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May 8, 2012

The Honorable Martin O'Malley
Governor of Maryland
State House
100 State Circle
Annapolis, Maryland 21401-1991

Re: House Bill 651

Dear Governor O'Malley:

We have reviewed and hereby approve for constitutionality and legal sufficiency House Bill 651, "Incarcerated Obligor – Suspension of Payments and Accrual of Arrearages." This bill suspends, under certain circumstances, the accrual of arrearages for child support obligors who are incarcerated. We write to discuss concerns regarding the conformity of this legislation with the federal funding mandate in 42 U.S.C. § 666(a)(9).

Title IV-D of the Social Security Act, 42 U.S.C. § 651, *et seq.*, establishes the federal-state child support program. A State, to be eligible for federal funding under Title IV-D must have in effect laws requiring the use of all procedures for the improvement of child support enforcement effectiveness described in 42 U.S.C. § 666. *See* 42 U.S.C. § 654(20)(a). As relevant to House Bill 651, 42 U.S.C. § 666(a)(9) requires that a State must have procedures that require that any payment or installment of support under any child support order is:

- (A) 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,

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- (B) entitled as a judgment to full faith and credit in such State and in any other State, and
- (C) not subject to retroactive modification by such State or by any other State;

except that such procedures may permit modification with respect to any period during which there is pending a petition for modification, but only from the date that notice of such petition has been given, either directly or through the appropriate agent, to the obligee or (where the obligee is the petitioner) to the obligor.

42 U.S.C. § 666(a)(9).

Section 12-104 of the Family Law ("FL") Article of the Maryland Code presently prevents the retroactive elimination of any arrears that accumulated under a child support order during any period before the date that a motion for modification is filed. Notably, FL § 12-104 was enacted to change Maryland law to conform with 42 U.S.C. § 666(a)(9). *Harvey v. Marshall*, 389 Md. 243, 266-267 (2005) ("[T]he Maryland Legislature understood clearly that significant federal funds were in jeopardy if it did not enact legislation [FL 12-104] intended to effectuate the child support mechanisms located in, and defined by, 42 U.S.C. § 666(a)(9).") Under House Bill 651, a qualifying prisoner may obtain relief that is arguably precluded by the mandate in 42 U.S.C. § 666(a)(9), for anyone who had failed to file a timely motion to modify.¹

¹ The issue is not the prisoner's *eligibility* for a modification, but rather whether he or she must first file a motion to obtain that relief. *See Wills v. Jones*, 340 Md. 480 (1995) (incarceration of an obligor parent, reducing the parent's income, may constitute a material change in circumstances that could justify granting a motion seeking a downward adjustment of a support amount). If the relief provided in House Bill 651 is interpreted as being a modification, proposed FL § 12-104.1(b), reinstating the former support amount 60 days after the obligor's release, might in turn be viewed as setting a new support amount without applying the child support guidelines contrary to the mandate in 42 U.S.C. § 667.

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Nevertheless, although House Bill 651 will allow some obligors to achieve the relief that can presently be obtained only with a timely motion to modify, it is unclear that the mandate in 42 U.S.C. § 666(a)(9) was intended by Congress to be so broad as to preclude a State from enacting policies that permit, under certain carefully limited and objective circumstances, arrears from accruing in the first place without the need for filing a motion to modify. If House Bill 651 is interpreted as preventing arrears from accruing, rather than as permitting their retroactive elimination, it arguably is not prohibited by the requirements of 42 U.S.C. § 666(a)(9).

To be sure, we cannot say with certainty that federal officials will not view this legislation as an effort to evade the non-retroactivity provisions. We understand that the Maryland Child Support Enforcement Administration has been cautioned in prior years by some federal officials that legislative proposals containing language similar to the language in House Bill 651 would be contrary to the non-retroactivity provisions in 42 U.S.C. § 666(a)(9). Nevertheless, we have found no case law or definitive federal policy directives indicating that a state is precluded from providing parents the type of automatic relief from the accumulation of arrears that will be allowed in Maryland if House Bill 651 is enacted.

We note that House Bill 651 does not specify the intended effect of this law on support orders entered before its effective date. In general, absent some indication to the contrary, the General Assembly is presumed to intend that a statute be applied only prospectively. *Mayor and City Council of Baltimore v. Kelso Corporation*, 294 Md. 267, 276 (1982). It will assist Maryland in avoiding any federal conformity challenge to proposed FL § 12-104.1 if its provisions are construed as applying only to support orders issued or modified after its effective date. By applying the statute only to such orders, parents involved in child support litigation will be on notice that support arrears may stop accumulating if the obligor parent is subsequently incarcerated for eighteen months and meets the other qualifications to have his or her support amount temporarily be reduced to zero. In contrast, applying this law to preexisting orders at least raises concerns that it might adversely affect the vested rights of the custodial parent and child to whom the arrears are owed. *See Langston v. Riffe*, 359 Md. 396 (2000) (child has vested right in the court-ordered support already paid by a parent and to the arrears that are owed).

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~~For the reasons stated above, it is our view that, while serious concerns are raised, without further guidance in case law or federal regulations, we cannot say that the enactment of House Bill 651 would clearly endanger federal funding.~~

Very truly yours,


Douglas F. Gansler
Attorney General

DFG/DF/kk

cc: The Honorable John P. McDonough
Joseph Bryce
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