EASTERN REGIONAL INTERSTATE CHILD SUPPORT ASSOCIATION

Comments by the Eastern Regional Interstate Child Support Association
On the Notice of Proposed Rule Making
Child Support Technical Corrections
Federal Register, Vol. 83, No. 242, pp. 64803-07

I. Introduction

The Eastern Regional Interstate Child Support Association (ERICSA) is a not-for-profit organization of child support professionals from government agencies, the private sector, the bench, and the bar. Its mission is to build a stronger intergovernmental child support community by developing and advocating effective policy, facilitating communication, and delivering innovative professional training in order to enhance the well-being of families.

Founded in 1963, ERICSA historically has drawn its membership from tribes and states that border on, or are east of, the Mississippi River. ERICSA holds an annual training conference and provides policy positions on key issues affecting child support.

The federal Office of Child Support Enforcement (OCSE) proposes regulatory changes based on the President's directives in Executive Order 13777. The Notice of Proposed Rule Making (NPRM) is intended to make technical amendments to the *Flexibility, Efficiency, and Modernization in Child Support Enforcement* (FEM) rule, published on December 20, 2016.

ERICSA provides comments herein to two proposed amendments and to a new date for regulatory compliance contained in the NPRM. Specifically, ERICSA supports the amendment to 45 C.F.R § 302.33 (*Services to Individuals Not Receiving Title IV-A Assistance*) and the compliance date delay for certain states implementing the FEM rule amendment to 45 C.F.R. § 303.8(b)(7)(ii). ERICSA objects to the amendment to 45 C.F.R. § 307.11 (*Functional Requirements for Computerized Support Enforcement Systems in Operation by October 1, 2000*), and requests that OCSE withdraw the proposed amendments in their entirety. For the remaining proposed regulatory changes, ERICSA defers to comments submitted by individual states.

II. ERICSA's Comments on Specific Proposed Regulations

Section 302.33: *Services to Individuals Not Receiving Title IV-A Assistance*

ERICSA supports the proposed regulatory changes to 45 C.F.R. § 302.33, which implement the new program fee and threshold collection rate set forth in Section 53117 of Public Law 115-123, *Modernizing Child Support Enforcement Fees*.

Section 307.11: ***Functional Requirements for Computerized Support Enforcement Systems in Operation by October 1, 2000***

ERICSA objects to the proposed changes to the functional requirements for computerized support enforcement systems regulation at 45 C.F.R. § 307.11. Under the proposed regulation, the state's computerized support enforcement system must prevent the collection of child support through income withholding in cases where the noncustodial parent is a recipient of both Supplemental Security Income (SSI) and either Social Security Disability Insurance (SSDI) or Social Security Retirement (SSR). The proposed regulation also requires the return of child support to the noncustodial parent within five business days after the agency determines that support was withheld from an SSDI or SSR payment with a concurrent SSI benefit.

These are substantial changes from the FEM rule, which neither prohibited income withholding nor included the concurrent benefit of SSR. In fact, OCSE expressly addressed and rejected in the FEM final rule any change in current policy regarding garnishment:

> In light of the comments, we want to emphasize that the final rule makes no changes to our policy regarding recipients of title II benefits being subject to garnishment as outlined in Section 459(h)(1)(A)(ii)(1) of the Act. OCSE has long held that title II benefits are subject to garnishment (See DCL 13-06; PIQ-09-01; DCL-00-103). Title II benefits, such as SSDI benefits, are considered remuneration from employment, and therefore, State or tribal child support agencies **are allowed to continue to garnish the benefits of child support directly from the Federal payor as authorized under 459(h).** This final rule only places limitations on garnishments from financial accounts of concurrent SSI and SSDI beneficiaries.

FLEXIBILITY, EFFICIENCY, AND MODERNIZATION IN CHILD SUPPORT ENFORCEMENT PROGRAMS, Fed. Reg. Vol. 81, No. 244, Dec. 20, 2016, p. 93553 (Comment 3) (emphasis added).

Because the proposed amendments to section 307.11 are not technical corrections, they should not be included in the *Child Support Technical Corrections* final rule.[1]

ERICSA further objects to the proposed changes because they are not consistent with provisions in the Social Security Act (hereafter referred to as Act). Section 459(a) of the Act provides that entitlement moneys that are based upon remuneration for employment payable to an individual by the United States are subject to withholding for child support. Section 459(h)(1) clarifies that entitlement moneys that are based upon remuneration for employment include periodic benefits under Title II of the Act. Both SSDI and SSR are periodic benefits based upon remuneration for

[1] In the NPRM, OCSE cites PIQ-18-02, Question and Answer 3, as support for its view that the proposed amendments to section 307.11 are technical, rather than substantive, changes. However, a review of OCSE's guidance prior to PIQ-18-02 demonstrates that a prohibition against income withholding from SSDI or SSR payments, when combined with SSI, is a substantive, not technical, change. *See* DCL-13-06; PIQ-09-01; DCL-00-103.

employment under Title II of the Act. *See* 42 U.S.C. §§ 202, 223.

Federal law allows for the collection of child support from SSDI or SSR through income withholding.[2] Further, while the Social Security Administration (SSA) will not withhold support from an SSI benefit,[3] it will withhold child support from an SSDI or SSR payment where there is a concurrent SSI benefit. Therefore, the regulation proposed by OCSE contradicts the withholding powers granted in section 459 of the Act, as well as the SSA's own policies and practices. Moreover, it strips child support agencies of an enforcement tool allowed under federal law and available to private individuals and private child support collection companies.

ERICSA also objects to the proposed changes because of their impact on program operations. A prohibition against collecting support through income withholding of SSDI and SSR payments when combined with an SSI benefit will be difficult to implement due to the highly automated state computerized support enforcement systems for income withholding. One of the most successful collaborations between OCSE and SSA was the institution of the Court Order Garnishment System (COGS) program to allow SSA to retain IWOs prior to the resolution of a disability application filed by the noncustodial parent.[4] Therefore, many state systems are programed to automatically issue electronic income withholding notices to SSA upon notice of pending SSDI claims, which is long before the states know whether there will be an SSI concurrent benefit. This automated process has significant benefits as it allows the child support agency to intercept the distribution of a retroactive lump sum paid directly to the noncustodial parent and instead take the legally allowed amount from the sum and pay it towards a child support arrearage.

The proposed rule may require states to alter or reverse the automatic income withholding process for SSA benefits in order to safeguard against withholding in concurrent SSI benefit cases. Aside from the difficulties involved in altering systems processes, especially outdated legacy systems, child support cases where the noncustodial parent has no SSI benefit will be detrimentally affected because there will not be income withholding in place when the lump sum payment is issued.

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[2] 42 U.S.C. § 659(h)(1)(A)(ii)(I) allows the withholding of SSA benefits to enforce child support. "[F]ederal regulations governing federal personnel at 5 C.F.R. 581.103(c)(1) specify that SSD is attachable for child support purposes. SSD funds can be attached to satisfy child support obligations even if the support entitlement has been assigned to the State. The assignment does not change the nature of the debt, only the payee. *See, Knickerbocker v. Norman,* 938 F.2d 891 (8th Cir., Iowa,1991), *Shepherd v. Shepherd,* 467 N.W.2d 237 (Iowa 1991)." DCL-00-103 (Oct 6, 2000).

[3] 42 U.S.C. § 1383(d) and 5 C.F.R. § 581.104(j). In addition, an SSI benefit amount is not considered income for purposes of calculating child support ("Federal Supplemental Security Income (SSI) benefits received by a disabled parent may not be utilized as income when calculating a child support obligation when such benefits are the sole source of support of that parent, and income cannot otherwise be imputed to the parent; child support guidelines specifically exempt SSI benefits and other means-tested income from being listed either as 'gross income' or as 'non-taxable income,' and to require SSI benefits to be diverted for child-support purposes would undercut purpose of Congress in enacting the SSI program and hardly satisfy the intent of the Personal Responsibility and Work Opportunities Reconciliation Act (PRWORA) to remove and keep individuals off the welfare rolls in any meaningful way. Social Security Act, § 205, 42 U.S.C.A. § 405; 45 C.F.R. § 302.56(c)(1)." *Burns v. Edwards*, 367 N.J. Super. 29, 842 A.2d 186 (App. Div. 2004).

[4] *See* Office of Child Support Enforcement, IM-06-03: *Social Security Administration (SSA) National Garnishment Database titled, "Court Order Garnishment System (COGS)"* (Mar. 23, 2006) and DCL-06-39: *SSA's Court Order Garnishment System* (Dec. 6, 2006).

Moreover, a manual income withholding process for SSA benefits is less cost-effective and places a significant administrative burden on state agencies.

Finally, we note that section 454B of the Act requires that state disbursement units send current support within two business days after receipt. In contrast, the proposed change to section 307.11 requires states to return within five business days child support collected from an SSDI or SSR payment when there is an SSI benefit. States will be placed in the difficult position of deciding whether to hold all current support payments collected from SSDI or SSR to check for an SSI benefit—and risk violating the two-business day distribution rule—or risk having to absorb the cost of refunding payments that have already been disbursed to the custodial parent.

For all these reasons, ERICSA requests that OCSE withdraw the proposed amendments to 45 C.F.R. § 307.11 in their entirety.

Effective and Compliance Date for 45 CFR 303.8(b)(7)(ii)

ERICSA supports the delay in the compliance date for certain states implementing the FEM rule amendment to 45 C.F.R. § 303.8(b)(7)(ii). Several states with established laws that considered incarceration to be voluntary unemployment are transitioning to the new review and adjustment rules for incarcerated noncustodial parents under the FEM rule. ERICSA commends OCSE for extending the time for these states to comply with the FEM rule that the IV-D agency send notices to both parents within 15 business days of learning that the noncustodial parent will be incarcerated for more than 180 days.

III. Conclusion

The Board of Directors of ERICSA and its Officers appreciate the opportunity to respond to the Notice of Proposed Rule Making. In summary, we support the proposed regulatory changes to 45 C.F.R. § 302.33 and the delay in the compliance date for certain states to implement the FEM rule amendment to 45 C.F.R. § 303.8(b)(7)(ii). We oppose the proposed regulatory changes to 45 C.F.R. § 307.11. ERICSA defers to the States for comments on other portions of the pending NPRM.