; 7) the fact that OASDI benefits are protected [from seizure by legal action]; and 8) the statute of limitations. . ."

Ellender v. Schweiker, 575 F. Supp. at 600 and 603 (S.D. N.Y. 1983).

This minimum fairness requirement applies with even greater force when the payment is due from support collected pursuant to a custodial parent's order for support.

Defendant's taking of support can often have an impact similar to the termination of utilities considered in *Memphis Light & Gas v. Craft*, 436 U.S. 1 (1977) and parents are entitled to at least the same minimum standards for notice and an opportunity to effectively contest as is a customer of a government operated utility:

The purpose of notice under the Due Process Clause is to advise the affected individual of, and permit adequate preparation for, and impending 'hearing'. [footnote omitted] Notice in a case of this kind does not comport with constitutional requirements when it does not advise the customer of the availability of a procedure for protesting the proposed termination of utility service as unjustified." 436 U.S. at 14-15.

Custodial parents require pre-deprivation notice so they may assert that Defendant's claim based on a bad check from either the non-custodial parent or the non-custodial parent's employer is the debt of the check writer, *not the debt of the custodial parent or the child entitled to support.*

Here, Defendant recoups claims based on bad checks from from the custodial parent without any prior notice to custodial parents that child support has been taken, the amount taken, or the basis of Fuller's claim. The risk of erroneous deprivation of support from a mistaken claim for recoupment requires a pre-deprivation notice and a opportunity to contest the claim in a meaningful process as required by *Goldberg v. Kelly*, 397 U.S. 254 at 263-271 (1970).

IV. PRELIMINARY INJUNCTION FACTORS ARE MET

A. THE CUSTODIAL PARENTS LIKELY WILL SUCCEED ON THE MERITS AND ARE IRREPARABLY INJURED BY THE WITHHOLDING OF SUPPORT FOR "RECOUPMENT"

To obtain a preliminary injunction a party must show: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury if the injunction is not granted; (3) that the movant's injury outweighs the injury to the nonmovant; and (4) that the injunction would not disserve the public interest. *Haitian Refugee Center Inc. V. Baker*, 949 F.2d 1109, 1110 (11th Cir. 1991).

The harm experienced by custodial parents is most closely analogous to the situation presented to a welfare recipient whose welfare benefits are suddenly terminated without a pre-termination notice or hearing. The Supreme Court has recognized the special necessity for continued flow of payments to the kind of very low income families who are typical of the those whose support is collected through the IV-D program:

Thus the crucial factor in this context — a factor not present in the case of the blacklisted government contractor, the discharged government employee, the taxpayer denied a tax exemption, or virtually anyone else whose governmental entitlements are ended — is that termination of aid pending resolution of a controversy over eligibility **may deprive an eligible recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate. His need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress** from the welfare bureaucracy.

Goldberg v. Kelly, 397 U.S. 254, 264 (1970)(emphasis added).

Furthermore, Fuller makes no attempt to advise custodial parents of their rights or any procedure to contest his decision to take part or all of the collected child support.

Accordingly, the likelihood of Plaintiffs' success on the merits is great. The custodial parents' claims are based on the explicit instruction to Defendant Fuller from the Federal Office of Child Support Enforcement that he *must abide* by 42 U.S.C. § 657 and 45 C.F.R. § 302.51. See, Exhibit 2, Action Transmittal 97-13.

A preliminary injunction is necessary because Plaintiff custodial parents have no remedy at law if Defendant Fuller's assertions that he is immune from any monetary award are correct (See, Defendant Fuller's Answer, Third and Tenth Affirmative Defenses, Docket number 12)

Plaintiffs respectfully request that Defendant Fuller be ordered to immediately cease taking child support to satisfy any claim he asserts based on a dishonored check. Plaintiffs further request that Defendant be required to provide pre-seizure notice of any claim of recoupment and that Plaintiffs be provided with an opportunity to contest any such claim.

B. THE PUBLIC INTEREST AND THE BALANCING OF INJURIES SUPPORTS THE ISSUANCE OF A PRELIMINARY INJUNCTION.

Defendant Fuller is not harmed by a preliminary injunction suspending recoupment. Should he argue and then ultimately prevail in a claim to a right to take support, his reactivation of the recoupment process would allow him to recover funds from future support payments. In contrast, if a family's support is kept by the State, they may (and will likely) suffer utility termination, eviction, and hunger. The custodial parent may lose her job if she cannot pay for transportation or her car is repossessed when her support is taken and she cannot afford her car payment. Loss of basic subsistence income has fundamental and sometimes irreversible effects.

The state's interest is irrefutably in the well-being of its children by assuring

minimum subsistence for them through child support rather than welfare payments. The public interest is, therefore, best served by the active involvement of custodial parents in efforts to establish adequate levels of support and to enforce the regular collection of support. Every custodial parent who is able to keep her children with her and avoid homelessness and foster care placement, represents a savings to the State of Alabama and to the federal government who pays for a substantial part of the costs of both the Family Assistance and child support programs. The public's interest is further served by the State of Alabama avoiding momentary sanctions from the Federal OCSE for its violation of child support distributions as required by 42 U.S.C. § 657.⁹

C. A PRELIMINARY INJUNCTION IS NECESSARY

Defendant Fuller's previously undisclosed practice of recoupment for dishonored checks deprives custodial parents of the very resources necessary to provide for their children's basic needs and accordingly, meets the hardship element required for the issuance of a preliminary injunction.

Plaintiffs respectfully request that Defendant Fuller be ordered to immediately cease taking child support to satisfy any claim he asserts based on a dishonored check. Plaintiffs further request that Defendant Fuller be required to provide pre-seizure notice to custodial parents of any recoupment claim he may assert and that custodial parents be notified on how they may contest such a claim.

Custodial parents in IV-D cases ask that this Court order Defendant Fuller to distribute support in strict compliance with 42 U.S.C. § 657 and 45 C.F.R. § 302.51 and to prohibit recoupment and/or the taking of any amount received through Fuller's State Distribution Unit system any debt claimed as arising from a dishonored check.

Should Fuller seek to recover the bad debt of a non-custodial parent or employer from future support he should be allowed to do only after he has satisfied this

⁹ Fullers' State IV-D Plan has been disapproved and he is now subject to an "alternative penalty" of \$4.4 million for federal fiscal year 2001-2002 and up to \$9 million for federal fiscal year 2002-2003.

court that he has meet the legal standard for the waiver of statutory right. If the right to distribution under section 657 is waivable, which Plaintiffs do not concede, the right certainly cannot be waived without the informed, knowing, contemporaneous and revocable agreement of the custodial parent.

Plaintiffs ask that Defendant Fuller be ordered to submit any policy he may wish to adopt in the future, soliciting permission from custodial parents to allow recoupment for bad checks from their future child support to this Court and the Plaintiffs for prior review. Prior review and Court approval is necessary because Defendant Fuller has demonstrated his disregard for both federal law and Constitutional due process in every aspect of his policies concerning notice of support collected and distributed and his practice of secret recoupment notwithstanding explicit federal instructions in Action Transmittal 97-13. (Plaintiffs' Exhibit 2)

Plaintiffs respectfully request that the Court review in advance any proposed policy, procedures, communications with custodial parents and the form of any written agreement which might allow recoupment, if Defendant chooses to attempt this means to request repayment.

Likewise any policy, notices, and pre-deprivation grievance procedures which Defendant proposes in order to satisfy due process requirements should be reviewed in advance and subject to approval by this Court.

Plaintiffs do not seek to enjoin DHR's recordation of the amounts of bad checks. But Fuller should be told that no claim may be asserted until a process is approved by this Court and that no support can be taken under Fuller's current practices. More specifically, Plaintiffs request that no taking of support funds be allowed to occur until the Court has reviewed and accepted any new IV-D program policy seeking custodial parent consent, pre-deprivation notice, and procedures to contest any proposed recoupment in both IV-D and non IV-D cases.

VI. CONCLUSION

_____Defendant contends that he is immune from Plaintiffs' claims for monetary relief as a result of Department of Human Resource child support program actions. (See Defendants' Answer, pp. 14-15, Docket number 12) It is obvious by this assertion that Fuller is cognizant of the fact that these families have few savings, few assets, no readily available credit and that they live from child support check to child support check. Fuller's hidden recoupment practice -- taking child support to repay the debt of the non-custodial parent or an employer -- should be enjoined forthwith.

Defendant has taken child support from families without legal authority, without due process notice and without any procedure or opportunity to contest any claim DHR may have. Defendant's "self-help" seizure of child support wholly lacks accountability for the injuries it has inflicted and the lives it has disrupted. Fuller should be enjoined from any future seizure of support in the name of "recoupment." Plaintiffs respectfully request a Preliminary Injunction be granted forthwith.

Respectfully submitted this ____ day of January, 2003.

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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing Request for Production of Documents to Defendant Hobson, on the following by placing copies thereof, addressed to them as indicated below, in United States Mail, First Class postage prepaid, on this the _____ day of January, 2003.

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