

MEMORANDUM

TO: Interested People

FROM: Paula Roberts

DATE: September 8, 1998

RE: Federal Guidance on Alternative Penalties Related to Automation Failures

The Family Support Act of 1988 (FSA) required every state to automate its child support enforcement (IVD) program. This automation was to be completed by October 1, 1997. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) imposed an additional set of automation requirements on states. This automation must be completed by October 1, 2000. The Child Support Performance and Incentive Act of 1998 (CSPIA) established a system of fiscal penalties for states which fail to meet their FSA and/or PRWORA automation requirements. On July 31, 1998, the Office of Child Support Enforcement (OCSE) issued Action Transmittal 98-22 which describes how the new penalty system will function. The text of the Action Transmittal can be found at OCSE's web site, <http://www.acf.dhhs.gov/programs/cse/> Below is a summary of the law and the Action Transmittal.

BACKGROUND

States receive substantial federal funding for operating their child support (IVD) programs. This includes 66 percent of the basic costs of the system, 80 percent of automation costs, and 90 percent of the genetic testing costs associated with paternity establishment. 42 USC Section 655. In order to draw down this money, a state must have-- and be operating consistently with-- an approved State Plan which meets the requirements of 42 USC Section 654. Moreover, in order to draw down its Temporary Assistance for Needy Families (TANF) block grant funds, a state needs to be able to certify that it has an approved state IVD plan. 42 USC Section 602(a)(2). Thus, failure to have an approved state child support plan can result in a loss of both IVD and TANF funds.

Among the state plan requirements is that child support functions be automated. 42 USC Section 654(24). Pursuant to this requirement, states were to have completed one set of automation tasks by August 1, 1997.¹ (This summary will refer to these requirements as "basic automation.") Moreover, many additional automation requirements were contained in PRWORA. For example, the basic automated system must include a central state case registry. (This summary will refer to these provisions

¹ 42 USC Section 654(16). Originally, states were required to have certified systems by October 1, 1995. When only one state met this deadline, the deadline was extended for an additional two years.

as the "new requirements.")

States have had difficulty meeting these requirements. As of October 1, 1997, only seventeen states had been certified as meeting their basic automation obligations.² Since the new automation requirements are based on the foundation laid by the basic requirements, it seems likely that some states will miss the deadline for implementing the new requirements as well. Since imposition of existing sanctions (loss of both IVA and IVD funds) would seriously harm low income families, there was a need to come up with a less draconian penalty system which nonetheless conveyed the message that states' failure to automate is a serious breach of the law.

THE NEW LEGISLATION

The CSPIA does just that. The legislation provides a specific penalty for failure to meet both the basic and the new automation requirements. For those who qualify, this alternative penalty will be imposed in lieu of the state plan penalty. To be codified at 42 USC Section 655(a)(4)(A). The alternative penalty is considerably smaller than the state plan penalty. It also affects only IVD funds. States' TANF allotments will not be reduced if the state qualifies for the alternative penalty. To be codified at 42 USC Section 609(a)(8)(A)(i)(III)

Who Qualifies for the Alternative Penalty: Under the CSPIA, for this alternative penalty provision to apply, the Secretary of HHS will have to find that 1) the state has not met one or more of the automation requirements contained in subsection 654(24)³; 2) the state has made and is continuing to make a good faith effort to meet the requirements; and 3) the state has submitted (and HHS has approved) a corrective compliance plan which describes how, when, and at what cost the state will achieve compliance. When these conditions are met, the Secretary will not disapprove the state IVD plan but will instead apply the alternative penalty provision and reduce the state's IVD funding by a prescribed amount. To be codified at 42 USC Section 655(a)(4)(A)(I).

² As of August 1998, thirty five states were certified. Two more had been reviewed and eight had reviews scheduled. The remaining states (including California, Indiana, Kansas, Michigan, Nevada, North Dakota, Ohio, Pennsylvania, and South Carolina) appear to be far from certification.

³ It should be noted that not all of the automation requirements are found at 42 USC Section 654(24). For example, the mandate to create a central payment and disbursement unit is *not* contained in 42 USC Section 654(24), nor are the child support distribution requirements. Therefore, any failure to meet these requirements subjects the state to the general penalty applicable to failure to meet a state plan requirement: state plan disapproval and potential loss of TANF and IVD funds. The Action Transmittal emphasizes this point (p.2).

According to the Action Transmittal:

- C until such time as the state requests that it be subject to the alternative penalty, OCSE will proceed with the state plan disapproval process. Therefore, states which do not have certified basic automation systems which wish to avoid the loss of their IVA and IVD funds need to quickly file a request with OCSE.
- C to qualify for the alternative penalty, a state must submit both a "corrective compliance plan" and a letter from the State's Chief Executive Officer or his/her designee requesting that the state be subject to the alternative penalty rather than the state plan disapproval process.
- C the "corrective compliance plan" must explain how, when and at what cost the state will achieve automation. Both time frames and cost estimates for achieving compliance must be included.
- C for states which are going to implement (or complete implementation of) a system for which they already have an approved Advance Planning Document (APD), the "corrective compliance plan" must be in the form of an Advanced Planning Document Update (APDU) which meets the requirements of 45 CFR Section 307.10⁴. For states which are planning to develop a different system than the one previously approved, the "corrective compliance plan" must include a closeout APDU (for the old system) and a new APD for the planned system.
- C the "corrective compliance plan" must be approved by OCSE for the state to qualify for the alternative penalty.
- C if a state fails to make a good faith effort to meet its automation obligations (presumably by failing to implement its corrective compliance plan) the state plan disapproval process may be reinstated and the full IVA/IVD penalties imposed.

Calculating the Penalty: Under the CSPIA, the penalty is calculated by taking the penalty base and multiplying it by the applicable percentage. To be codified at 42 USC Section 655(a)(4)(B). The penalty base is the amount of federal reimbursement for basic program costs (i.e., the expenditures eligible for 66 percent federal reimbursement) for the previous fiscal year.

⁴ This regulation is currently being revised. See 63 *Fed. Reg.* 14402 et seq. (March 25, 1998) for the proposed revisions.

Attachment B to Action Transmittal 98-22 provides the penalty base for FY 1998. Thereafter, the penalty base will be adjusted each year to reflect actual IVD expenditures reimbursed at the 66% rate.⁵

Once the penalty base is determined, OCSE will multiply it by the applicable percentage described in the statute. The applicable percentage-- and thus the size of the potential penalty-- increases each year. For an initial failure to meet an automation deadline, the applicable percentage is 4 percent; if the failure is not corrected, in the second year, the applicable percentage is 8 percent; if the failure persists, in the third year, the percentage rises to 16 percent; in the fourth year, it is 25 percent; and in each subsequent year it is 30 percent.

Avoiding the Penalty for Basic Automation Failures: The CSPIA contains a provision **exempting** states which did not meet the October 1, 1997 deadline for meeting *basic* automation requirements but are now certified as meeting those requirements from any penalty. Also able to avoid a penalty are states which requested a certification review on or before August 1, 1998, which are subsequently certified pursuant to that request. To be codified at 42 USC Section 655(a)(4)(C).⁶ This means that those states which did not meet the October 1, 1997 deadline for basic automation but have had their systems certified since then will suffer no financial penalty for failing to meet that deadline. States which have a certifiable system and made a certification request to OCSE before August 1, 1998 may also be able to avoid a penalty.

According to the Action Transmittal, a state which is not yet certified and wishes to take advantage of this provision must submit a request to OCSE along with a completed Certification Questionnaire and Financial Distribution Test Deck results. OCSE will review this material and schedule an on-site review within three weeks of the request.

Incentives to Come Quickly Into Compliance with the Automation Requirements: To provide an incentive to states to come into compliance with the automation requirements, the new law also contains a **partial forgiveness** provision. If a state is penalized for failure to meet its automation requirements, but later achieves compliance, 90 percent of the penalty imposed during the year before compliance was achieved will be forgiven. To be codified at 42 USC Section 655(a)(4)(C)(ii).

⁵ For the fourth quarter of a fiscal year, states first submit estimated expenditure and then (during the following fiscal year) they report actual expenditures. For this reason, OCSE will calculate an initial base amount and then adjust it once an actual expenditure report is submitted. After this initial adjustment, no other adjustments will be made.

⁶ If a state requests a review but fails to obtain certification, the penalty will be imposed. 42 USC Section 655(a)(4)(C)(I)(III). This should prevent states with systems which do not meet the basic requirements from requesting a review just to avoid the penalty.

For example, suppose State A fails to meet its basic automation requirements until March 2001 (i.e., in FY 2002). Also assume that State A's 1998 penalty base is \$ 100 million and remains this amount for each fiscal year in question. For FY 1998 its penalty will be 4 percent of the base or \$4 million. For FY 1999, its penalty will be 8 percent of the base or \$8 million. For FY 2000, its penalty will be 16 percent of the base or \$16 million. For FY 2001, its penalty will be 25 percent of the base or \$25 million dollars. Since it achieves compliance during FY 2002, 90 percent of the \$25 million penalty (\$22.5 million) will be forgiven. Since the penalty will already have been imposed, OCSE will add \$22.5 million to the state's FY 2003 IVD federal funds. Note that the forgiveness only applies to the penalty imposed for the fiscal year prior to compliance. There is no forgiveness of penalties imposed for years prior to that.

According to the Action Transmittal, partial forgiveness will be available to a state which meets the requirements for *conditional* certification in the relevant fiscal year even if additional modifications are needed for the state to achieve full, unconditional certification.⁷ However, if modifications are required before a state achieves even conditional certification, then the forgiveness will not be available unless the state makes those modifications within the given fiscal year and OCSE subsequently determines that the state's system was certifiable within that fiscal year.

Dealing with Multiple Automation Failures: The CSPIA contains two provisions relating to multiple automation failures. *First*, it makes clear that all failures to meet the basic automation requirements are to be treated as a single failure. Likewise all failures to meet the new automation requirements are to be treated as a single failure. To be codified at 42 USC Section 655(a)(4)(A)(ii). *Second*, the legislation makes clear that if a state is being penalized for meeting its basic automation requirements it cannot simultaneously be penalized for meeting the new automation requirements. To be codified at 42 USC Section 655(a)(4)(D).

According to Action Transmittal 98-22, if a state fails to meet both basic and new requirements, the progressively larger penalty for failure to meet basic requirements will be imposed until the state achieves compliance with the basic requirements. If the state also achieves compliance with the new automation requirements in the same fiscal year, there will be no further penalties. If, however, compliance with the new requirements is not achieved, penalties will then be assessed for the failure to meet the new requirements. The penalty amount will be calculated by determining how long the failure to meet the new requirements has existed and applying the penalty percentage for that year. For example, assume that State B fails to meet both its basic and its new automation requirements. By FY 2001, it would face a single 25 percent penalty for failure to meet its basic automation obligations. If, during FY 2001, it met its basic obligation but

⁷ This is important to states since , of the 35 certified systems, 22 are only conditionally certified.

not its new automation requirements, the state would be eligible for the 90 percent forgiveness. However, if, by the end of 2002, it had not met its new automation obligations, then State B would face an 8 percent penalty because that would be the second year of its failure to timely meet those obligations.