

2023 ANNUAL  
CONFERENCE



# Do's & Don'ts for Defaults: How to avoid Deficiencies

## **Child Support Magistrates:**

- Cate Baker – 6<sup>th</sup> and 10<sup>th</sup> Districts
- Jennifer Ryan – 9<sup>th</sup> District
- Kris Solheid – 1<sup>st</sup> and 5<sup>th</sup> Districts

## **Moderator:**

- Melissa Rossow – Assistant Chief Child Support Magistrate

# Today's Presentation



Discussion about laws and expectations for proposed default orders and for defaults after hearings



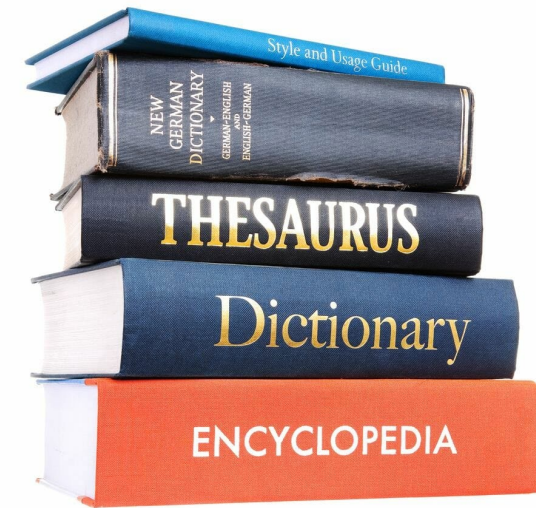
Leave with helpful information and background, including a helpful flowchart and list



Ask questions by submitting general (not case specific) questions on a question card

# Some Terminology

- **Notice of Deficiency** – A notice signed by a child support magistrate (CSM) when a requested default has not been signed
- **Default Order** – An order issued by a CSM:
  - Without a hearing - After the parties did not file a timely response and were given the opportunity to request a hearing and did not do so
  - After proper notice of the hearing, neither party appears at the hearing



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# Notice of Deficiencies

- The Notice of Deficiencies will explain the reasons why the CSM did not sign the order
- The CSM can choose to:
  - Set the case on for hearing or
  - Return the case to the moving party
- Notice of Deficiencies outlines the options available to the moving party



State of Minnesota		District Court
County	Judicial District:	
	Court File Number:	
	Case Type:	

**NOTICE OF DEFICIENCIES**

Reviewer: \_\_\_\_\_ Review Date: \_\_\_\_\_

County Attorney: \_\_\_\_\_

Obligor: \_\_\_\_\_

Obligee: \_\_\_\_\_

Prism Number: \_\_\_\_\_

Order Type: ☐ Establishment ☐ Modification ☐ Paternity

**TO COURT ADMINISTRATION:**

☐ I have not signed the filed *Default Order* for the reasons indicated below. Please send this *Notice of Deficiency* to the county attorney named above, or to the initiating party if that is not the county.

☐ I have not signed the filed *Consent Order* for the reasons indicated below. Please send a copy of this *Notice of Deficiency* to each party who signed the Consent Order.

☐ I have not signed the filed *Default/Consent Order*. This matter shall be scheduled for a hearing. The Court Administrator shall issue a notice to each party stating date, time and place of the hearing.

\_\_\_\_\_

**TO THE PARTIES:**

**REASON FOR RETURN OF UNSIGNED ORDER:**

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

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\_\_\_\_\_

# consistency noun

con·sis·ten·cy kən-ˈsi-stən(t)-sē

**plural** consistencies

Synonyms of *consistency* >

**1 a** : agreement or harmony of parts or features to one another or a whole :

## CORRESPONDENCE

| The furnishings and decorations in all the rooms reflect a *consistency* of style.

*specifically* : ability to be asserted together without contradiction

**b** : harmony of conduct or practice with **profession**

| followed her own advice with *consistency*



- Consistency when consistency is important/required
- One little fact can make a difference
- How to treat similarly situated people similarly?
  - CLV discussions, training, policy, legislation, appeals...
  - CSM Consistency Committee
  - Regional Meetings



A decorative graphic on the left side of the slide consists of numerous overlapping, torn-edge sticky notes in shades of pink, yellow, green, and light blue. Each sticky note features a large, bold, black question mark. The notes are scattered and layered, creating a textured, collage-like effect.

# Polling Question 1

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Has your county received a Notice of Deficiencies from a Child Support Magistrate in the last year?

☐ Yes

☐ No

☐ I don't do that kind of work



# Polling Question 2

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Did you always agree with the Child Support Magistrate's decision to issue a Notice of Deficiencies?

- ☐ Yes
- ☐ No, but I always understood why
- ☐ No, and I sometimes do not understand why
- ☐ No, and I never understood why





# Polling Question 3

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What percentage of all paper default orders were not signed by CSMs from July 2022 – July 2023?

- ☐ 0 -10%
- ☐ 11 - 20%
- ☐ 21- 30%
- ☐ 31- 40%
- ☐ 41- 50%
- ☐ More than 50%

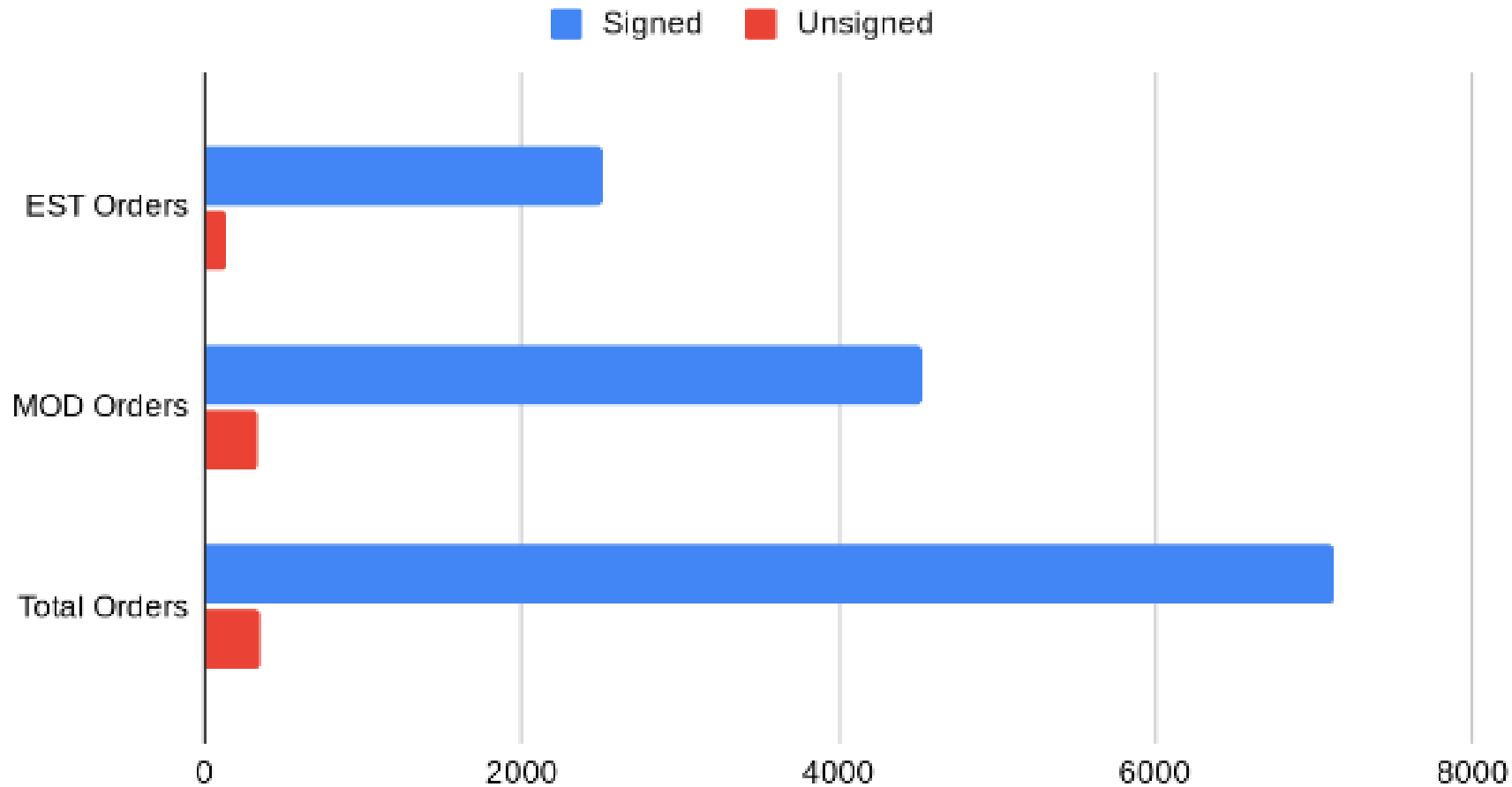


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# Deficiency Data

# Paper Deficiencies by the Numbers (7/1/22 – 7/1/23 Statewide)



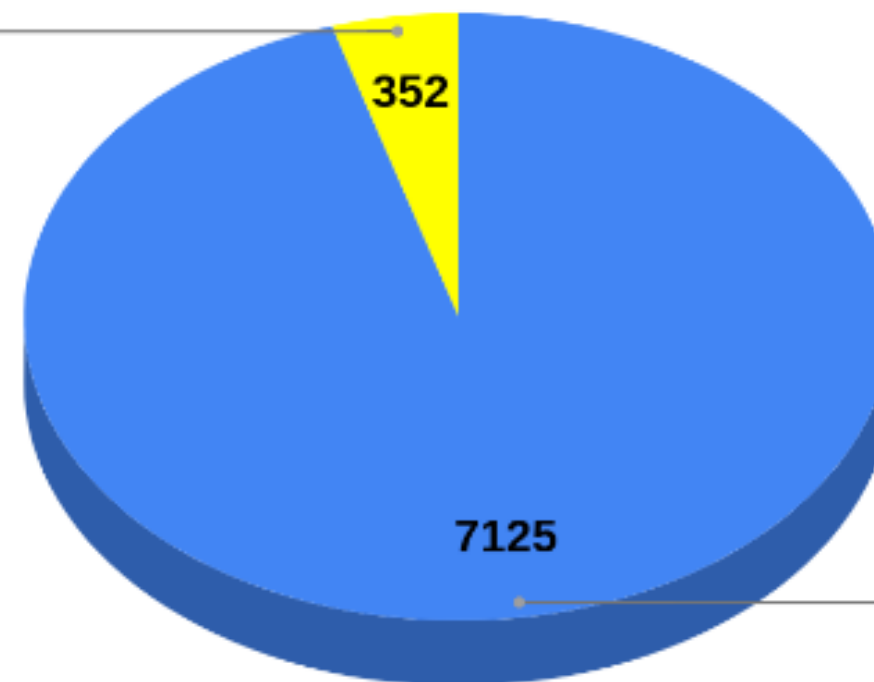
# Paper Deficiencies by the Numbers

## - Total Default Orders

Total default  
orders submitted:

- 7,477
  - 7,125 signed
  - 352 not signed

Orders Unsigned  
4.7%



Orders Signed  
95.3%

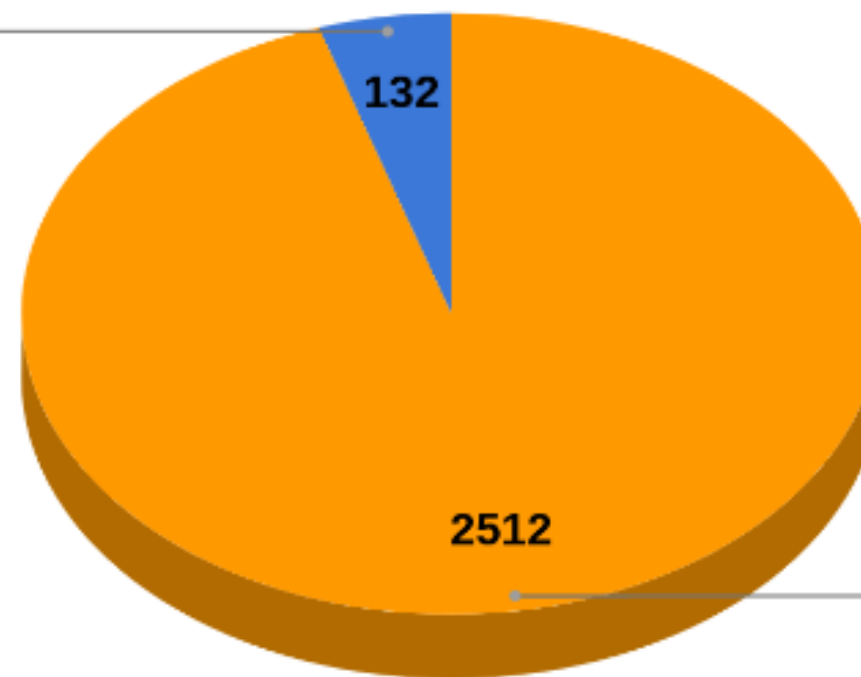
# Paper Deficiencies by the Numbers

## - Establishment Default Orders

Total default establishment orders submitted:

- 2,644
  - 2,512 signed
  - 132 not signed

**EST Unsigned**  
5.0%



**EST Signed**  
95.0%



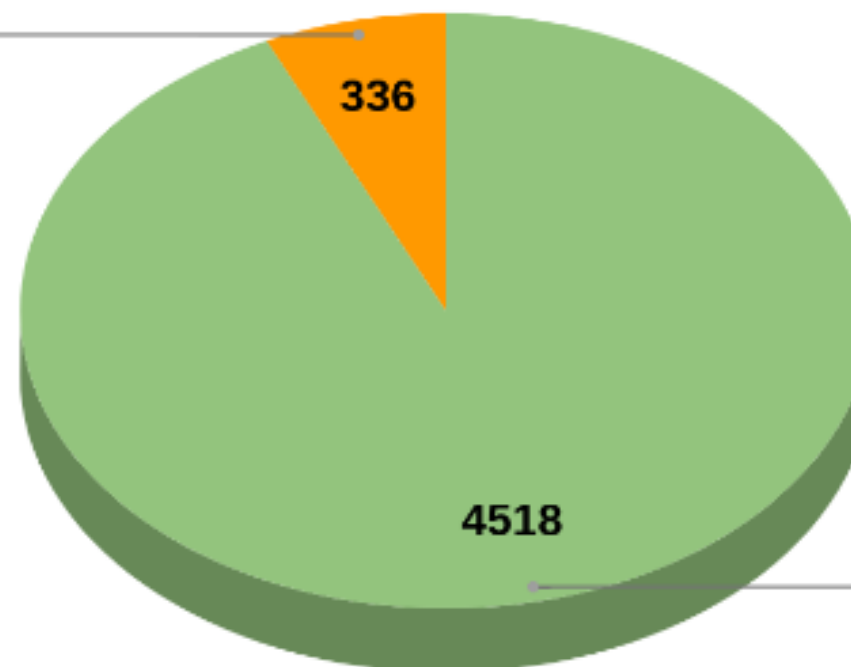
# Paper Deficiencies by the Numbers

## - Modification Default Orders

Total modification orders submitted:

- 4,854
  - 4,518 signed
  - 336 not signed

MOD Unsigned  
6.9%



MOD Signed  
93.1%

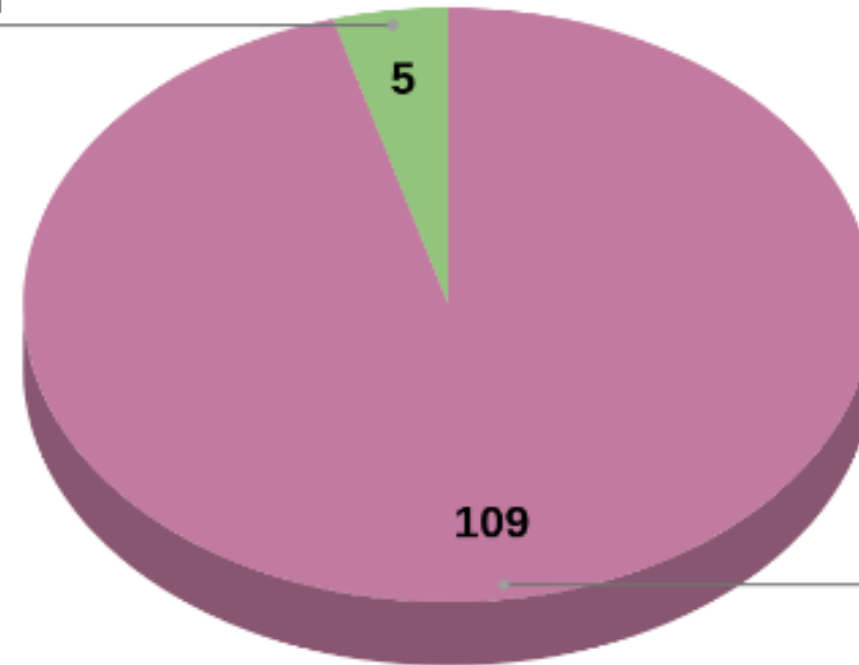
# Paper Deficiencies by the Numbers - COLA Stipulations



Total COLA stip submitted:

- 114
  - Signed – 109
  - Rejected – 5

**COLA Unsigned**  
4.4%



**COLA Signed**  
95.6%

## Overview - Final Rule 2016 Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs

### Background

The child support program ensures noncustodial parents provide financial support for their children, primarily collected through payroll withholding. Child support payments lift approximately one million families out of poverty each year, and account . Among poor single mothers with children that receive it, child support accounts for 41 percent of the family's income.



### FinalRule

Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs

## Final Rule Summary

### Overview

This [final rule](#) strengthens and updates the child support program by amending existing rules, some of which are 35 years old, to:

- set accurate child support obligations based on the noncustodial parents' ability to pay;
- increase consistent, on-time payments to families;
- move nonpaying cases to paying status;
- increase the number of noncustodial parents supporting their children;
- improve child support collection rates;
- reduce the accumulation of unpaid and uncollectible child support arrearages; and
- incorporate technological advances and evidence-based standards that support good customer service and cost-effective management practices.



Updated March 2021

### Quick Facts: Child Support Guidelines

This **Quick Facts guide** provides information about using the guidelines formula to set and modify child support orders.

The Child Support Program<sup>1</sup> is a successful federal-state-tribal partnership whose mission is to promote economic stability for children whose parents live apart. The program collects \$5.06 for every \$1 in public funds invested. In FY 2019, \$32 billion was collected in 13.6 million cases for 14.3 million children.<sup>2</sup>

Federal regulations (45 C.F.R. § 302.56) require each state to have child support guidelines based on specific numeric criteria for setting and modifying child support orders. As long as minimum federal requirements are met, states have flexibility in developing child support guidelines. The purpose of the guidelines is to ensure the adequacy of child support awards, promote settlements through

## Federal Final Rule

### • As a reminder...the Federal Final Rule requires the following of county agencies:

1. Review the Obligor's circumstances for "actual and present" ability to pay.
2. Provide the court with information regarding the Obligor's ability to pay or otherwise comply with the order.
3. Provide clear notice that "ability to pay" is critical question in the contempt.

9/19/2018

MFSRC Annual Conference

44

# Reminder about the Federal Flexible Rules

- The Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs Final Rule was signed into law on January 19, 2017
- For more information see the Federal Register
  - <https://www.federalregister.gov/documents/2016/12/20/2016-29598/flexibility-efficiency-and-modernization-in-child-support-enforcement-programs>
- Fact Sheets are available on the Office of Child Support Services website in the Dear Colleague Letter: DCL-17-10
  - <https://www.acf.hhs.gov/css/policy-guidance/child-support-final-rule-fact-sheets>



Rule

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

A Rule by the Centers for Medicare & Medicaid Services and the Children and Families Administration on 12/20/2016

PUBLISHED DOCUMENT		DOCUMENT DETAILS	
Start Printed Page 93492		Printed version: PDF	Publication Date: 12/20/2016
<b>AGENCY:</b> Office of Child Support Enforcement (OCSE), Administration for Children and Families (ACF) and the Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services (HHS).		<b>Agencies:</b> Centers for Medicare & Medicaid Services Administration for Children and Families	
<b>ACTION:</b> Final rule.		<b>Date:</b> This final rule is effective on January 19, 2017. States may comply any time after the	
<b>SUMMARY:</b>			



# Goals of the 2017 Federal Flexible Rules

- Ensure accurate and evidence-based child support orders based on the obligor's ability to pay
- Increase consistent and timely child support payments
- Move nonpaying cases to paying cases
- Increase the number of obligors supporting their children
- Improve child support collection rates
- Reduce accumulation of unpaid and uncollectable child support arrears
- Incorporate technological advances and evidence-based standards that support good customer service and cost-effective management practices





# Federal Flexible Rules and Paper Default Orders

- Consider balancing paper defaults with setting cases on for hearing
- Consider setting cases on for hearing when:
  - Anything questionable
  - Substantial potential income is imputed
  - Substantial past support is requested
  - The obligor has multiple families
  - One or both of the parties is self-employed
  - English is a second language
  - A party's hearing request is received shortly after the default period ended, but the default order has not yet been submitted to the CSM



# Types of Defaults

- Paper defaults
- Hearings where neither parent/custodian appears
- Hearings where only one parent/custodian appears



# Common Reasons for Notices of Deficiencies

## The Basics

Information necessary for a decision  
is missing

Misapplication of the law

Issues specific to defaulting after a  
hearing

# Reasons for Deficiencies



## Basic issues:

- No personal jurisdiction
- County did not intervene if the case started privately
- Information in the default order does not match the pleadings/motion
- Proposed default order is not signed by a County Attorney
- Confidential address motion is not tied to another motion
- Stipulation
  - Missing a waiver of counsel
  - County Attorney did not sign



# Reasons for Deficiencies



## Basic issues:

- Service issues:
  - All necessary parties were not served
  - Service was not proper
    - Incarcerated party
    - Consents/waivers missing
  - Affidavits of service were not filed
  - Timing issues
- Affidavit of default and nonmilitary service not filed or is outdated
- Unnecessary judgment language in the order
  - When it is not a paternity adjudication or there is no money judgment in the case

# Reasons for Deficiencies



## Information necessary for a decision is missing:

- How parentage was determined
- Relative caretaker/married but separated
  - Custody order or specific consent from the parents
- Whether parenting time ordered (for PEA or not)
- Nonjoint children (or not)
- Ongoing support Calculations
  - How income was determined
  - How potential income was determined
    - Demonstrated earning history
    - Ability to pay
    - Hours less than presumed reason

# Reasons for Deficiencies



## Information necessary for a decision is missing:

- Health care coverage information
- Child care verification
  - Proof of expenses
  - Work or education related
- Deviation basis and findings
- Past support
  - Calculations
  - Ability to pay now and in the past
  - Imputed income for past time period
- Worksheets missing

# Reasons for Deficiencies



## Misapplication of the law:

- No legal basis for action taken
  - Interstate issues
  - NPA with no custody order or consent
- Parents no longer have custody of child, and a modification is pursued rather than a caretaker establishment
- NJC deduction not applied when it should have been
- Overtime is used in modification calculation when not used in original order without explanation
- Set and suspend - automatic reinstate - automatic re-direct



# Reasons for Deficiencies



## Issues specific to defaulting after a hearing:

- Notice issues
  - Zoom notice not timely
  - Returned mail/address changes
  - Request for hearing is in the file
- No proposed order amount (or no income information provided in pleadings/motion)
  - Child Support will be determined at the hearing
- Unique circumstances such as storm or power outages

# Resources



## List of Reasons

### Reasons for Notices of Deficiencies

#### Basics:

- ☐ No personal jurisdiction
- ☐ No information on jurisdiction basis when a party does not live in MN
- ☐ County did not intervene if case began privately
- ☐ Information in the default order does not match the pleadings/motion:
  - o Can amend the pleading and then proceed with default process based on the amended pleading
  - o For an address change, can note the change (i.e. Per phone call on 8/10/23 Mother gave updated address)
- ☐ Proposed default order is not signed by a County Attorney
- ☐ Confidential address motion is not tied to another type of motion (i.e. PAT, EST, MOD)
- ☐ Stipulation is missing:
  - o Waiver of counsel
  - o County Attorney signature
- ☐ Service Issues:
  - o All necessary parties were not served
  - o Service was not proper
    - Incarcerated party
    - Consents/waivers missing
    - Personal service required, but mail service happened
  - o Affidavits of service were not filed
  - o Timing issues
  - o Returned mail/address changes
- ☐ Affidavit of default and nonmilitary service is not filed or is outdated
- ☐ Judgment language is in the order, but there is not a paternity adjudication or a money judgment in the order

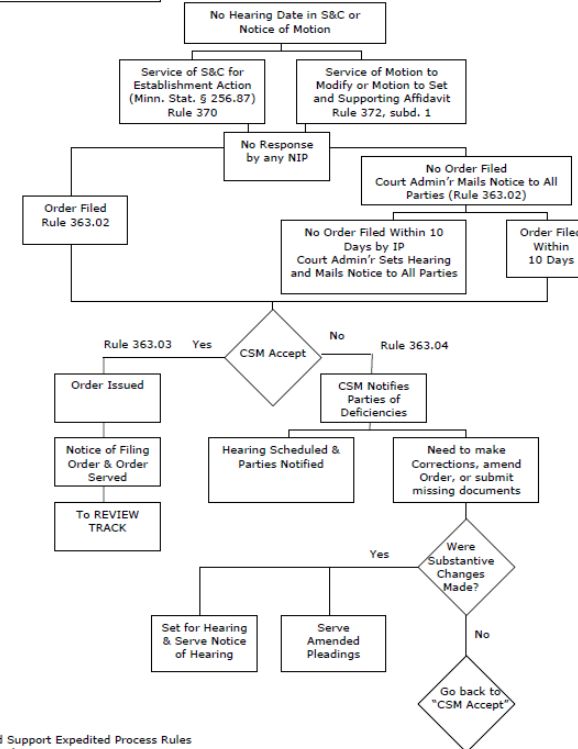
#### Information Needed For a Decision is Missing or Inadequate:

- ☐ How parentage was determined
- ☐ Basis for relative caretaker having the children – consent or public assistance only
- ☐ Married but living separated parents – no affidavit from parents or proof of consent
- ☐ Amount of parenting time was ordered (or not)
- ☐ ~~Noted~~ children for both parties (or statement that there are none)
- ☐ Basis for determination of income, particularly when potential income is being imputed
- ☐ Basis for guidelines amount (no worksheet attached or not spelled out clearly)
- ☐ How income was determined
- ☐ How potential income was determined
  - o Demonstrated earning history
  - o Ability to pay
  - o Reason to rebut less than full-time (40) hours
- ☐ Health care coverage information
  - o No information on the availability and cost of health care coverage
  - o The obligor is on MA and is ordered to contribute towards MA
- ☐ Child care verification
  - o No proof of child care expenses, just an amount stated
  - o No verification of employment or school for the parent receiving child care
- ☐ If a deviation is requested, what is the basis, why is it in the best interests of the child
  - o If public assistance is in place - without a deviation - substantial hardship
- ☐ Past support
  - o Not supported by calculations (i.e. different numbers, or just a lump sum stated)
  - o Not supported by obligor's ability to pay
  - o Asking for a nonpublic assistance judgment, and
    - The pleadings are not signed by the custodial parent, or
    - There is no affidavit by the custodial parent or other documentation that the custodial requests past support
- ☐ No proposed order amount or income information - child support will be determined at the hearing

## Flowchart

IP = Initiating Party  
NIP = Noninitiating Party  
S&C = Summons & Complaint

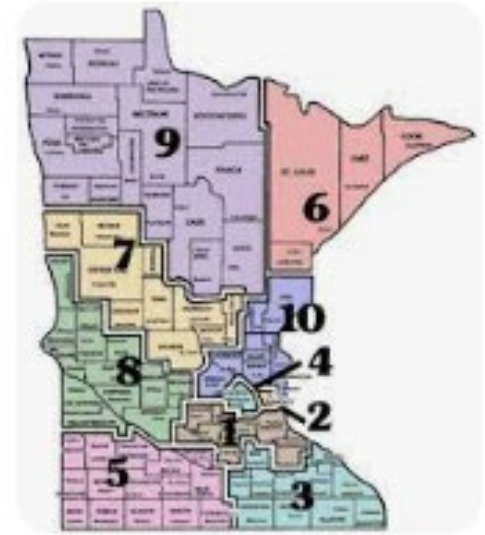
### DEFAULT- RULE 363



Child Support Expedited Process Rules  
located at [www.courts.state.mn.us](http://www.courts.state.mn.us)  
State Court Administration  
November 1, 2003

# Regional Meetings

- Child Support Magistrates can participate in regional meetings to discuss processes and expectations and to answer questions
- Meetings have been happening across the state
- How to have a meeting:
  - Contact Jill Prohofsky or Melissa Rossow or your local CSM
  - MFSRC can help – regional representatives
  - In-person or by Zoom
  - Helpful to send questions in advance
  - No case discussions or discussions about specific facts or decisions on cases
  - Collaborate and not complain



## Reasons for Notices of Deficiencies

### Basics:

- ☐ No personal jurisdiction
- ☐ No information on jurisdictional basis when a party does not live in MN
- ☐ County did not intervene if case began privately
- ☐ Information in the default order does not match the pleadings/motion:
  - Can amend the pleading and then proceed with default process based on the amended pleading
  - For an address change, can note the change (i.e. Per phone call on [date] [parent] gave updated address)
- ☐ Proposed default order is not signed by a County Attorney
- ☐ Confidential address motion is not tied to another type of motion (i.e. PAT, EST, MOD)
- ☐ Service Issues:
  - All necessary parties were not served
  - Service was not proper
    - Incarcerated party
    - Consents/waivers missing
    - Personal service required, but mail service happened
  - Affidavits of service were not filed
  - Timing issues
  - Returned mail/address changes
- ☐ Stipulation is missing:
  - Waiver of counsel
  - County Attorney signature
- ☐ Affidavit of default and nonmilitary service is not filed or is outdated
- ☐ Judgment language is in the order, but there is not a paternity adjudication or a money judgment in the order

### Information Necessary For a Decision is Missing or Inadequate:

- ☐ How parentage was determined
- ☐ Basis for relative caretaker having the children – consent or public assistance only
- ☐ Married but living separated parents – no affidavit from parents or proof of consent
- ☐ Amount of parenting time was ordered (or not)
- ☐ Nonjoint children for both parties (or that there are none)
- ☐ Basis for determination of income, particularly when potential income is being imputed
- ☐ Basis for guidelines amount (no worksheet attached or not spelled out clearly)
- ☐ How income was determined
- ☐ How potential income was determined
  - Demonstrated earning history
  - Ability to pay
  - Reason to rebut less than full-time (40) hours
- ☐ Health care coverage information
  - No information on the availability and cost of health care coverage
  - The obligor is on MA and is ordered to contribute towards MA
- ☐ Child care verification
  - No proof of child care expenses, just an amount stated
  - No verification of employment or school for the parent receiving child care
- ☐ If a deviation is requested, what is the basis and why is it in the best interests of the child
  - If public assistance is in place - without a deviation - substantial hardship
- ☐ Past support
  - Not supported by calculations (different numbers, or just a lump sum stated)
  - Not supported by obligor's ability to pay
  - Asking for a nonpublic assistance judgment, and:
    - The pleadings are not signed by the custodial parent, or
    - There is no affidavit by the custodial parent or other documentation that the custodial requests past support
- ☐ No proposed order amount or income information - child support will be determined at the hearing

## Misapplication of the Law:

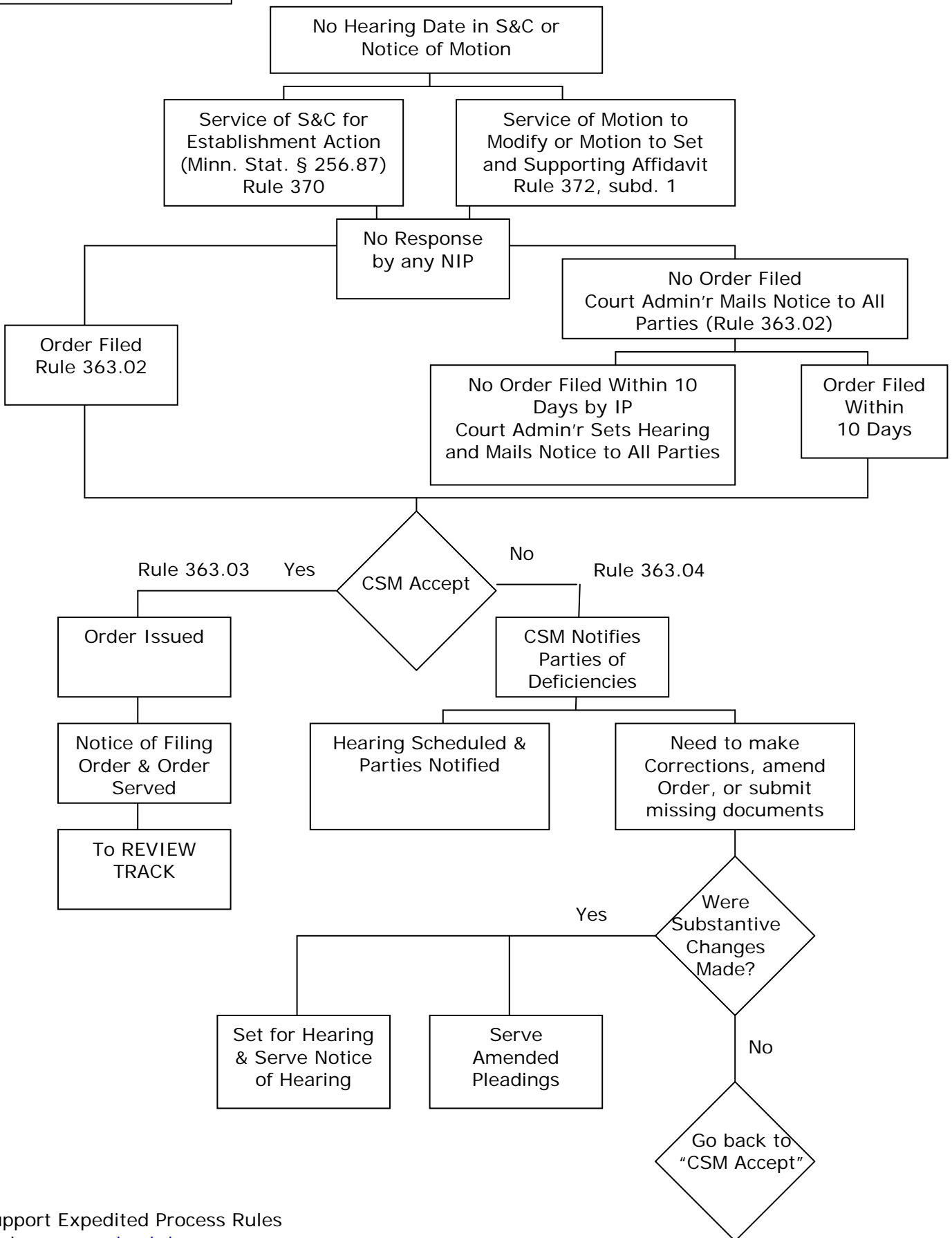
- ☐ No legal basis for action taken
  - Interstate issues
  - Nonpublic assistance with no custody order or consent
- ☐ Parents no longer have custody of child, and a modification is pursued rather than a caretaker establishment
- ☐ Nonjoint child deduction was not applied when it should have been
- ☐ Overtime is used in a modification calculation when it was not used in the original order without explanation
- ☐ Automatic Language
  - Child support auto-redirect (child support follows the child if the child lives with someone other than the named custodial parent)
  - Set and suspend (i.e. basic support is \$300 per month but is suspended as long as the parents are living together)
  - Auto-reinstatement (basic support is \$300 per month but is suspended while the obligor is incarcerated)
- ☐ Under the CSM's interpretation of the federal flexible rules
  - The order is not "right-sized"
  - The order is unreasonable and unfair
- ☐ The amount after the medical support offset is the basic support order amount
- ☐ Case Consolidation – scopes of the action do not match
- ☐ Confidential address motion is a stand-alone motion (not tied to another substantive motion)

## Issues Specific to Defaulting After a Hearing:

- ☐ Notice issues:
  - Notice of hearing not sent timely
  - Zoom notice not sent timely
  - Returned mail/address changes
- ☐ No proposed order amount or no income information provided in the pleading motion, rather a statement that child support will be determined at the hearing
- ☐ A request for hearing form was returned
- ☐ For defaulting at a hearing when one or both parties do not appear:
  - No Notice in the pleadings that if they fail to appear it may result in a default. Particularly important if the pleadings are not specific and say that the issue will be addressed at the hearing
- ☐ Unique circumstances such as storms or power outages or pandemics
- ☐ The catch-all: Fairness and justice

IP = Initiating Party  
NIP = Noninitiating Party  
S&C = Summons & Complaint

## **DEFAULT- RULE 363**







## Final Rule Summary

### Overview

This [final rule](#) strengthens and updates the child support program by amending existing rules, some of which are 35 years old, to:

- set accurate child support obligations based on the noncustodial parents' ability to pay;
- increase consistent, on-time payments to families;
- move nonpaying cases to paying status;
- increase the number of noncustodial parents supporting their children;
- improve child support collection rates;
- reduce the accumulation of unpaid and uncollectible child support arrearages; and
- incorporate technological advances and evidence-based standards that support good customer service and cost-effective management practices.

### What is new

Research finds that setting an accurate order based on the noncustodial parent's ability to pay improves the chances that the parent will comply with the support order and continue to pay over time. The final rule incorporates the longstanding federal requirement that child support orders reflect the noncustodial parents' ability to pay established under income-based guidelines adopted by each state. The rule increases public participation and transparency in state guidelines review processes. The rule also requires child support agencies to increase their case investigative efforts to improve the accuracy of child support orders. The rule includes language for states to consider the noncustodial parent's specific circumstances in imputing income when evidence of income is limited. Because three-fourths of child support payments are collected through payroll withholding, the rule standardizes and streamlines payment processing to ensure that this highly effective support enforcement tool does not unduly burden employers. The regulations clarify that health care coverage includes public and private insurance to increase state flexibility in ensuring that parents meet their medical support obligations by providing health care coverage or payments for medical expenses that are reasonable in cost and best meet the health care needs of the child.

The rule incorporates civil contempt due process requirements to implement the 2011 Supreme Court decision in *Turner v. Rogers*. The final rule establishes criteria that child support agencies must use to determine which cases to refer to court for a civil contempt action and how they prepare cases for a civil contempt proceeding. Under the rule, state child support agencies must maintain and use an effective system for enforcing the support obligation by establishing criteria for filing civil contempt petitions in child support cases funded under title IV-D. The criteria must include requirements that the child support agency: (i) screen the case for information regarding the noncustodial parent's ability to pay or otherwise comply with the order; (ii) provide the court with such information regarding the noncustodial parent's ability to pay, or otherwise comply with the order, which may assist the court in making a factual determination regarding the noncustodial parent's ability to pay the purge amount or comply with the purge conditions; and (iii) provide clear notice to the noncustodial parent that his or her ability to pay constitutes the critical question in the civil contempt action.

Federal law requires states to review, and if appropriate, adjust support orders when either parent has experienced a substantial change in circumstances. The rule provides that a state may not exclude incarceration from consideration as a "substantial change in circumstances." In addition, after learning that a parent who owes support will be incarcerated for more than 180 calendar days, the state must either send a notice to both parents of their right to request a review and adjustment or automatically initiate a review and adjustment with notice to the parents. When modifying orders, states may consider an incarcerated parent's income and assets in setting the order amount.

To better meet the needs of unmarried parents, this rule also gives states the flexibility to allow applicants for child support services to request help with establishing paternity only in cases in which both parents reside in the state. In an effort to direct resources for cases where collections are possible and ensure that families have more control over whether to receive child support services, the rule expands the circumstances in which a state may close cases. The revised regulation also strengthens notice provisions to ensure that safeguards are in place to keep recipients informed about case closure actions.

The rule also removes outdated barriers to electronic communication and document management, updating existing child support regulations, which frequently limit methods of storing or communicating information to a written or paper format. Finally, the rule incorporates several technical changes to update, clarify, revise, or delete former regulations to ensure that the child support regulations are accurate, aligned with current state practice, and up-to-date.

### **How this affects states**

This final rule draws on research and successful state practices to recognize and incorporate standards designed to improve the effectiveness and efficiency of the child support program. The final rule will make child support program operations and enforcement procedures more effective for families and more flexible and efficient for states and employers. The rule also recognizes advancements in technology that can enable improved collection rates and the move toward electronic communication and document management. This final rule will improve and simplify program operations and remove outmoded limitations to program innovations to serve families better. The rule makes significant changes to the regulations on case closure, child support guidelines, civil contempt, and medical support enforcement. The rule is intended to increase child support collection rates.

### **How this affects families**

The rule is evidence-based and is expected to result in families receiving more consistent payment of child support. The rule is intended to improve the accuracy of and compliance with child support orders by requiring state child support agencies to increase case investigation efforts and develop a sufficient evidentiary basis for child support orders. The final rule also ensures that the quadrennial state guidelines review process is more transparent by making the review results available to the public and allowing citizens an opportunity to provide meaningful input into the review process. States may not preclude incarcerated parents from seeking a review and adjustment of their orders, helping to reduce uncollectible debt, participation in illegal income-generating activities, and recidivism. Electing to offer paternity-only limited services will allow parents who are living together to legally establish paternity of their children, will better meet the needs of the modern family, and will result in a more flexible and family-friendly child support program.



# Guidelines

## Overview

The [Final Rule: Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs](#) updates guidelines for setting child support orders at 45 CFR 302.56 and the establishment of child support orders at 45 CFR 303.4. This fact sheet discusses specific revisions made to §§ 302.56(a), 302.56(c)(1), and 303.4(b).

The goal of these revisions is to increase reliable child support for children by setting child support orders based on the noncustodial parent's earnings, income, or other evidence of ability to pay. Orders set beyond a parent's ability to pay can lead to unintended consequences, such as unmanageable debt, reduced employment, participation in the underground economy, and increased criminal activities.<sup>1</sup> It is counterproductive and not in children's best interests to have their parents engage in a cycle of nonpayment, illegal income generation, and incarceration. Support orders based on the noncustodial parent's ability to pay should result in less conflict between parents, fewer requests for hearings, and less time and resources spent on enforcement.

## What is new

This rule makes the following changes to child support guidelines (§ 302.56(c)(1)). First, state child support guidelines must provide that a child support order be "based on the noncustodial parent's earnings, income, and other evidence of ability to pay". This change codifies OCSE's longstanding interpretation of statutory guideline requirements<sup>2</sup> and reflects the basic principle underlying the federal child support guidelines statute – that application of state guidelines should result in income-based orders. The existing federal regulation that guidelines must consider all earnings and income of the noncustodial parent is unchanged. Child support guidelines must take into consideration the basic subsistence needs of the noncustodial parent 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. This means states have flexibility to determine the best approach to meeting this requirement. Nearly all states already incorporate a self-support reserve or low-income adjustment into their child support guidelines.<sup>3</sup> If income imputation is authorized under a state's child support guidelines, then child support guidelines must take into consideration the specific circumstances of the noncustodial parent to the extent known when determining the amount of imputed income, and may not use a standard amount in lieu of fact-gathering in a specific case.

The rule also revises the "establishing support obligations" regulations at § 303.4(b) by requiring child support agencies funded under title IV-D of the Social Security Act to base support obligations or recommended support obligation amounts on the earnings and income of the noncustodial parent whenever available. If evidence of earnings and income are unavailable or insufficient to use as the measure of the parent's ability to pay, then the recommended support obligation amount should be based on available information about the specific circumstances of the noncustodial parent. The rule addresses a divergence in the way public and private child support cases are currently handled. It requires cases handled by the state child support agency to meet similar evidentiary standards for establishing an order and imputing income as are applied in private cases. Without an evidentiary basis, imputed income is fictitious income and does not generally result in orders based on the noncustodial parent's ability to pay.

## How this affects states

Child support agencies will need to take steps to determine the factual basis for the support obligation through case conferencing, interviews, questionnaires, and other strategies. They will need to gather information regarding the earnings and income of the noncustodial parents, and when this information is unavailable, obtain information on the specific circumstances of the noncustodial parent. Imputing income will need to be done on a case-by-case basis, when there is an evidentiary gap. Child support

agencies will no longer be able to impute standard amounts in default cases based on a state minimum wage or statewide occupational wage rates because these practices are not based on evidence of the noncustodial parent's ability to pay and therefore are unlikely to result in an order that reflects the specific facts of the case.

States must revise their child support guidelines to meet the requirements of the rule changes within one year after completion of the state's first quadrennial review of its child support guidelines that commences more than one year after publication of the final rule.

## How this affects families

With this rule change, noncustodial parents will be more likely to meet their child support obligations, benefiting their children by improving child support compliance and payment consistency, and reducing uncollectable debt. The research indicates that orders set too high result in less, not more, payments to families. Other negative effects associated with orders set beyond a noncustodial parent's ability to pay may also decline, such as reduced contact with their children, lower employment, and increased underground activities.<sup>4</sup>

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1. Mincy, Ronald et al, *Failing Our Fathers: Confronting the Crisis of Economically Vulnerable Nonresident Fathers*, Oxford University Press, 2014; Kotloff, Lauren, J., *Leaving the Street: Young Fathers Move From Hustling to Legitimate Work*, Public/Private Ventures, 2005; and Rich, Lauren, M., *Regular and Irregular Earnings of Unwed Fathers: Implications for Child Support Practices*, Children and Youth Services Review, April–May 2001, 23(4/5): 353–376, available at: <https://www.sciencedirect.com/science/article/pii/S0190740901001396>.
  2. See [AT-93-04](#) and [PIQ-00-03](#).
  3. Venohr, Jane, *Child Support Guidelines and Guidelines Reviews: State Differences and Common Issues*, Family Law Quarterly, Fall 2013, 47(3): 327–352, available at: [http://static1.squarespace.com/static/5154a075e4b08f050dc20996/t/54e34dd2e4b04coeab578456/1424182738603/3fall13\\_venohr.pdf](http://static1.squarespace.com/static/5154a075e4b08f050dc20996/t/54e34dd2e4b04coeab578456/1424182738603/3fall13_venohr.pdf).
  4. Pamela Holcomb, Kathryn Edin, Jeffrey Max, Alford Young, Jr., Angela Valdovinos D'Angelo, Daniel Friend, Elizabeth Clary, Waldo E. Johnson, Jr., 2015, *In Their Own Voices: The Hopes and Struggles of Responsible Fatherhood Program Participants in the Parents and Children Together Evaluation*. Report submitted to the Office of Planning, Research, and Evaluation. OPRE Report #2015-67 available at: <http://www.acf.hhs.gov/programs/opre/resource/in-their-voices-hopes-struggles-responsible-fatherhood-parents-children-evaluation>; and Maureen Waller and Robert Plotnick, *Effective child support policy for low-income families: evidence from street level research*, Journal of Policy Analysis and Management, 2001, 20(1): 89–110.



# Modification for Incarcerated Parents

## Overview

The majority of federal and state prisoners are parents, and many have child support orders that were established before incarceration.<sup>1</sup> Incarceration can result in the accumulation of high levels of child support debt because parents have little to no ability to earn income while they are incarcerated and reduced ability to pay off the debt when released.<sup>2</sup> Studies find that incarcerated parents leave prison with an average of \$20,000 or more in unpaid child support, with no means to pay upon release.<sup>3</sup> This accumulated child support debt is rarely paid. Research finds that uncollectible debt substantially reduces noncustodial parent earnings, which in turn reduces child support payments to their families. One study found that people released from jail are unemployed 9 weeks more per year and annual earnings are reduced by 40%.<sup>4</sup> On the other hand, reducing uncollectible debt can increase payments.<sup>5</sup>

The goal of the [final rule](#) revisions is to increase consistent child support payments for children by setting child support orders based on the noncustodial parent's earnings, income, or other evidence of ability to pay, including for incarcerated parents. Children do not benefit when their parents engage in a cycle of nonpayment, underground income generation, and re-incarceration. Support orders modified for incarcerated parents, based on their current ability to pay, result in less debt accrual, more formal employment, more child support payments, and less need for enforcement after they are released.

Despite the significant research on the consequences of continuing the accrual of support when it is clear there is no ability to pay, about one quarter of states treat incarceration as “voluntary unemployment”. These “voluntary unemployment” rules typically pre-date the federal review and adjustment statute that requires states to modify support orders when parents experience a substantial change in circumstances, and block the federal rule's application.

## What is new

The final rule provides that state guidelines under 45 CFR 302.56(c)(3) may not treat incarceration as “voluntary unemployment” in establishing or modifying child support orders. The new rule prohibits states from legally barring modification of support obligations during incarceration. We have also revised § 303.8(c) to indicate that the reasonable quantitative standards that the state develops for review and adjustment must not treat incarceration as a legal bar for petitioning for and receiving an adjustment of an order.

Existing review and adjustment regulations specify the requirements that a state must meet for adjusting to child support orders in IV-D cases. The rule adds a requirement that state child support agencies may elect in its state plan to initiate review of an order after learning that a noncustodial parent will be incarcerated more than 180 calendar days. If the state has not elected this new option, then within 15 business days of learning that the noncustodial parent will be incarcerated more than 180 calendar days, the state must notify both parents of their right to request a review.

## How this affects states

States should determine whether they have “voluntary unemployment” policies or standards that legally prevent incarcerated parents from obtaining a review and adjustment of their orders upon a showing of a substantial change in circumstances. If so, they must conform their policies within one year after completion of the first quadrennial review of the state's guidelines that commences more than one year after publication of the final rule. Since states may elect to initiate the review upon learning of the noncustodial parent's incarceration for over 180 calendar days, we encourage states to implement this proactive approach to ensure that orders are based on the noncustodial parent's ability to pay during his or her incarceration. When modifying orders, states may consider an incarcerated parent's income and assets in setting the order amount. In electing this state plan option, the state may also need to consider whether further changes to state laws are required to implement this procedure.



A number of states conduct data matches with correctional facilities in the state to determine whether a parent is incarcerated. We encourage, but are not requiring states to actively establish partnerships with federal, state, local, and private prisons to conduct data matches to locate, as well as to educate incarcerated parents about the child support program. We encourage states to develop electronic interfaces with corrections institutions to maximize the identification of incarcerated parents and to implement outreach strategies designed to educate incarcerated parents of their rights to request reviews of their support orders, which will help to increase program efficiency.

### How this affects families

Setting and modifying realistic child support obligations for incarcerated parents can improve their ability to provide consistent support for their children upon release from prison.<sup>6</sup> With this rule change, formerly incarcerated noncustodial parents will be more likely to meet their child support obligations, benefiting their children by improving child support compliance and reliability, and reducing uncollectable debt. Other collateral consequences associated with orders set beyond a noncustodial parent's ability to pay may also decline, such as increased underground employment activity and reduced contact with their children. We also expect that more incarcerated parents learn about their right to request a review of their child support orders early in their prison terms in an effort to manage their debt.

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1. Christopher Mumola, *Incarcerated Parents and Their Children*, Bureau of Justice Statistics Special Report, August 2000, NCJ 182335.
  2. Council of State Governments, *Report of the Re-Entry Policy Council: Charting the Safe and Successful Return of Prisoners to the Community*, Justice Center, 2005, available at: <http://www.csjusticecenter.org/wp-content/uploads/2013/04/1694-11.pdf>. For further background, see Jessica Pearson's article, Pearson, Jessica, "Building Debt While Doing Time: Child Support and Incarceration," *Judges' Journal* 43:1, Winter 2004, available at: <https://csdaca.org/wp-content/uploads/2014/11/BuildingDebt-2.pdf>.
  3. U.S. Department of Health and Human Services, Office of Child Support Enforcement, *Incarceration, Reentry, and Child Support Issues: National and State Research Overview*, 2006; Pamela Ovwigho, et al., *The Intersection of Incarceration and Child Support: A Snapshot of Maryland's Caseload*, School of Social Work, University of Maryland, 2005; Esther Griswold and Jessica Pearson, *Twelve Reasons for Collaboration Between Departments of Correction and Child Support Enforcement Agencies*, *Corrections Today*, June 2003.
  4. See our, "Jobs not Jail Infographic", published October 2015 on OCSE website at: [http://www.acf.hhs.gov/sites/default/files/programs/css/jobs\\_not\\_jail\\_final\\_10\\_02.pdf](http://www.acf.hhs.gov/sites/default/files/programs/css/jobs_not_jail_final_10_02.pdf) and *Collateral Costs: Incarceration's Effect on Economic Mobility*. The Pew Charitable Trusts. (2010, September), available at: [http://www.pewtrusts.org/~media/legacy/uploadedfiles/pes\\_assets/2010/collateralcosts1pdf.pdf](http://www.pewtrusts.org/~media/legacy/uploadedfiles/pes_assets/2010/collateralcosts1pdf.pdf).
  5. For further information, see Carolyn J. Heinrich, Brett C. Burkhardt, and Hilary M. Shager, *Reducing Child Support Debt and Its Consequences: Can Forgiveness Benefit All?* (2010), available at: [http://www.irp.wisc.edu/research/childsup/cspolicy/pdfs/2007-09/FamiliesForward\\_3\\_19\\_10.pdf](http://www.irp.wisc.edu/research/childsup/cspolicy/pdfs/2007-09/FamiliesForward_3_19_10.pdf); Maria Cancian, Carolyn Heinrich, and Yiyoon Chung, *Does Debt Discourage Employment and Payment of Child Support?* (2009), available at: <http://www.irp.wisc.edu/publications/dps/pdfs/dp136609.pdf>; and Harry Holzer, Paul Offner, and Elaine Sorensen, *Declining Employment Among Young Black Less-Educated Men: The Role Of Incarceration and Child Support* (2004), available at: [http://www.urban.org/uploadedpdf/411035\\_declining\\_employment.pdf](http://www.urban.org/uploadedpdf/411035_declining_employment.pdf).
  6. Alicia Bannon, Mitali Nagrecha and Rebekah Diller, *Criminal Justice Debt a Barrier to Reentry*, Brennan Center for Justice, 2010; *Report of the Re-Entry Policy Council: Charting the Safe and Successful Return of Prisoners to the Community*, Council of State Governments, 2005; Esther Griswold and Jessica Pearson, *Twelve Reasons for Collaboration between Departments of Correction and Child Support Enforcement Agencies*, *Corrections Today*, June 2003.





# Civil Contempt - Ensuring Noncustodial Parents Have the Ability to Pay

## Overview

As the federal agency responsible for funding and oversight of state child support programs, OCSE has an interest in ensuring that:

- constitutional principles articulated in the U.S. Supreme Court Decision in *Turner v. Rogers*, 564 U.S.\_\_\_\_, 131 S.Ct. 2507 (2011) are carried out in the child support program,
- child support case outcomes are just and comply with due process, and
- enforcement proceedings are cost-effective and in the best interest of the child.

The *Turner* case provides OCSE and state child support agencies with an opportunity to evaluate the appropriate use of civil contempt and to improve program effectiveness, including adequate case investigation. As the U.S. Supreme Court stated in *Turner v. Rogers*, a noncustodial parent's ability to pay constitutes the "critical question" in a civil contempt case, whether the state provides legal counsel or alternative procedures designed to protect the indigent obligor's constitutional rights.

The [final rule](#) revises 45 CFR 303.6(c)(4), by establishing criteria that child support agencies must use to determine which cases to refer and how they prepare cases for a civil contempt proceeding. The main goal is to increase consistent child support payments for children by ensuring that low-income parents are not incarcerated unconstitutionally because they are poor and unable to comply with orders that do not reflect their ability to pay. In addition, the final rule is intended to reduce the routine use of costly and often ineffective contempt proceedings and increase case investigation and more cost-effective collection efforts.

## What is new

Section §303.6(c)(4) of the final rule requires the state child support agency to establish procedures for the use of civil contempt petitions. Before filing a civil contempt action that could result in the noncustodial parent being sent to jail, states must ensure that the child support agency has screened the case to determine whether the facts support a finding that the noncustodial parent has the "actual and present" ability to pay or to comply with the support order.

The child support agency must also provide the court with information regarding the noncustodial parent's ability to pay or otherwise comply with the order to help the court make a factual determination regarding the parent's ability to pay the purge amount or comply with the purge conditions.

Finally, prior to going to court, the state must give clear notice to the noncustodial parent that his or her ability to pay constitutes the critical question in the civil contempt action.

## How this affects states

The new rule provides state child support agencies with a guide for conducting constitutionally acceptable proceedings. The final rule will reduce the risk of erroneous deprivation of the noncustodial parent's liberty, without imposing significant fiscal or administrative burden on the state. States that have reduced their over-reliance on contempt proceedings have found that they increased collections and reduced costs at the same time. There is no evidence that the routine use of contempt proceedings improves collection rates or consistent support payments to families.

States have considerable flexibility in implementing these provisions. The provisions are based upon successful case practice in a number of states that conduct case-specific investigations and data analyses. Child support agencies will need to take steps to determine how to implement these changes in their states, which may include educating and collaborating with the judiciary.

### How this affects families

Research shows that routine use of civil contempt is costly and counterproductive to the goals of the child support program.<sup>1</sup> All too often it results in the incarceration of noncustodial parents who are unable to pay to meet their purge requirements.<sup>2</sup> Modernizing practices in this area will encourage parents to comply with child support orders, maintain legitimate employment, and minimize the accumulation of unpaid child support debt. These guideline provisions help ensure that child support case outcomes are just and comply with due process, and that enforcement proceedings are cost-effective and in the best interest of the child.

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1. See Elizabeth G. Patterson, *Civil Contempt & the Indigent Child Support Obligor: The Silent Return of Debtor's Prison*, 18 Cornell Journal of Law & Public Policy 95, 126 (2008) (*Civil Contempt*), available at: <http://www.lawschool.cornell.edu/research/jlpp/upload/patterson.pdf>.
  2. See Rebecca May & Marguerite Roulet, Ctr. for Family Policy & Practice, *A Look at Arrests of Low-Income Fathers for Child Support Nonpayment: Enforcement, Court and Program Practices*, 40 (2005), available at: <http://www.cffpp.org/publications/LookAtArrests.pdf>.