

Complying with the 2016 Federal Final Rule

*Flexibility, Efficiency, and Modernization in Child
Support Enforcement Programs*



Virginia Child Support Guidelines Review Panel
October 26, 2020

Provisions Requiring Legislative Action

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- ▶ This Panel's *Report to the Governor and General Assembly* is due in December 2021.
- ▶ The report will include the Panel's recommendations for legislative changes related to the child support guidelines, including provisions required by the 2016 federal final rule, *Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs*.

Provisions Requiring Legislative Action

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- ▶ The final rule includes requirements that all states must implement to continue receiving federal funding to operate their child support programs.
- ▶ Some provisions relate only to state child support agencies and their processes, but others will require legislative changes that must be enacted by the end of 2023.
- ▶ The following final rule provisions will require legislative changes in Virginia.



Meeting Federal Rule Requirements

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Requirement

- ▶ States must establish 1 set of guidelines for setting/modifying child support obligations that meets final rule requirements.

Current Status

- ▶ Virginia currently has 1 set of guidelines, but it does not meet final rule requirements.

Proposed Action

- ▶ Once other changes are made based on the following requirements, this provision will be met.

Ability to Pay

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Requirement

- ▶ Guidelines must provide that child support orders are based on a noncustodial parent's (NCP's) earnings, income, and other evidence of ability to pay.



Background

- ▶ Many low-income NCPs don't fulfill their child support obligation because they don't earn enough to pay the ordered amount.
- ▶ Research suggests that setting accurate, realistic orders based on parents' actual ability to pay improves the chances that they will continue to pay over time.

Ability to Pay

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Background

- ▶ Obligations set beyond parents' ability to pay are associated with:
 - Unmanageable debt
 - Reduced low-wage employment
 - Increased underground activities
 - Reduced contact with children



Ability to Pay

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Current Status

- ▶ Virginia's guidelines do base calculations on a parent's earnings and income, but there is no statutory definition of "ability to pay."

Proposed Action

- ▶ Add statutory definition of ability to pay.
 - DCSE's adopted definition:
Ability to pay is established by showing either that respondent has income or cash sufficient to pay or that there are steps respondent can take that would allow him/her to pay some or all of the amount owing.
- ▶ Add language in code sections relating to calculations that orders be based on the obligor's ability to pay.

Ability to Pay

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PANEL DECISION POINT

- ▶ Recommend adding:
 - Statutory definition?
 - Use DCSE's definition?
 - Draft a different definition?
 - Language in code sections relating to calculations that orders be based on the obligor's ability to pay?
- ▶ Other?



Low-Income Adjustment

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Requirement

- ▶ Guidelines must consider basic subsistence needs of NCPs (and custodial parents (CPs) at state's discretion) with limited ability to pay by incorporating a low-income adjustment which can be:
 - Self-support reserve
 - Other method determined by the state

Low-Income Adjustment

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Background

- ▶ A low-income adjustment is:
 - The amount of money an NCP needs to support him or herself at a minimum level.
 - Intended to ensure that low-income parents can meet their own basic needs and permit continued employment.



Low-Income Adjustment

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Current Status

- ▶ Virginia's existing schedule does not include a low-income adjustment.
- ▶ Actual dollar amounts in the schedule were updated in 2014 for the first time since implementation in 1988.
- ▶ The 2013 Panel recommended that update based on economic data and research provided by the Center for Policy Research (CPR).
- ▶ The Panel considered including a self-support reserve at that time but ultimately decided against it.

Guidelines Schedule – Lower Incomes

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Combined Monthly Gross Income	One Child	Two Children	Three Children	Four Children	Five Children	Six Children
0-350	68	104	126	141	155	169
400	78	119	144	161	177	192
450	88	133	162	181	199	216
500	97	148	179	200	220	239
550	107	162	197	220	242	263
600	116	177	215	240	264	287
650	126	191	232	259	285	310
700	135	206	250	279	307	333
750	145	220	267	298	328	357
800	154	234	284	317	349	379
850	163	248	300	336	369	401
900	171	260	316	353	388	422
950	179	273	331	369	406	442
1000	187	285	346	386	425	462

Low-Income Adjustment

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Proposed Action

- ▶ Revise guidelines to include a self-support reserve.
 - Incorporate into the guidelines worksheet and add statutory language to address self-support reserve.

OR

- Hire an economist to modify just the low-income portion of the schedule.

Low-Income Adjustment

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Example: West Virginia worksheet

- ▶ WV calculates obligation using both parents' income
- ▶ Then a separate section addresses ability to pay for obligor parents with monthly gross income under \$1,500
- ▶ Self-support reserve is \$500/month
- ▶ Minimum order is \$50/month regardless of income

PART I. CHILD SUPPORT ORDER	Mother	Father	Combined
1. MONTHLY GROSS INCOME (Exclusive of overtime compensation)	\$	\$	
a. Minus preexisting child support payment	-	-	
b. Minus maintenance paid	-	-	
c. Plus overtime compensation, if not excluded, and not to exceed 50%, pursuant to W. Va. Code §48-1-228(b)(6)	+	+	
d. Additional dependents deduction			
2. MONTHLY ADJUSTED GROSS INCOME	\$	\$	\$
3. PERCENTAGE SHARE OF INCOME (Each parent's income from line 2 divided by Combined Income)	%	%	100%
4. BASIC OBLIGATION (Use Line 2 combined to find amount from schedule.)			\$
5. ADJUSTMENTS (Expenses paid directly by each parent)	\$	\$	
a. Work-Related Child Care Costs Adjusted for Federal Tax Credit (0.75 x actual work-related child care costs.)			
b. Extraordinary Medical Expenses (Uninsured only) and Children's Portion of Health Insurance Premium Costs.	\$	\$	
c. Extraordinary Expenses (Agreed to by parents or by order of the court.)	\$	\$	
d. Minus Extraordinary Adjustments (Agreed to by parents or by order of court.)			
e. Total Adjustments (For each column, add 5a, 5b, and 5c. Subtract Line 5d. Add the parent's totals together for Combined amount.)	\$	\$	\$
6. TOTAL SUPPORT OBLIGATION (Add line 4 and line 5e Combined.)			\$
7. EACH PARENT'S SHARE OF THE TOTAL CHILD SUPPORT OBLIGATION (Line 3 x line 6 for each parent.)	\$	\$	
8. PAYOR PARENT ADJUSTMENT (Enter payor parent's line 5e.)	\$	\$	
9. RECOMMENDED CHILD SUPPORT ORDER (Subtract line 8 from line 7 for the payor parent only. Leave payee parent column blank.)	\$	\$	

	Mother	Father	Combined
PART II. ABILITY TO PAY CALCULATION (Complete if the payor parent's adjusted monthly gross income is below \$1,550.)			
10. Spendable Income (0.80 x line 2 for payor parent only.)			
11. Self Support Reserve	\$500	\$500	
12. Income Available for Support (Line 10 - line 11. If less than \$50, then \$50)			
13. Adjusted Child Support Order (Lessor of Line 9 and Line 12.)			

Low-Income Adjustment

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PANEL DECISION POINT

- ▶ Revise guidelines to include self-support reserve?
 - Incorporate self-support reserve into guidelines worksheet and add statutory language?
- OR**
- Hire an economist to modify just the low-income portion of the schedule?
- ▶ Other?



Imputing Income

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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	

Imputing Income

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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

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Background

- ▶ Overuse of imputed income often results in orders that are not based on a realistic determination of ability to pay.
- ▶ Because these orders are not based on ability to pay, they frequently do not result in consistent payments.

Imputing Income

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Background

- ▶ The rule recognizes the need for imputation when evidentiary gaps exist, such as voluntary unemployment and discrepancies between a party's reported income and standard of living.
- ▶ However, “fictional income” should not be imputed just because an NCP is low-income; it should be used only in limited circumstances when the facts of the case justify it.

Imputing Income

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Current Status

- ▶ Va. Code 20-108.1 allows imputed income for parties who are voluntarily unemployed or underemployed except:
 - When child is not in school, income may not be imputed to CP unless the cost of reasonable child care services is also included.
 - When either parent changes employment, courts must evaluate the good faith and reasonableness of the decision, including to attend education/training programs likely to maintain or increase the party's income.

Potential Roadblocks

- ▶ Some information will be difficult to obtain if data is not captured and parents do not or cannot provide information.
- ▶ Factors are extensive and raise potential concern that all aspects of a parent's life may be relevant and open to examination in determining a support obligation.
- ▶ Stakeholder groups may raise concerns that the requirement is onerous and will lead to an expansion of trials.

Imputing Income

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Proposed Action

- ▶ Explore how other states have incorporated the imputation criteria into their statutes and regulations.
- ▶ Develop specific and measurable methods of benchmarking imputation criteria to be incorporated into Virginia's statutes and regulations.

Imputing Income

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PANEL DECISION POINT

- ▶ Request that Panel staff look into and report to Panel:
 - Other states' imputation criteria?
 - Specific and measurable methods of benchmarking imputation criteria?
- ▶ Other?



Incarceration as Voluntary Unemployment

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Requirement

- ▶ Incarceration may not be treated as voluntary unemployment in establishing or modifying child support obligations.

Current Status

- ▶ Long-standing Virginia case law holds that incarceration constitutes voluntary unemployment.
- ▶ Case law give courts discretion in imputing income to incarcerated parents.



Incarceration as Voluntary Unemployment

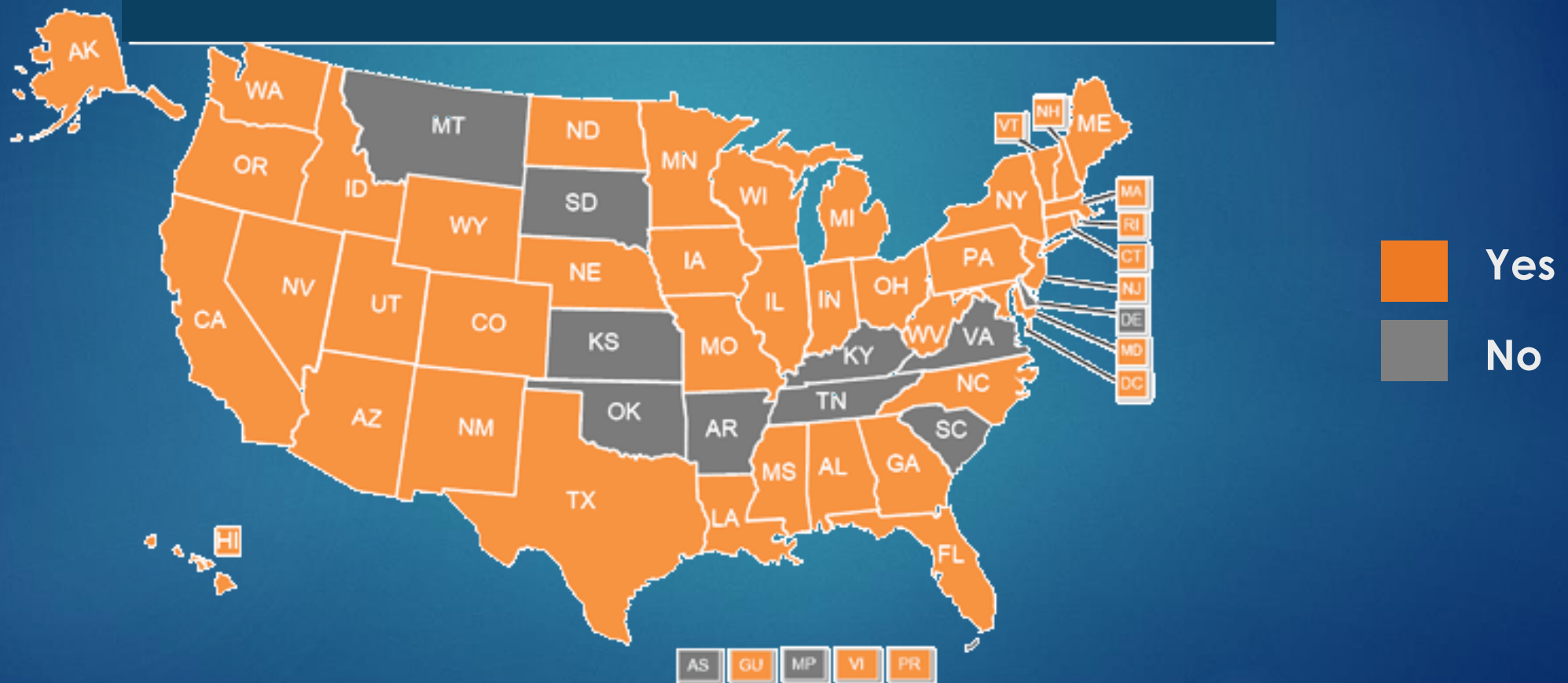
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- ▶ In September 2020, the federal Office of Child Support Enforcement published a Notice of Proposed Rulemaking (NPRM) that would allow states two exceptions to this requirement.
- ▶ States would have the option to exclude cases where a person is incarcerated due to:
 - 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 a victim. The state could apply this exception to the individual's other child support cases as well, if any.

Incarceration as Voluntary Unemployment

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Is modification or suspension of child support orders allowed during periods of incarceration?



Incarceration as Voluntary Unemployment

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Potential Roadblocks

- ▶ Stakeholders, including the legislature, judiciary, and Family Bar, may raise concerns.

Proposed Action

- ▶ Amend statute to overrule long-standing case law to prohibit treating incarceration as voluntary unemployment.
- ▶ Research:
 - Effects of incarceration on income levels
 - Discrepancies in incarceration practices

Incarceration as Voluntary Unemployment

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PANEL DECISION POINT

- ▶ Recommend amending statute to overrule long-standing case law to prohibit treating incarceration as voluntary unemployment?
- ▶ Request that Panel staff research and report to Panel:
 - Effects of incarceration on income levels?
 - Discrepancies in incarceration practices?
- ▶ Other?



Health Care as Basis for Review

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Requirement

- Health care needs must be an adequate basis to initiate review and adjustment of a child support order regardless of whether an adjustment to the support obligation itself is necessary.



Health Care as Basis for Review

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Current Status

- ▶ A change in health care coverage (including cost) does not qualify as a material change in circumstances for review and adjustment of a support order.
- ▶ This final rule requirement relates only to DCSE's review and adjustment process, not to court process, which means courts may deny DCSE's motions on this basis.

Health Care as Basis for Review

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Proposed Action

- ▶ Legislation is needed to clarify that courts must consider a change in health care coverage (including cost) as a material change in circumstances even if there is no change to the obligation amount.

Health Care as Basis for Review

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PANEL DECISION POINT

- ▶ Recommend legislation to clarify that courts must consider a change in health care coverage (including cost) as a material change in circumstances even if there is no change to the obligation amount?
- ▶ Other?



