COMPLYING WITH THE 2016 FEDERAL FINAL RULE

Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs

VIRGINIA CHILD SUPPORT GUIDELINES REVIEW PANEL

MARCH 30, 2021

9:00 AM – 12:00 PM

VIRTUAL PLATFORM

FEDERAL RULE TOPICS FOR DISCUSSION

- Low-income adjustment
- Imputation of income
- Incarceration no longer voluntary unemployment
- Health care coverage as a basis for modification

LOW-INCOME ADJUSTMENT

The federal rule requires that guidelines take into consideration:

"the basic subsistence needs of the noncustodial parent (and at the State's discretion, the custodial parent and children) who has a limited ability to pay by incorporating a low-income adjustment, such as a self-support reserve or some other method determined by the State."

45 CFR § 302.56(c)(1)(ii)

LOW-INCOME ADJUSTMENT

- Virginia's current statutory language:

> If the gross income of the obligor is equal to or less than 150 percent of the federal poverty level promulgated by the U.S. Department of Health and Human Services from time to time, then the court, upon hearing evidence that there is no ability to pay the presumptive statutory minimum, may set an obligation below the presumptive statutory minimum provided doing so does not create or reduce a support obligation to an amount which seriously impairs the custodial parent's ability to maintain minimal adequate housing and provide other basic necessities for the child.

Va. Code § 20-108.2(B)

LOW-INCOME ADJUSTMENT

- Virginia's Division of Child Support Enforcement (DCSE) asked the federal Office of Child Support Enforcement (OCSE) whether this language is sufficient to meet the federal rule requirement that guidelines include a low-income adjustment.
- OCSE advised:

  Virginia's current language is sufficient and meets the standard of flexibility that is available to states under 45 CFR 302.56(c)(1)(ii). States have wide discretion to take into consideration the subsistence needs of the custodial parent and children, as well as those of the noncustodial parent.

IMPUTING INCOME

Federal Rule Requirement

- If imputation is authorized, the guidelines must consider:
  - NCP's specific circumstances (and CP's at state's discretion) to the extent known, including factors such as:

Assets	Literacy	Local job market
Residence	Age	Availability of employers willing to hire NCP
Employment & earnings history	Health	Prevailing earnings level in local community
Job skills	Criminal record & other employment barriers	Other relevant background factors
Educational attainment	Record of seeking work	

45 CFR § 302.56(c)(1)(iii)

IMPUTING INCOME

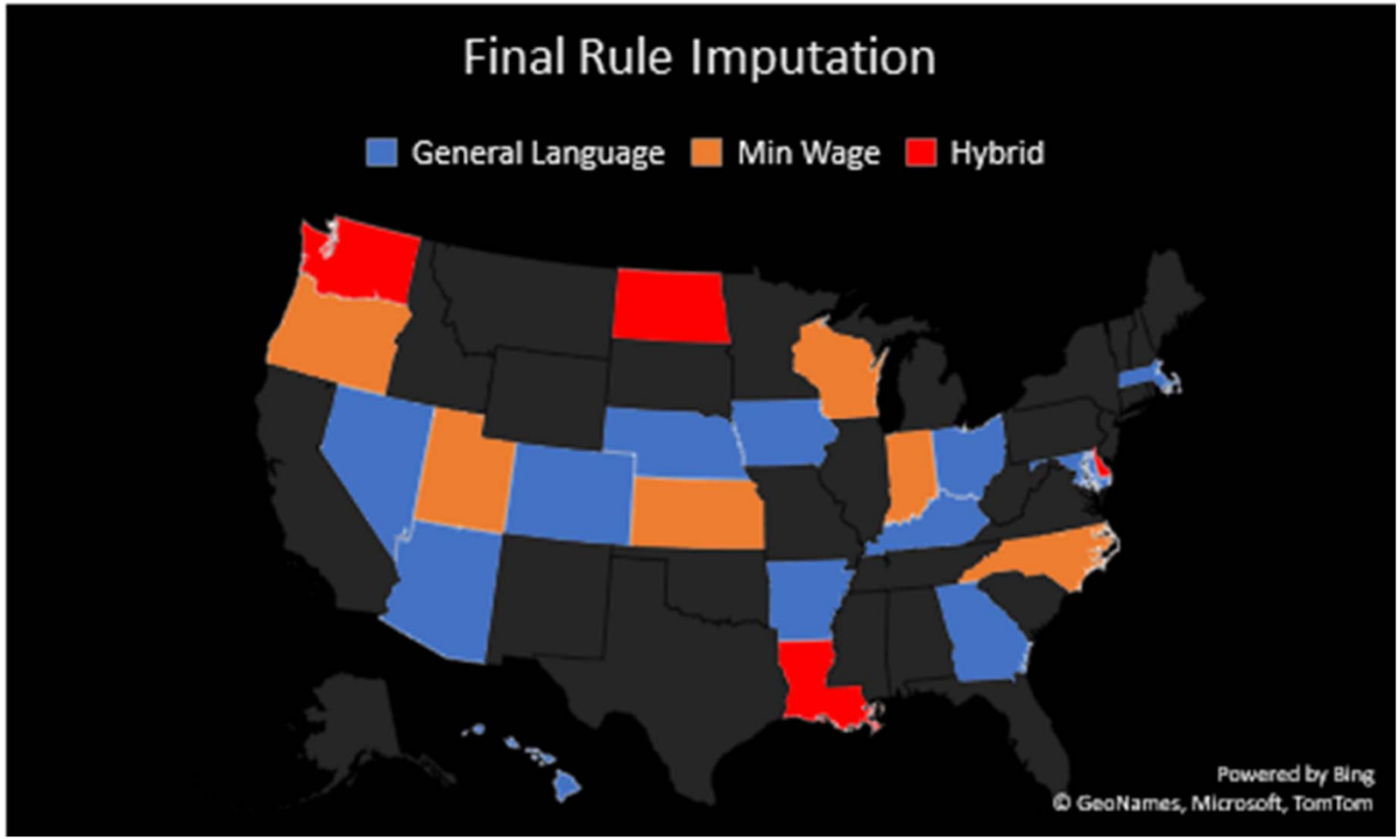
Background

- Intent is to require a stronger focus on fact-gathering and setting orders based on evidence of actual income and ability to pay rather than on a standard imputed amount applied universally.

IMPUTING INCOME

- The Panel's consensus at the October 26, 2020 meeting was to recommend codifying case law that requires evidence for imputation
- The Panel asked staff to research:
  - How other states are using imputation criteria
  - Whether there are specific and measurable methods that can be used to benchmark imputation criteria

STATE APPROACHES TO IMPUTATION



STATE APPROACHES TO IMPUTATION

- 9 states use the general federal rule language
- 6 states use minimum wage
- 4 states use data from the Bureau of Labor Statistics (BLS) or minimum wage as circumstances dictate
- Other states:
  - Illinois – If insufficient work history then presume 75% of FPL
  - Tennessee – Increase income from last order up to 10% annually since entry of last order (modification cases where parent does not cooperate with providing financial info)

CURRENT VIRGINIA LAW ON IMPUTATION

- If the court finds the guidelines amount would be unjust or inappropriate, it may order a different amount but must:
  - State the amount of support that would have been required under the guidelines
  - Give a justification of why the order varies from the guidelines
  - Determine the amount by relevant evidence pertaining to certain deviation factors that affect the obligation, the ability of each party to provide child support, and the best interests of the child

Va. Code § 20-108.1(B)

CURRENT VIRGINIA LAW ON IMPUTATION

These deviation factors include:

3. Imputed income to a party who is voluntarily unemployed or voluntarily under-employed; provided that income may not be imputed to a custodial parent when a child is not in school, child care services are not available and the cost of such child care services are not included in the computation and provided further, that any consideration of imputed income based on a change in a party's employment shall be evaluated with consideration of the good faith and reasonableness of employment decisions made by the party, including to attend and complete an educational or vocational program likely to maintain or increase the party's earning potential

11. Earning capacity, obligations, financial resources, and special needs of each parent

Va. Code § 20-108.1(B)

IMPUTATION OPTIONS

1. Add federal rule language to § 20-108.1(B)(11)
2. Create a hybrid method using federal rule language and minimum wage
3. Create a hybrid method using federal rule language, BLS data, and minimum wage

IMPUTATION OPTION #1: MASSACHUSETTS
GENERAL FEDERAL RULE LANGUAGE

Example from Massachusetts:

The Court shall consider the age, number, needs and care of the children covered by the child support order. The Court shall also consider the specific circumstances of the parent, to the extent known and presented to the Court, including, but not limited to, the assets, residence, education, training, job skills, literacy, criminal record and other employment barriers, age, health, past employment and earnings history, as well as the parent's record of seeking work, and the availability of employment at the attributed income level, the availability of employers willing to hire the parent, and the relevant prevailing earnings level in the local community.

Model: MA Orders 2018-23

IMPUTATION OPTION #2: NORTH CAROLINA
HYBRID FEDERAL RULE LANGUAGE & MINIMUM WAGE

(3) Potential or Imputed Income. If the court finds that a parent's voluntary unemployment or underemployment is the result of the parent's bad faith or deliberate suppression of income to avoid or minimize his or her child support obligation, child support may be calculated based on the parent's potential, rather than actual, income. Potential income may not be imputed to a parent who is physically or mentally incapacitated or is the primary custodian for a child who is under the age of three years and for whom child support is being determined. In compliance with 45 C.F.R. § 302.56(c)(3), incarceration may not be treated as voluntary unemployment in establishing or modifying a child support order.

The amount of potential income imputed to a parent must be based on the parent's assets, residence, employment potential and probable earnings level, based on the parent's recent work history, occupational qualifications and prevailing job opportunities and earning levels in the community and other relevant background factors relating to the parent's actual earning potential. If the parent has no recent work history or vocational training, potential income should not be less than the minimum hourly wage for a 35-hour work week.

IMPUTATION OPTION #2: INDIANA
HYBRID FEDERAL RULE LANGUAGE & MINIMUM WAGE

3. **Unemployed, underemployed and potential income.** If a court finds a parent is voluntarily unemployed or underemployed without just cause, child support shall be calculated based on a determination of potential income. A determination of potential income shall be made by determining employment potential and probable earnings level based on the obligor's employment and earnings history, occupational qualifications, educational attainment, literacy, age, health, criminal record or other employment barriers, prevailing job opportunities, and earnings levels in the community. If there is no employment and earnings history and no higher education or vocational training, the facts of the case may indicate that Weekly Gross Income be set at least at the federal minimum wage level, provided the resulting child support amount is set in such a manner that the obligor is not denied a means of self-support at a subsistence level.

Order Amending Ind. Support Guidelines, No. 19S-MS-41, 2019 Ind. LEXIS 521 (July 26, 2019)

IMPUTATION OPTION – VIRGINIA'S MINIMUM WAGE

HYBRID FEDERAL RULE LANGUAGE & MINIMUM WAGE

Beginning	Ending	Min. Wage
May 1, 2021	Jan. 1, 2022	$9.50 per hour
Jan. 1, 2022	Jan. 1, 2023	$11.00 per hour
Jan. 1, 2023	Jan. 1, 2025	$12.00 per hour
Jan. 1, 2025	Jan. 1, 2026	$13.50 per hour
Jan. 1, 2026	Jan. 1, 2027	$15.00 per hour
Jan. 1, 2027	Annual Review	Based on U.S. Avg. Consumer Price Index changes

- Based on 2021 Federal Poverty Guidelines, current monthly FPL rate: $1073.33 per month at 100% of FPL; $1610 per month at 150%; and $2146.67 per month at 200%.
- At $9.50 per hour, employee is above 150% of FPL ($1610) at 40 hours per week and above 100% of FPL ($1073.33) at 35 hours and 30 hours per week but dips below 100% FPL ($1073.33) at 25 hours and 20 hours per week.

Va. Code Ann. § 40.1-28.10

IMPUTATION OPTION 3: DELAWARE

HYBRID BUREAU OF LABOR STATISTICS DATA & MINIMUM WAGE

(a) General. -- In determining each parent's ability to pay support the Court considers the health, income and financial circumstances, and reasonable earning capacity of each parent, the manner of living to which the parents had been accustomed as a family unit and the general equities inherent in the situation.

(b) Actual income. -- A parent employed at least 35 hours per week in a manner commensurate with his or her training, education and experience shall be presumed to have reached his or her reasonable earning capacity.

(c) Documented part-time employment. -- A parent with documented earnings representing an average of fewer than 35 hours per week at employment otherwise commensurate with his or her training and experience shall be imputed the number of hours reasonably available either with parent's current employer or through similar employment but not less than 35 hours per week unless:

(1) The parent has medical limitations;

(2) More substantial employment has proven unavailable despite diligent efforts;

(3) Upon consideration of available hours and rates of pay, available full-time employment would not produce greater total earnings; or

(4) A child of the union has profound special needs inhibiting the support recipient's ability to maintain employment.

Del. Family Ct. Civ. R. 501

IMPUTATION OPTION 3: DELAWARE
HYBRID BUREAU OF LABOR STATISTICS DATA & MINIMUM WAGE

(d) Imputed income. -- Unemployment or underemployment that is either voluntary or due to misconduct, failure to provide sufficient documentation, or failure to appear for a hearing or mediation conference shall cause reasonable earning capacity to be imputed. In determining whether actual employment is commensurate with training and experience and when imputing income, the Court shall consider each parent's assets, residence, employment and earnings history, job skills, educational attainment, literacy, age, health, criminal record and other employment barriers, record of seeking work, as well as the local job market, the availability of employers willing to hire the noncustodial parent, prevailing earnings level in the local community, and other relevant background factors. Except as provided in subsection (c) of this Rule, imputed income shall be calculated at not less than 40 hours of wages each week.

(e) Wage surveys. -- The Court may take judicial notice of occupational wage surveys compiled by the United States Bureau of Labor Statistics (BLS) and the Office of Occupational and Labor Market Information (OOLMI) in the Delaware Department of Labor to impute or corroborate reasonable earning capacity.

Del. Family Ct. Civ. R. 501

IMPUTATION OPTION 3: DELAWARE CONTINUED
HYBRID BUREAU OF LABOR STATISTICS DATA & MINIMUM WAGE

- **(1)** If a parent's reasonable earning capacity has not previously been established and the actual income expressed as an hourly wage exceeds the survey's "Entry" level wage (average of the lowest 30%) for the parent's occupation, then the rate of pay shall be presumed commensurate with the parent's training and experience.
- **(2)** For imputation purposes, analysis should begin with the median wage for each occupation, but may be adjusted up or down between "Entry" and "Experienced" (average of the highest 70%) based upon the totality of the circumstances.
- **(f) Minimum income. --** In any instance not governed by subsections (b) or (c) of this Rule, every parent will be presumed to have a reasonable earning capacity of not less than the greater of the Federal or State statutory minimum wage at 40 hours per week (173.33 hours per month). As related to this subsection, when using the State statutory minimum wage, the Court will not utilize the statutory training wage or youth wage.
- **(g) Unemployment. --** A person who receives unemployment compensation shall be presumed to have been terminated from employment involuntarily and without cause. Termination without receipt of unemployment compensation shall be presumed voluntary or for cause. Continued unemployment or underemployment in excess of 6 months shall be presumed voluntary.

Del. Family Ct. Civ. R. 501

DEMONSTRATION & DISCUSSION

- Demonstration of imputation calculator prototype
- Panel discussion and decisions
  1. Add general federal rule language only
  2. Use a hybrid method
     - Federal rule language and minimum wage
     - Federal rule language, BLS data, and minimum wage
  3. Other?

INCARCERATION NO LONGER VOLUNTARY UNEMPLOYMENT

Background

- The federal rule requires that states not treat incarceration as voluntary unemployment for purposes of establishing or modifying a child support obligation
- In September 2020, OCSE issued a Notice of Proposed Rulemaking that may allow two exceptions to this requirement:
  - Intentional nonpayment of child support resulting from a criminal case or civil contempt action
  - Any offense of which the individual's dependent child or the child support recipient was the victim

45 CFR § 302.56(c)(3)

INCARCERATION NO LONGER VOLUNTARY UNEMPLOYMENT

- Goal: ensure that parties have realistic child support orders based on their actual present ability to pay
- Incarcerated parents with child support orders can accumulate high levels of debt with no ability to pay while confined and a reduced ability to pay upon release

INCARCERATION NO LONGER VOLUNTARY UNEMPLOYMENT

- At its October 2020 meeting, the Panel's consensus was to:
  - Move forward with some form of relief and recommend overturning current case law
  - Recommend language to provide complete relief—including from civil show causes for nonpayment—during and directly following incarceration
- The Panel asked staff to research what other states are doing regarding this issue

INCARCERATION NO LONGER VOLUNTARY UNEMPLOYMENT

General information from other states

- Virginia is one of only a few states that still consider incarceration as voluntary unemployment
  - Approximately 40 states and DC do not consider incarceration to be voluntary unemployment
  - Many states had addressed this issue prior to issuance of the federal rule; others have adopted the provision since then
  - Some states never considered incarceration as voluntary unemployment

INCARCERATION NO LONGER VOLUNTARY UNEMPLOYMENT

States use a wide variety of approaches:

- In most states, the incarcerated parent must make the request for modification
  - Examples: Alabama, Alaska, Florida, Hawaii, Iowa, Illinois, Indiana, Kansas, Massachusetts, Missouri, Ohio, South Dakota, Nevada, New Hampshire, New Jersey, Pennsylvania, Texas, West Virginia
- In some states, the child support agency files the request proactively
  - Examples: Arizona, Idaho, Maine, Maryland, Michigan, Oregon, Rhode Island, Vermont
- A few states automatically reduce the obligation
  - Delaware: automatic reduction to ½ of minimum order for orders entered after 1/31/19; for orders entered prior to 2/1/19, parent can request modification
  - California, Louisiana, New York: order suspended by operation of law

INCARCERATION NO LONGER VOLUNTARY UNEMPLOYMENT

- Most states use the 180-day incarceration threshold but others use a shorter threshold
  - Examples: California, Texas, and Vermont have a 90-day threshold
- Some states do not allow a request for modification if the parent is incarcerated for failure to pay child support or committed a crime against the custodial parent or child
  - Examples: California, New York
- States base the obligation on current ability to pay and take into account whether parents have other income/assets that give them the ability to pay while incarcerated

INCARCERATION NO LONGER VOLUNTARY UNEMPLOYMENT

In the meantime…

- House Bill 2055 was introduced in the 2021 General Assembly Session.
- Original bill language:

> …(iii) a *party's current incarceration, as defined in § 8.01-195.10, for 180 or more consecutive days, other than for failure to pay child support as ordered or for a crime against the child that is the subject of the child support order or the custodial parent of that child, shall not be deemed voluntary unemployment or voluntary underemployment. In addition, notwithstanding subsection F, a party's incarceration for 180 or more consecutive days, other than for failure to pay child support as ordered or for a crime against the child that is the subject of the child support order or the custodial parent of that child, shall be a material change in circumstances upon which a modification of child support may be based*;

Va. Code § 20-108.1(B)

INCARCERATION NO LONGER VOLUNTARY UNEMPLOYMENT

- Final version after amendments:

  *…(iii) a party's current incarceration **alone**, as defined in § 8.01-195.10, for 180 or more consecutive days, other than for ~~failure to pay child support as ordered or for~~ a crime against the child that is the subject of the child support order or the custodial parent of that child, shall not be deemed voluntary unemployment or voluntary underemployment. In addition, notwithstanding subsection F, a party's incarceration for 180 or more consecutive days, other than for failure to pay child support as ordered or for a crime against the child that is the subject of the child support order or the custodial parent of that child, shall be a material change in circumstances upon which a modification of child support may be based;*

- Enactment clause added as part of amendment:

  That the provisions of this act shall only apply to petitions for child support commenced on or after July 1, 2021, and petitions for modifications of such orders, and that the provisions of this act shall not be construed to create a material change in circumstances for the purposes of modifying an existing child support order.

INCARCERATION NO LONGER VOLUNTARY UNEMPLOYMENT

Current status of HB 2055

- Amendment was agreed upon in conference
- Bill is now before the Governor for review – he must take action by March 31
- The Department of Social Services (DSS) has asked that the enactment clause be stricken and, based on concerns raised by members of the family bar and Sen. Surovell, requested advice from legal counsel at the Office of the Attorney General regarding:
  - Whether the original bill language violated the Va. or U.S. Constitution
  - Whether the enactment clause conflicts with federal law

INCARCERATION NO LONGER VOLUNTARY UNEMPLOYMENT

Counsel advised that HB 2055 as introduced:

- Did not violate the Va. or U.S. Constitution with regard to the prohibition on *ex post facto* laws or bill of attainder
  - *Ex post facto* laws and bill of attainder apply to criminal matters; child support matters are civil
- Did not limit or deny any substantive or procedural due process rights
  - No retroactive effect
  - Would not automatically reduce any child support order or reduce/eliminate any child support arrears
  - Merely allows a party to request modification based on incarceration

INCARCERATION NO LONGER VOLUNTARY UNEMPLOYMENT

- Counsel further advised that the enactment clause added to HB 2055 as an amendment:
  - Conflicts with the 2016 federal rule requirement that prohibits states from legally barring modification of support obligations during incarceration in all cases
  - Creates a two-tier system of child support cases because courts would:
    - Continue to treat incarceration as voluntary unemployment for parents with orders entered before July 1, 2021
    - Not treat incarceration as voluntary unemployment for parents whose orders were entered on or after that date

INCARCERATION NO LONGER VOLUNTARY UNEMPLOYMENT

- Enactment clause also creates a contradiction:
  - Actual bill language: Incarceration "shall be a material change in circumstances upon which a modification of child support may be based"
  - Enactment clause: Incarceration "shall not be construed to create a material change in circumstances for purposes of modifying an existing child support order"

INCARCERATION NO LONGER VOLUNTARY UNEMPLOYMENT

- OCSE has advised DSS that:
  - The federal rule requirement applies to all child support orders, not just those entered on or after a certain date
  - If the law applies only to requests for modification of child support orders entered on or after July 1, 2021, Virginia will be out of compliance with federal law

INCARCERATION NO LONGER VOLUNTARY UNEMPLOYMENT

- Failure to comply would result in the **loss of $74 million** in federal funding for DCSE and possibly additional cuts in TANF payments to Virginia residents
- DCSE collects $650 million for families annually
- Of DCSE's 281,881 total cases, only 0.9% (2,551 cases) would be eligible for modification under this provision
- Virginia would also lose access to federal data sharing and tools, such as the Federal Parent Locator Service, federal tax refund offsets, and passport sanctioning, among others

HEALTH CARE AS A BASIS FOR REVIEW

- Federal rule deleted last sentence of 45 CFR § 303.8(d) – this change allows a child's eligibility for Medicaid to be considered sufficient to meet the child's health care needs:

> *Health care needs must be an adequate basis. The need to provide for the child's health care needs in the order, through health insurance or other means, must be an adequate basis under State law to initiate an adjustment of an order, regardless of whether an adjustment in the amount of child support is necessary.* ~~*In no event shall the eligibility for or receipt of Medicaid be considered to meet the need to provide for the child's health care needs in the order.*~~

45 CFR § 303.8(d)

HEALTH CARE AS A BASIS FOR REVIEW

Change to § 308.3(d) conforms with changes to § 303.31 which was amended to:

- Allow states to give parents more flexibility in providing health care coverage that is reasonable in cost and best meets child's needs
- Clarify that health care coverage includes both private and public insurance
- Require agencies to petition court to include health care coverage that is accessible and can be obtained at a reasonable cost

HEALTH CARE AS A BASIS FOR REVIEW

- Including public coverage such as Medicaid and other state health care programs for children in low-income families, such as Virginia's Family Access to Medical Insurance Security (FAMIS), as part of medical support gives states greater flexibility to ensure that medical support is being provided for all children
- This does not mean Medicaid ***must*** be considered sufficient in every case; in some cases, it may not be sufficient to meet the child's needs
- OCSE does not prescribe how agencies address medical support provisions in their orders but encourages states to consider adopting a broad medical support provision that encompasses all options available to families

HEALTH CARE AS A BASIS FOR REVIEW

Docket/Workload Concerns

- During the federal rule comment period, there was a suggestion to set a threshold for when to modify an order for health care coverage similar to the threshold for review and adjustment for a support obligation, citing concerns about agencies' facing heavy workloads to modify orders.
- OCSE responded that it has historically left specific criteria for modifications up to states and their guidelines, but *when an order lacks a medical support provision, the situation warrants immediate attention* to remedy the issue

HEALTH CARE AS A BASIS FOR REVIEW

Is a statutory change necessary?

- A legislative change is needed to:
  - Ensure uniformity of processes across the state
  - Treat both administrative orders and courts orders consistently
  - Clarify that a change in health care coverage must be considered by courts as a material change in circumstances so that courts do not deny DCSE's motions for modification in these cases

HEALTH CARE AS A BASIS FOR REVIEW

Examples from other states

State	Statutory Language
Minnesota	"The terms of an order respecting maintenance or support may be modified upon a showing of…a change in the availability of appropriate health care coverage or a substantial increase or decrease in health care coverage costs." There is also a provision for medical support-only modification if the full order was established or modified within 3 years of the date of the motion and there is a change in availability of coverage or a substantial increase or decrease in cost. The court is not required to hold an evidentiary hearing on a motion for medical support-only in these cases.
Texas	"A court or administrative order for child support in a Title IV-D case may be modified at any time, and without a showing of material and substantial change in the circumstances of the child or a person affected by the order, to provide for medical support or dental support of the child if the order does not provide health care coverage…or dental care coverage as required…."
Utah	A child support order can be modified by petition at any time if there is a material change in the availability, coverage, or reasonableness of cost of health care insurance.

Minn. Code 518A.39(Subd. 2)(a) and (Subd. 8)(a)(1)
Tex. Fam. Code § 156.401(a-2)
Utah Code 78B-12-212; see also Utah Courts website at https://www.utcourts.gov/howto/family/modification/child_support/

HEALTH CARE AS A BASIS FOR REVIEW

DCSE's Statutory Authority

- DCSE can review and request modification of child support orders if there is a material change in circumstances—defined as a change in an existing support obligation of at least 10% but not less than $25 per month—when calculating the new obligation using the guidelines.
- Currently DCSE has no authority to review an order if there is a change in health care coverage that would not result in a modification to the support obligation of at least 10% but not less than $25 per month.

Va. Code Ann. § 63.2-1921

HEALTH CARE AS A BASIS FOR REVIEW

Courts' Statutory Authority

§ 20-108. Revision and alteration of such decrees.

The court may, from time to time after decreeing as provided in § 20-107.2, on petition of either of the parents, or on its own motion or upon petition of any probation officer or the Department of Social Services, which petition shall set forth the reasons for the relief sought, revise and alter such decree *concerning the care, custody, and maintenance of the children and make a new decree concerning the same, as the circumstances of the parents and the benefit of the children may require.* The intentional withholding of visitation of a child from the other parent without just cause may constitute a material change of circumstances justifying a change of custody in the discretion of the court.

Va. Code Ann. § 20-108

HEALTH CARE AS A BASIS FOR REVIEW

Case Law

- "The mother did not provide the threshold element that a material change in circumstances had occurred. Not only was the mother's income the same…she received a larger percentage of take-home pay. The mother resided in the same home and paid the same rent. While some of her other expenses, such as health insurance, had increased, other expenses, such as child care, had decreased. The father's ability to provide support had not changed." (*Crabtree v. Crabtree*, 17 Va. App. 81, 435 S.E.2d 883 (1993)
- "Once a child support award has been entered only a showing of a material change in circumstances will justify modification of a support award. The moving party has the burden of showing a material change by a preponderance of the evidence." *Antonelli v. Antonelli*, 242 Va. 152, 409 S.E.2d 117 (1991)

HEALTH CARE AS A BASIS FOR REVIEW

- Scenarios where the addition of or change in health care coverage may not create a material change in circumstances:
  - Public health care coverage can be ordered but may not cost enough to create a 10%/$25 change
  - The parent ordered to provide coverage may lose a job and the other parent may have it available at a similar cost
- We could continue to use the material change threshold for increases or decreases in the cost of coverage

Va. Code Ann. § 63.2-1921

HEALTH CARE AS A BASIS FOR REVIEW

Panel discussion and decisions

THE END