



Commonwealth of Virginia  
**CHILD SUPPORT GUIDELINES REVIEW PANEL**

*The Honorable Edward A. Robbins, Jr., Chair*

December 8, 2021

TO: The Honorable Ralph S. Northam,  
Governor  
and  
Members of the Virginia General Assembly

FROM: The Honorable Edward A. Robbins, Jr.  
Chair, Child Support Guidelines Review Panel

A handwritten signature in black ink, appearing to be "E. Robbins, Jr.", written over the printed name in the "FROM" field.

SUBJECT: Transmittal of Panel Report for 2021

Va. Code §§ 20-108.1 and 20-108.2 set forth the Commonwealth's guidelines for the determination of child support obligations. In accordance with § 20-108.2(H), I am privileged to submit the Child Support Guidelines Review Panel's report of its review of Virginia's guidelines during the 2017-2021 quadrennium.

Whether appointed by the Governor or the General Assembly, the fifteen of us are grateful for the opportunity to serve the Commonwealth on a subject so vital to so many of our citizens.

cc: The Honorable Glenn Youngkin, Governor-Elect  
The Honorable Daniel Carey, M.D., Secretary of Health and Human Resources

Mailing Address: 801 E. Main Street, 12<sup>th</sup> Floor  
Richmond, VA 23219-2901  
804-726-7417

**REPORT TO THE  
GOVERNOR  
AND  
GENERAL ASSEMBLY OF VIRGINIA**



**REVIEW OF VIRGINIA'S  
CHILD SUPPORT GUIDELINES**

Va. Code Ann. §§ 20-108.1 and 20-108.2

**Virginia Child Support Guidelines Review  
Panel**

The Honorable Edward A. Robbins, Jr., Chair

December 2021

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## EXECUTIVE SUMMARY

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- Virginia’s child support guidelines, set out at Va. Code §§ [20-108.1](#) and [20-108.2](#), were enacted in 1988 in response to federal law. [42 U.S.C. § 667](#) requires states to establish guidelines for child support obligation amounts by law or by judicial or administrative actions. Guidelines must be reviewed at least once every four years “to ensure that their application results in the determination of appropriate child support award amounts.”
- Federal and state law governs state child support programs, and [45 C.F.R. § 302.56](#) sets out various requirements for state child support guidelines. In December 2016, the federal rule, *Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs*, amended [45 C.F.R. § 302.56](#) by adding several requirements for state child support guidelines. The federal rule also revised [45 CFR § 303.8](#) in regard to the provision of health care coverage in child support orders. These changes must be enacted in 2022 in order for Virginia’s child support program to continue to receive federal funding, which constitutes 66% of its total funding.
- Va. Code § [20-108.2](#)(H) requires that the Child Support Guidelines Review Panel “determine the adequacy of the guideline for the determination of appropriate awards for the support of children by considering current research and data on the cost of and expenditures necessary for rearing children, and any other resources it deems relevant to such review.”
- Pursuant to § [20-108.2](#)(H), Panel membership includes representation of various entities affected by the child support guidelines. These groups include Virginia’s General Assembly, the courts, the Department of Social Services, members of the Virginia State Bar, custodial and noncustodial parents, and a child advocate.
- The Panel recommends that the General Assembly:
  - (1) Amend Va. Code § [20-108.1](#)(B)(3) to add a subsection requiring that a parent’s specific circumstances, to the extent presented to the court, be considered if imputing income, including the factors set out by the federal rule.
  - (2) Amend Va. Code § [63.2-1921](#)(A) to add health care coverage as a basis for the Department of Social Services to initiate review of a child support order.

# Virginia Child Support Guidelines Review Panel Report to the Governor and General Assembly December 2021

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## Brief History of Virginia's Guidelines

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Virginia's child support guidelines, set out at Va. Code §§ [20-108.1](#) and [20-108.2](#), were enacted in 1988 in response to federal requirements. The schedule of monthly basic child support obligations is located in § [20-108.2](#), along with narrative sections addressing minimum obligations; the definition of income; specific treatment for calculating obligations in various custody arrangements; health care coverage; and child care costs. Section [20-108.1](#) addresses numerous deviation factors which permit obligations to be set at amounts other than those presumed to be the correct amount based on the guidelines schedule. Fifteen factors exist which permit a deviation in the obligation amount upon a finding that the presumptive amount would be unjust or inappropriate in a particular case, based on relevant evidence pertaining to the deviation factors.

In 2014, Virginia updated the guidelines schedule for the first time since the enactment of the guidelines and added language regarding an obligor's gross monthly income. In 2018, Virginia updated the guidelines to provide statutory guidance for calculating obligations in mixed custody cases and to require that the guidelines worksheet relied upon by a court or the Department of Social Services to compute a child support obligation must be included with the order and must be provided to the parties.

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## Federal Requirements for Child Support Guidelines

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- Prior to the December 2016 issuance of the federal rule, [Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs](#), federal regulation [45 C.F.R. § 302.56](#) required states to adopt child support guidelines that:
  - (1) Establish one set of child support guidelines for setting and modifying child support orders within the state;
  - (2) Take into consideration all earnings and income of the noncustodial parent;
  - (3) Are based on specific descriptive and numeric criteria and result in a computation of the support obligation; and
  - (4) Address how the parents will provide for the child(ren)'s health care needs through health insurance coverage and/or through cash medical support.
- The federal rule revised [45 C.F.R. § 302.56](#) by adding several new requirements for state child support programs. The primary goal of the rule was to establish child support obligations based on parents' actual ability to pay. In addition to the above requirements, each state's child support guidelines must also, at a minimum:

- (1) Provide that child support orders are based on a noncustodial parent's earnings, income, and other evidence of ability to pay that:
    - Considers all earnings and income of the noncustodial parent (and, at the state's discretion, the custodial parent)
    - Considers the basic subsistence needs of the noncustodial parent (and, at the state's discretion, the custodial parent)
    - Considers the specific circumstances of the noncustodial parent (and, at the state's discretion, the custodial parent) to the extent known, including a variety of enumerated factors, if imputation is authorized
  - (2) Provide that incarceration may not be treated as voluntary unemployment in establishing or modifying child support orders
- The federal rule also revised [45 C.F.R. § 303.8](#) to require that health care coverage must be an adequate basis for review of a child support order regardless of whether there is a change in the child support obligation.

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## Statutory Mandate of the Panel

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Federal law and Virginia law require that the child support guidelines be reviewed every four years.

### Federal Law

The federal law regarding states' review of their child support guidelines is found at [45 C.F.R. § 302.56](#)(e) and (h). Prior to the issuance of the federal rule, subsection (e) stated:

- (e) The State must review, and revise, if appropriate, the guidelines established under paragraph (a) of this section at least once every four years to ensure that their application results in the determination of appropriate child support award amounts.

The federal rule added the requirement that states "shall publish on the internet and make accessible to the public all reports of the guidelines reviewing body, the membership of the reviewing body, the effective date of the guidelines, and the date of the next quadrennial review."

Prior to the issuance of the federal rule, subsection (h) stated:

- (h) As part of the review of a State's guidelines required under paragraph (e) of this section, a State must consider economic data on the cost of raising children and analyze case data, gathered through sampling or other methods, on the application of, and deviations from, the guidelines. The analysis of the data must

be used in the State's review of the guidelines to ensure that deviations from the guidelines are limited.

The federal rule also added several new requirements for guidelines review panels, and subsection (h) now states:

- (h) As part of the review of a State's child support guidelines required under paragraph (e) of this section, a State must:
  - (1) Consider economic data on the cost of raising children, labor market data (such as unemployment rates, employment rates, hours worked, and earnings) by occupation and skill-level for the State and local job markets, the impact of guidelines policies and amounts on custodial and noncustodial parents who have family incomes below 200 percent of the Federal poverty level, and factors that influence employment rates among noncustodial parents and compliance with child support orders;
  - (2) Analyze case data, gathered through sampling or other methods, on the application of and deviations from the child support guidelines, as well as the rates of default and imputed child support orders and orders determined using the low-income adjustment required under paragraph (c)(1)(ii) of this section. The analysis must also include a comparison of payments on child support orders by case characteristics, including whether the order was entered by default, based on imputed income, or determined using the low-income adjustment required under paragraph (c)(1)(ii). The analysis of the data must be used in the State's review of the child support guidelines to ensure that deviations from the guidelines are limited and guideline amounts are appropriate based on criteria established by the State under paragraph (g); and
  - (3) Provide a meaningful opportunity for public input, including input from low-income custodial and noncustodial parents and their representatives. The State must also obtain the views and advice of the State child support agency funded under title IV-D of the Act.

These new requirements must be enacted in Virginia by 2026. The current Panel deferred these issues to the next Panel.

### **Virginia Law**

Virginia law at § [20-108.2\(H\)](#) requires that the Secretary of Health and Human Resources “ensure that the guideline set out in this section is reviewed by October 31, 2001, and every four years thereafter, by the Child Support Guidelines Review Panel....” The Panel must “determine the adequacy of the guideline for the determination of appropriate awards for the support of children by considering current research and data on the cost of and expenditures necessary for rearing children, and any other resources it deems relevant to such review.”

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## Panel Membership

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Pursuant to § [20-108.2](#)(H), Panel membership includes representation of various entities affected by the child support guidelines. These groups include Virginia's General Assembly, the courts, the Department of Social Services, members of the Virginia State Bar, custodial and noncustodial parents, and a child advocate. Four Panel members representing the General Assembly (three from the House and one from the Senate) were appointed respectively by the Speaker of the House of Delegates and the Chair of the Senate Committee on Rules. The remaining eleven citizen members were appointed by Governor Northam upon the recommendation of Daniel Carey, M.D., Secretary of Health and Human Resources. The Panel's composition changed during the course of this quadrennial cycle. Asterisks denote members serving at the time of the submission of this report.

<b>Circuit Court Judge</b>	The Honorable Edward A. Robbins, Jr.* (Chair)
<b>Senate Representatives</b>	Senator Glen H. Sturtevant, Jr. Senator Scott A. Surovell*
<b>House Representatives</b>	Delegate Karrie K. Delaney* Delegate Jennifer D. Carroll Foy Delegate James A. (Jay) Leftwich, Jr.* Delegate Don L. Scott, Jr.* Delegate David J. Toscano Delegate Vivian E. Watts
<b>Juvenile and Domestic Relations District Court Judge</b>	The Honorable Deborah V. Bryan*
<b>Virginia State Bar</b>	Lawrence (Larry) D. Diehl, Esq. Daniel L. Gray, Esq.* Dennis M. Hottell, Esq.* Kimberlee H. Ramsey, Esq.*
<b>Noncustodial Parents</b>	Sean Edwards* Ryan Johnston*
<b>Custodial Parents</b>	Yvonne J. Nageotte* Kim-marie A. Pigott-Brown*
<b>Child Advocate</b>	Valerie L'Herrou, Esq.*
<b>Department of Social Services</b>	Craig M. Burshem*



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## Meetings

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The Panel met four times from September 2019 through September 2021. The first meeting on September 19, 2019, was in person. Due to the state of emergency declared by Governor Northam during the COVID-19 pandemic, the second and third meetings on October 26, 2020, and March 30, 2021, were held virtually via the Zoom platform. The fourth meeting on September 29, 2021, was a hybrid, with a quorum of members attending in person and other members attending virtually via Zoom. Pursuant to Virginia law, only votes by in-person attendees were counted.<sup>1</sup> All meetings were public, announced on the Commonwealth Calendar, and posted on the General Assembly calendar and the Panel's page on the Division of Legislative Services' website.

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## Communications

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### *Website*

The Panel continued to use its webpage posted on the Division of Legislative Services' website ([http://dls.virginia.gov/interim\\_studies\\_child\\_support.html](http://dls.virginia.gov/interim_studies_child_support.html)) so that its activities would be transparent and available to the public through the internet. The website contains information about the Panel's membership, the Panel's email address, meeting materials, and research information. Each meeting is listed separately and contains the agenda, meeting minutes, and any materials offered during that meeting, including PowerPoint presentations, research and analysis, and other related documents.

### *Email*

The Panel used its email address ([vaguidelinespanel@dss.virginia.gov](mailto:vaguidelinespanel@dss.virginia.gov)) to receive email comments from concerned citizens and the public. During this cycle, the Panel received three emails. Of those, two were about specific Division of Child Support Enforcement (DCSE) cases and were referred to DCSE for a response. The remaining question was on the topic of calculating child support when a custodial parent has additional children; the writer asked that the Panel consider this issue during its deliberations. Panel staff replied to all correspondence.

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## Policy Issues Considered

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The Panel focused its work on the federal rule requirements that must be enacted in 2022 in order for Virginia's child support program to continue receiving federal funding. After reviewing the federal rule, current law, background, and research regarding these issues, the Panel made the following decisions:

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<sup>1</sup> See [H7001](#), Ch. 1, § 17(a)-(c), 2021 Special Session II, and Va. Code §§ [3708.2](#) and [3708.10](#).

## 1. Ability to Pay

Based on the federal rule, [45 C.F.R. § 302.56\(c\)\(1\)](#) now requires that state child support guidelines provide that child support orders are based on a noncustodial parent's earnings, income, and other evidence of ability to pay.

**Panel decision:** The Panel determined the Virginia's current guidelines already address this requirement, so the Panel did not need to take any action on this issue. In addition, the Panel agreed that adding a statutory definition of ability to pay was unnecessary.

## 2. Basic Subsistence Level

Based on the federal rule, [45 C.F.R. § 302.56\(c\)\(1\)\(ii\)](#) now requires that state child support guidelines must consider the basic subsistence needs of noncustodial parents with limited ability to pay by incorporating a low-income adjustment. This Panel reviewed the previous Panel's decision not to incorporate a low-income adjustment into the guidelines schedule and to instead recommend adding language to Va. Code § [20-108.2\(B\)](#) to allow that, if an obligor's gross income is equal to or less than 150% of the federal poverty level, the court, upon hearing evidence that there is no ability to pay, may set the obligation below the presumptive statutory minimum obligation amount provided that doing so does not result in an obligation that seriously impairs the custodial parent's ability to provide adequate housing and other basic necessities for the child. This language was added to § [20-108.2\(B\)](#) in 2014.

Virginia asked the federal Office of Child Support Enforcement (OCSE) for guidance as to whether this statutory language satisfies the federal rule's low-income adjustment requirement (see OCSE response at Appendix A).

**Panel decision:** Because OCSE advised that Virginia's current statutory language is sufficient, the Panel did not need to take any action on this requirement.

## 3. Imputation of Income

Based on the federal rule, [45 C.F.R. § 302.56\(c\)\(1\)\(iii\)](#) now requires that, if imputation of income is authorized, the guidelines must consider a noncustodial parent's specific circumstances, to the extent known, including such factors as the noncustodial parent's assets, residence, employment and earnings history, job skills, educational attainment, literacy, age, health, criminal record and other employment barriers, and record of seeking work, as well as the local job market, the availability of employers willing to hire the noncustodial parent, the prevailing earnings level in the local community, and other relevant background factors.

At the Panel's request, Panel staff provided information on several other states' imputation models. The Panel contemplated various methods, focusing particularly on Delaware's statutory scheme, which includes a number of additional factors not specifically required by the federal rule, including use of occupational wage surveys, minimum wage, and hours worked to determine an imputed income amount.

**Panel decision:** The Panel agreed to recommend that Virginia adopt just the federal rule requirements when considering imputation of income by adding language to Va. Code § [20-108.1\(B\)\(3\)](#) that includes the factors specifically set out in the rule. The Panel also recommended that the court be required to communicate the reasons for its decision to impute income, which is already a requirement of Va. Code § [20-108.1\(B\)](#). The Panel deferred consideration of any additional issues to the next Panel.

#### 4. Incarceration as Voluntary Unemployment

[45 C.F.R. § 302.56\(c\)\(3\)](#) now requires that states not treat incarceration as voluntary unemployment when establishing or modifying a child support order. The Panel discussed this new requirement throughout the review cycle. Virginia appellate courts have repeatedly held and affirmed that incarceration constitutes voluntary unemployment when establishing or modifying a child support order.

[House Bill 2055](#), introduced in the 2021 General Assembly Session, proposed a change to Va. Code § [20-108.1\(B\)](#) that would have considered incarceration as a material change in circumstances upon which a modification of child support could be based, except where a parent was incarcerated for failure to pay support as ordered or for a crime against the custodial parent or child that was the subject of the support order. An amendment to the bill language removed the exception for failure to pay support and added an enactment clause that would have applied the provision only to petitions for child support commenced on or after July 1, 2021, and to requests for modifications of those orders. The Governor's amendment established that the bill would not go into effect unless re-enacted by the 2022 Session.

Upon DCSE's request for guidance, OCSE indicated that the enactment clause would not be sufficient for Virginia's compliance since the requirement must apply to all orders, not just those entered on or after a certain date (see Appendix B).

The Panel considered input from DCSE Director Barbara Lacina, who noted the minimal number of cases that would be affected by the bill and discussed the impact to the child support program if the Commonwealth does not pass legislation during the 2022 Session that complies with the federal regulation. These ramifications include loss of significant federal funding, data sharing, and tools.

The two judicial members of the Panel did not take part in discussion concerning the policy aspects of this issue.

**Panel decision:** The Panel did not support the removal of the exception for cases where incarceration was due to a failure to pay child support and asked that DCSE make a recommendation on behalf of the Panel to the Governor's Office that this amendment be removed. In addition, at its September 29, 2021 meeting, a majority of the in-person Panel voting (2y-5n-1a) did not support a bill with language matching House Bill 2055 without the enactment clause if such a bill is introduced during the 2022 Session.

## 5. Health Care as a Basis for Review

The federal rule amended [45 CFR § 303.8](#) to require that the need to provide health care coverage must be an adequate basis to initiate modification of a support order regardless of whether an adjustment to the actual support obligation amount is necessary. The rule deleted prior language that prohibited consideration of public coverage, such as Medicaid, as adequate to meet a child's health care.

At the Panel's request, Panel staff researched how several states addressed this issue. After reviewing the information, the Panel asked staff to draft proposals based on approaches used by Utah and Texas. Utah's statutory language states that a child support order can be modified by petition any time there is a material change in the availability, coverage, or reasonableness of the cost of health care coverage for a child. Texas's language does not require a material change in circumstances but only applies to Title IV-D cases where the existing child support order does not provide health care coverage. The Panel considered both of these options, as well as a hybrid option that included both Utah's and Texas's approaches.

The Panel expressed concern about opening up all parts of a child support order due just to a change in health care coverage. The Panel discussed whether the current statutory language in Va. Code [§ 20-108](#) is sufficient to allow courts to address this issue. Currently, Va. Code [§ 63.2-1921\(A\)](#) allows the Department of Social Services to initiate a review only of the obligation amount ordered by a court.

**Panel decision:** The Panel recommended that Va. Code [§ 63.2-1921\(A\)](#) be amended to add health care coverage as a basis for the Department of Social Services to initiate review of a support order.

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## Decisions Made by the Panel

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The Panel voted to recommend that legislation be enacted to:

- (1) Amend Va. Code [§ 20-108.1\(B\)\(3\)](#) to add a subsection requiring that a parent's specific circumstances, to the extent presented to the court, be considered if imputing income, including the factors set out by the federal rule (proposed language attached as Appendix C).
- (2) Amend Va. Code [§ 63.2-1921\(A\)](#) to add health care coverage as a basis for the Department of Social Services to initiate review of a child support order (proposed language attached as Appendix D).

The Panel voted not to support legislation with language matching House Bill 2055 from the 2021 General Assembly regarding the federal rule requirement that incarceration not be treated as voluntary unemployment when establishing or modifying child support orders, without the enactment clause added during to the bill during the 2021 Session.

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## **Legislative Recommendations**

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The Panel's recommendations for legislative action are based on its votes recited above. The Panel recommends that the General Assembly enact legislation that will:

- (1) Amend Va. Code § [20-108.1](#)(B)(3) to add a subsection requiring that a parent's specific circumstances, to the extent presented to the court, be considered if imputing income, including the factors set out by the federal rule.
- (2) Amend Va. Code § [63.2-1921](#)(A) to add health care coverage as a basis for the Department of Social Services to initiate review of a child support order.

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## **Conclusion**

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The Panel's recommendation to amend the Virginia Code to require that, in order to impute income, courts must consider a parent's circumstances, including the various factors set out by the regulation and to the extent presented to the court, will help ensure that parents' child support obligations are based on their actual ability to pay that obligation. In addition, adding health care coverage as a basis for the Department of Social Services to initiate review of a child support order will provide flexibility to ensure that medical support is being provided to the greatest number of children.

## APPENDIX A: OCSE EMAIL – LOW-INCOME ADJUSTMENT

**RE: Low Income Adjustment**  
**Bynum, Rose M. (ACF) <Rose.Bynum@acf.hhs.gov>**

Fri, Mar  
5, 12:43  
PM

to Barbara, me

Happy Friday Barbara and Melody!

Here is DPT's response.

**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.**

Be well, stay safe and enjoy the weekend.

Rose  
**Rose Bynum**  
215-861-4033

**From:** Lacina, Barbara <[barbara.lacina@dss.virginia.gov](mailto:barbara.lacina@dss.virginia.gov)>  
**Sent:** Thursday, March 4, 2021 2:15 PM  
**To:** Bynum, Rose M. (ACF) <[Rose.Bynum@ACF.hhs.gov](mailto:Rose.Bynum@ACF.hhs.gov)>  
**Cc:** Mckinley, Melody <[melody.mckinley@dss.virginia.gov](mailto:melody.mckinley@dss.virginia.gov)>  
**Subject:** Re: Low Income Adjustment

Hi, Rose -

I hope you are well.

I am reaching out for an update on OCSE confirmation of our low-income adjustment, in order to plan accordingly for our upcoming Guidelines Review Panel meeting. Melody is drafting the agenda, and I have copied her, as we hope to send it out next week.

Thank you so much!  
Barbara

On Wed, Jan 27, 2021 at 2:57 PM Bynum, Rose M. (ACF) <[Rose.Bynum@acf.hhs.gov](mailto:Rose.Bynum@acf.hhs.gov)> wrote:  
Hi Barbara,

I reviewed and conferred with DPT whose response I am awaiting. I'll keep you posted.

## APPENDIX A: OCSE EMAIL – LOW-INCOME ADJUSTMENT

Rose  
**Rose Bynum**  
215-861-4033

**From:** Lacina, Barbara <[barbara.lacina@dss.virginia.gov](mailto:barbara.lacina@dss.virginia.gov)>  
**Sent:** Wednesday, January 27, 2021 11:19 AM  
**To:** Bynum, Rose M. (ACF) <[Rose.Bynum@ACF.hhs.gov](mailto:Rose.Bynum@ACF.hhs.gov)>  
**Subject:** Re: Low Income Adjustment

Thank you so much, Rose. Your support and assistance is greatly appreciated!

Barbara

On Wed, Jan 27, 2021 at 9:12 AM Bynum, Rose M. (ACF) <[Rose.Bynum@acf.hhs.gov](mailto:Rose.Bynum@acf.hhs.gov)> wrote:  
Hi Barbara,

I will review the federal statute, comments and confer with the Division of Policy for a response to you by your requested date if not sooner.

Rose  
**Rose Bynum**  
215-861-4033

**From:** Lacina, Barbara <[barbara.lacina@dss.virginia.gov](mailto:barbara.lacina@dss.virginia.gov)>  
**Sent:** Wednesday, January 27, 2021 8:56 AM  
**To:** Bynum, Rose M. (ACF) <[Rose.Bynum@ACF.hhs.gov](mailto:Rose.Bynum@ACF.hhs.gov)>  
**Subject:** Low Income Adjustment

Good Morning, Rose -

As you know, Virginia is working diligently on implementing the requirements of the 2016 federal final rule, Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs. In preparation for our upcoming Guidelines Review Panel meeting, I would like to confirm that our current statutory language meets the low-income adjustment requirement (45 CFR § 302.56(c)(1)(ii)).

Pursuant to the final rule, 45 CFR § 302.56(c)(1)(ii) requires that a state's 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...." Based on the comments to the rule, OCSE left determining how to handle the low-income adjustment up to the states. In the comments to § 302.56(c)(1)(ii), OCSE states:

## APPENDIX A: OCSE EMAIL – LOW-INCOME ADJUSTMENT

A low-income adjustment is the amount of money a parent owing support needs to support him or herself at a minimum level. It is intended to ensure that a low-income parent can meet his or her own basic needs as well as permit continued employment. A low-income adjustment is a generic term. A self-support reserve is an example of a low-income adjustment that is commonly used by the States. The revision allows States' flexibility to determine the best approach to adjusting their guidelines to take into consideration the basic subsistence needs of low-income parents.

In addition, OCSE rejected a request that the rule include a definition of subsistence needs or low-income and said, "States should use their discretion and flexibility to define these terms based on the economic and demographic factors in their State."

The Virginia Child Support Guidelines Review Panel previously considered incorporating a low-income adjustment into its numeric schedule when it recommended revisions to the guidelines schedule in 2013. Instead, the Panel recommended that Virginia's General Assembly address a low-income adjustment by enacting language that would deal with low-income situations for both noncustodial and custodial parents. Both Virginia's courts and the IV-D agency are required to calculate child support obligations pursuant to Va. Code § 20-108.2, which states in subsection (B):

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 providing that 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.

Given that OCSE gave states wide latitude to address the low-income adjustment, Virginia believes that our current language is sufficient, and we seek OCSE's confirmation. If OCSE believes this language is not adequate, please point us to the guidance details and provide advice on the specific language we should use. Our next Guidelines Review Panel meeting is in March, and we would appreciate a response on this by mid-February.

Thank you.  
Barbara



## APPENDIX B: OCSE EMAIL – HOUSE BILL 2055 ENACTMENT CLAUSE

From: **Bynum, Rose M. (ACF)** <[Rose.Bynum@acf.hhs.gov](mailto:Rose.Bynum@acf.hhs.gov)>  
Date: Tue, Feb 23, 2021 at 1:27 PM  
Subject: RE: Floor Amend  
To: Lacina, Barbara <[barbara.lacina@dss.virginia.gov](mailto:barbara.lacina@dss.virginia.gov)>

Good afternoon Barbara,

Here is DPT's [OCSE's Division of Policy and Training] response.

The Virginia Department of Social Services, Division of Child Support Enforcement has asked about the proposed Surovell enactment clause amendment to Virginia House of Delegates Bill HB2055. In particular, the Virginia agency states that:

We are very concerned about this language, as it excludes anyone who is currently incarcerated as well as anyone whose order is entered before 07/01/2021 and might later become incarcerated. Essentially, with this language, all of our cases with support orders in place as of 06/30/2021 would not be eligible for modification if they are or become incarcerated at any point in the life of their order.

RESPONSE: The proposed Surovell amendment limits the effect of Virginia's draft legislation to child support petitions commenced on or after July 1, 2021, and petitions for modification of such orders. The proposed amendment prevents the draft legislation being construed as a change of circumstances for modifying an existing support order.

Under the proposed amendment, noncustodial parents in cases prior to that date, who are (or will be) incarcerated, would have their incarcerations continue to be deemed voluntary unemployment or underemployment for child support purposes. Those parents would not benefit from the draft legislation's prohibition on such a determination.

The proposed amendment is not consistent with 42 CFR 302.56(c)(3), in which a state's child support guidelines must, at a minimum, provide that incarceration may not be treated as voluntary unemployment in establishing or modifying support orders. The regulation does not say that child support petitions commenced before a particular date should be treated differently from those after that date, or that existing support orders are exempted from the regulation.

Rose  
**Rose Bynum**  
215-861-4033

## APPENDIX C: PROPOSED STATUTORY LANGUAGE – IMPUTATION OF INCOME

### Va. Code § 20-108.1. Determination of child or spousal support.

A. In any proceeding on the issue of determining spousal support, the court shall consider all evidence presented relevant to any issues joined in that proceeding. The court's decision shall be rendered based upon the evidence relevant to each individual case.

B. In any proceeding on the issue of determining child support under this title, Title 16.1, or Title 63.2, the court shall consider all evidence presented relevant to any issues joined in that proceeding. The court's decision in any such proceeding shall be rendered upon the evidence relevant to each individual case. However, there shall be a rebuttable presumption in any judicial or administrative proceeding for child support, including cases involving split custody or shared custody, that the amount of the award that would result from the application of the guidelines set out in § 20-108.2 is the correct amount of child support to be awarded. Liability for support shall be determined retroactively for the period measured from the date that the proceeding was commenced by the filing of an action with any court provided the complainant exercised due diligence in the service of the respondent or, if earlier, the date an order of the Department of Social Services entered pursuant to Title 63.2 and directing payment of support was delivered to the sheriff or process server for service on the obligor.

In order to rebut the presumption, the court shall make written findings in the order, which findings may be incorporated by reference, that the application of such guidelines would be unjust or inappropriate in a particular case. The finding that rebuts the guidelines shall state the amount of support that would have been required under the guidelines, shall give a justification of why the order varies from the guidelines, and shall be determined by relevant evidence pertaining to the following factors affecting the obligation, the ability of each party to provide child support, and the best interests of the child:

1. Actual monetary support for other family members or former family members;
2. Arrangements regarding custody of the children, including the cost of visitation travel;
3. (a) 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;

*(b) Imputed income shall be determined by the specific circumstances of the parent, to the extent presented to the court, including such factors as the parent's assets, residence,*

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*employment and earnings history, job skills, educational attainment, literacy, age, health, criminal record and other employment barriers, and record of seeking work, as well as the local job market, the availability of employers willing to hire the parent, prevailing earnings level in the local community, and other relevant background factors in the case;*

4. Any child care costs incurred on behalf of the child or children due to the attendance of a custodial parent in an educational or vocational program likely to maintain or increase the party's earning potential;

5. Debts of either party arising during the marriage for the benefit of the child;

6. Direct payments ordered by the court for maintaining life insurance coverage pursuant to subsection D, education expenses, or other court-ordered direct payments for the benefit of the child;

7. Extraordinary capital gains such as capital gains resulting from the sale of the marital abode;

8. Any special needs of a child resulting from any physical, emotional, or medical condition;

9. Independent financial resources of the child or children;

10. Standard of living for the child or children established during the marriage;

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

12. Provisions made with regard to the marital property under § 20-107.3, where said property earns income or has an income-earning potential;

13. Tax consequences to the parties including claims for exemptions, child tax credit, and child care credit for dependent children;

14. A written agreement, stipulation, consent order, or decree between the parties which includes the amount of child support; and

15. Such other factors as are necessary to consider the equities for the parents and children.

C. In any proceeding under this title, Title 16.1, or Title 63.2 on the issue of determining child support, the court shall have the authority to order either party or both parties to provide health care coverage or cash medical support, as defined in § 63.2-1900, or both, for dependent children if reasonable under all the circumstances and health care coverage for a spouse or former spouse.

D. In any proceeding under this title, Title 16.1, or Title 63.2 on the issue of determining child support, the court shall have the authority to order a party to (i) maintain any existing life

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insurance policy on the life of either party provided the party so ordered has the right to designate a beneficiary and (ii) designate a child or children of the parties as the beneficiary of all or a portion of such life insurance for so long as the party so ordered has a statutory obligation to pay child support for the child or children.

E. Except when the parties have otherwise agreed, in any proceeding under this title, Title 16.1, or Title 63.2 on the issue of determining child support, the court shall have the authority to and may, in its discretion, order one party to execute all appropriate tax forms or waivers to grant to the other party the right to take the income tax dependency exemption and any credits resulting from such exemption for any tax year or future years, for any child or children of the parties for federal and state income tax purposes.

F. Notwithstanding any other provision of law, any amendments to this section shall not be retroactive to a date before the effective date of the amendment, and shall not be the basis for a material change in circumstances upon which a modification of child support may be based.

G. Child support payments, whether current or arrears, received by a parent for the benefit of and owed to a child in the parent's custody, whether the payments were ordered under this title, Title 16.1, or Title 63.2, shall not be subject to garnishment. A depository wherein child support payments have been deposited on behalf of and traceable to an individual shall not be required to determine the portion of deposits that are subject to garnishment.

H. In any proceeding on the issue of determining child or spousal support or an action for separate maintenance under this title, Title 16.1, or Title 63.2, when the earning capacity, voluntary unemployment, or voluntary under-employment of a party is in controversy, the court in which the action is pending, upon the motion of any party and for good cause shown, may order a party to submit to a vocational evaluation by a vocational expert employed by the moving party, including, but not limited to, any interviews and testing as requested by the expert. The order may permit the attendance of the vocational expert at the deposition of the person to be evaluated. The order shall specify the name and address of the expert, the scope of the evaluation, and shall fix the time for filing the report with the court and furnishing copies to the parties. The court may award costs or fees for the evaluation and the services of the expert at any time during the proceedings. The provisions of this section shall not preclude the applicability of any other rule or law.

## APPENDIX D: PROPOSED STATUTORY LANGUAGE – HEALTH CARE COVERAGE

### Va. Code § 63.2-1921. Authority to initiate reviews of certain orders.

A. The Department may, pursuant to this chapter and in accordance with § 20-108.2, initiate a review of the *health care coverage and the amount of support* ordered by any court. If a material change in circumstances has occurred, the Department shall report its findings and a proposed modified order to the court which entered the order or the court having current jurisdiction. Notice of each review shall be served on the nonrequesting party (i) in accordance with the provisions of § 8.01-296, 8.01-327, or 8.01-329, (ii) by certified mail, return receipt requested, (iii) by electronic means, or (iv) by the nonrequesting party executing a waiver. Either party may request a hearing on the proposed modified order by filing a request with such court within 30 days of receipt of notice by the requesting party. Unless a hearing is requested within the time limits, no hearing shall be required and the court shall enter the modified order, which shall be effective from the date that notice of such review was served on the nonrequesting party. The court shall modify any prior court order, or schedule a hearing on its motion and so notify the parties and the Department. If a hearing is held, the Department shall have the burden of proof.

B. However, if the order being reviewed by the Department deviated from the guidelines, when entered, based on one or more of the deviating factors set out in § 20-108.1 and the Department determines that there has been a material change in circumstances, the procedure set forth in subsection A shall not apply and the Department shall schedule a hearing with the court which entered the order or the court having current jurisdiction.

C. A material change in circumstances shall be deemed to have occurred if the difference between the existing child support award and the amount which would result from application of the guidelines is at least 10 percent of the existing child support award but not less than \$25 per month.