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November 27, 2023

Office of Child Support Services
Attention: Director of Policy and Training
330 C Street SW
Washington, DC 20201
Submitted via Federal eRulemaking Portal:
<https://www.regulations.gov>

Comments Submitted by the Eastern Regional Interstate Child Support Association in Response to the Notice of Proposed Rulemaking on Parentage Establishment in the Child Support Services Program

The Eastern Regional Interstate Child Support Association (ERICSA) is a not-for-profit organization whose mission is to build a stronger child support community to enhance the well-being of families. ERICSA membership is comprised of child support professionals from government agencies at the federal, state, tribal and local levels; private sector organizations; attorneys; and members of the judiciary. ERICSA's advocacy includes recommending and responding to changes in federal child support laws and regulations; reporting differences in child support policy and procedure among jurisdictions; and delivering innovative professional training to front-line child support staff and managers with particular emphasis on intergovernmental case processing.

ERICSA is pleased to submit these comments in response to the Notice of Proposed Rulemaking (NPRM), published in the September 26, 2023, Federal Register, 88 FR 65928. The NPRM proposes to replace the gender-specific term "paternity" with the gender-neutral term "parentage" throughout 45 CFR chapter III. ERICSA supports the proposed rule changes except for the full faith and credit provision, which would give a state the option to not recognize parentage legally established in another state.

I. ERICSA's Comments Supporting the NPRM

In recognizing that several states have amended their statutes to support parentage establishment for children of same-sex couples, OCSS has taken the proper move to update regulatory language to reflect these state statutory changes, and align federal law with the marriage equality decision, *Obergefell v. Hodges*, 576 U.S. 644 (2015), as well as numerous executive orders to advance equity for all including members of the LGBTQI+ community. ERICSA supports these important changes so that “paternity” will now mean the establishment of parentage and a legal parent-child relationship in accordance with the laws of the State or Tribe.

ERICSA also supports OCSS's affirmation that federal financial participation is available to states to establish parentage for same-sex couples. This regulatory guidance is consistent with the mission of the program: to take the steps necessary to establish support orders for all children, which necessarily begins in many cases with establishing the parent legally responsible for providing that support. Finally, ERICSA applauds OCSS's decision to codify in regulation that parentage established for same-sex couples can count toward a state's paternity establishment percentage (PEP) measure for incentive purposes.

II. ERICSA's Comments Recommending Changes to the NPRM

The preamble of the NPRM contained strong language supporting same-sex parentage establishment and acknowledged recent legislation in several states that recognized the rights of same-sex parents with the adoption of the Uniform Parentage Act of 2017 (UPA), as well as several states' adoption of a Voluntary Acknowledgment of Parentage (VAP) form to allow parentage establishment for children born to same sex parents. However, in contrast to strong support for same-sex parentage establishment, OCSS stated in the NPRM: “under this proposed rule, States and Tribes *may, at their option*, recognize same sex parentage established through the laws and procedures for the voluntary acknowledgment process in another State.” (emphasis supplied).

ERICSA disagrees that states are not required to give full faith and credit to other state's legal establishment of parentage. For an NPRM that purports to be inclusive and sensitive to increasingly diverse family structures, the proposed treatment of how jurisdictions may disregard legally established VAPs of other states flies in the face of traditional interpretation of constitutional law, caselaw, and state and federal statutory law.

A. The United States Constitution Requires States to Afford Full Faith and Credit to VAPs

The Full Faith and Credit Clause of the United States Constitution provides:

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

U.S. Constitution, Article IV, Section 1. (Emphasis added).

It is well established that states must recognize records and judicial proceedings of other states. This is true even where the “public Acts, Records, and judicial Proceedings” from one state would not be permitted under the laws of another state. As the United States Supreme Court recently explained, a state is required to recognize parentage established in another state through the adoption process even if that method of parentage establishment was not allowed by the recognizing state. *See V.L. v. E.L.*, 577 U.S. 404 (2016) (per curiam); *see also Milwaukee County v. M. E. White Co.*, 296 U. S. 268, 277 (1935) (explaining that the Full Faith and Credit Clause serves “to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation”).

All VAPs, once validly executed and filed, become an official record of the state and that record is retained in most states by the state’s vital records agency or, in some states, the child support agency. Therefore, a VAP of one state regardless of gender of the parents must be given full faith and credit by another state as a valid record of legal parentage establishment.

Also, the VAP results in a birth certificate confirming the signatories as the parents of the child. Like the VAP itself, birth certificates are official state records entitled to full faith and credit under the Constitution. The Supreme Court recognized the right for same-sex married parents to be listed on birth certificates in *Pavan v. Smith*, 582 U.S. 563 (2017) (per curiam), and explained the importance of birth certificates – namely, “important transactions like making medical decisions for a child or enrolling a child in school.”

In addition, VAPs since their creation by the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) in 1996, have been afforded status as a **legal finding** of parentage. VAPs under federal law must be afforded “full faith and credit.” 42 U.S.C. §666(a)(5)(C)(iv). And judicial or administrative proceedings are not required or permitted to ratify a VAP. 42 U.S.C. §§ 666(a)(5)(D)(ii) and (5)(E). As such,

the VAP also must be afforded the same full faith and credit as a judgment of parentage.

Full faith and credit is required for all parentage establishments, including parentage for children born to same sex couples, so long as the establishment is in accordance with that state's law. It does not matter how that parentage is legally established for same sex couples – VAPs carry the same weight as parentage establishment by marital presumption, administrative or judicial determination, or adoption. OCSS cannot produce a regulation which would allow a state to arbitrarily determine which methods used to establish a parent-child relationship to recognize and which methods they can ignore.

Further, the NPRM contains citations in numerous places to *Obergefell*'s commitment to provide same-sex couples “the constellation of benefits that the States have linked to marriage.” Under the UPA, parentage may be established by a VAP for a married couple. The NPRM's attempt to deny same sex married couples who establish parentage by the VAP process the same constellation of benefits of the VAP's full faith and credit protections available for a different sex married couples is in direct conflict with the principles advanced in *Obergefell*.

B. The NPRM conflicts with the Uniform Interstate Family Support Act.

The Uniform Interstate Family Support Act (UIFSA), the uniform interstate law enacted in all states, requires that parentage legally established in another state be recognized by the responding state. Section 315 of UIFSA (2008) prohibits non-parentage from being raised as a defense when parentage has been previously determined. The official comments to Section 315 state that “arguably, this section does no more than restate the basic principle of res judicata.” Absent an argument based on a lack of fundamental due process, states are mandated to accept parentage determinations of other states. The position advanced in the NPRM is in direct conflict with UIFSA – a federally mandated state law.

C. The NPRM is Contrary to Public Policy

ERICSA requests that the final rule not allow states to choose whether to enforce a VAP of another state and instead confirm that all states and tribes are required to honor all legal determinations of parentage made in another jurisdiction, regardless of the mechanism used to establish parentage. To distinguish VAPs as the one parentage process for same sex couples that does not require recognition is a harmful and discriminatory policy.

As pointed out in the preamble of the NPRM, funding is available under title IV-D for

the purpose of assuring that assistance in obtaining support will be available to **all** children. Allowing states the option of recognizing VAPs in some states but not others, flies in the face of this requirement and would allow a savvy parent to move to a state where the VAPs from the VAP-issuing state are not recognized, effectively providing a “safe refuge” from the responsibility of providing support, the very foundation of the child support program. Children would be effectively denied from receiving support from a legal parent.

Further, it creates untenable intergovernmental situations. Instead of it being a given that a responding jurisdiction will recognize a same-sex VAP, initiating states will be left to wonder if they should ratify the VAP through a court order to ensure recognition, which is contrary to established federal law. Without a court order, the initiating jurisdiction and the family being served will be uncertain whether the VAP will be recognized by the other jurisdiction.

Moreover if states and tribes have the option of whether to recognize the VAP, the responding jurisdiction conceivably could refuse to enforce a *support order* based on a VAP executed by a same-sex couple. Interstate cases are complex by nature and the NPRM adds a harmful layer of complexity not advocated by any state.

Further the NPRM contemplates numerous changes to chapter III that are predicated on a statute expressly using the “paternity” terminology, including state performance levels to avoid penalties under 42 U.S.C. § 652(g) and the ability to receive incentive payments under 42 U.S.C. § 658a. It is unclear why the NPRM calls out specifically the acknowledgment provisions of the U.S. Code to strictly be interpreted to mean “paternity” but does not take that same approach with changes to regulations based on other statutory requirements that also refer to “paternity” instead of “parentage.”

III. Conclusion

ERICSA agrees with nearly all the proposed changes in the NPRM and applauds OCSS in updating the language to be inclusive and to make it clear that same-sex parentage determinations are a reimbursable expense. However, ERICSA strongly disagrees with the proposal that states be left to determine whether to recognize a VAP legally executed in another state. Consistency and fundamental fairness to the children we serve demands no less. Therefore, ERICSA asks for the following changes to be made in

the final rule:

§ 302.70 Required State laws.

* * * * *

(a)(11) Procedures under which the State must give full faith and credit to a determination of parentage made by any other State ~~in accordance with sections 466(a)(5)(C)(iv) and (a)(11) of the Act~~, whether established through voluntary acknowledgment or through administrative or judicial processes.

Sincerely,

A handwritten signature in blue ink, appearing to read "Lisa Skenandore".

Lisa Skenandore
President