

General Comments on Initiative for 14-09-06.7

By R. Mark Rogers

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There is no apparent problem with the three points in this initiative as long as the initiative is implemented to conform to the requirements of 45 CFR 302.56. These comments focus only on section 3 since that is where there is disagreement. The bottom line is that the initiative must be viewed as establishing a certain type of guideline formula rather than causing guidelines to not be used.

The key requirements of 45 CFR 302.56 are:

- The state must have a presumptive and fully rebuttable child support guideline formula.
- The guideline formula must be applied presumptively to all child support cases.
- The formula must include all of an obligor's income.

Section 3 of the referendum creates two requirements for a guideline formula:

- The award must be based on the parenting plan.
- The award must be based on actual costs of the basic needs of the children.

These issues can be incorporated into child support guideline formulas and conform to federal regulations. First, the parenting plan can become part of the guideline application by requiring that the guideline have a parenting time adjustment based on a valid economic study and applying a standard of equal duty of support. That is both parents share both parents' child costs. The information from the parenting plan can be used as input into the guideline formula inclusive of a parenting time adjustment.

The initiative does not define basic needs. Basic needs can be defined very narrowly or broadly. Basic needs could be foster care amounts or basic needs could rise with income but not include extravagances. Regardless of the definition, the basic needs could be allocated according to parenting time and shares of combined income. In this manner, the requirements of both the initiative and federal regulations are met.

One of the key thrusts of this initiative is to move away from an income sharing guideline formula to a cost sharing formula. But a cost sharing formula clearly can include both parents' incomes as the mechanism for how to allocate the costs. Federal regulations do not prohibit a cost sharing guideline and, in fact, most states have various types of cost sharing guidelines.

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As noted in the Federal Register, when a question was raised regarding basing child support upon foster care guidelines, the federal agency published response was that such is allowable as a policy option. From the Federal Register, 56 FR 22335 May 15, 1991:

2. Comment: Several commenters asked that the regulation require that guidelines establish a minimum amount of support based on the level of Federal foster child guidelines, and be adjusted at each three percent increment of the Consumer Price Index (CPI). They also recommended that the level of support required by the guidelines should be that amount necessary to maintain the child(ren) at the standard of living they would have enjoyed had the marriage or relationship remained intact. These commenters also asked that the regulation prohibit States from exempting those with income above a certain level from application of the guidelines and reducing support amounts below a minimum standard when the obligor takes on the responsibility of additional children, quits a job or becomes a full-time student. Commenters recommended that the minimum standards also address the custodial parent's income in calculating awards. Other commenters asked that the guidelines address child care expenses and circumstances of second families with respect to treatment of income of a new spouse and expenses related to other dependents. Another commenter suggested that States be required to ensure that guidelines be reasonably related to economic data on costs of child rearing.

Response: We have established only minimum components for guidelines in this Federal regulation and believe it is appropriate for States to develop guidelines' specifics. However, section 467 of the Act does prohibit States from explicitly limiting application of the guidelines to those with income above or below a specific level; the guidelines must be used as a rebuttable presumption in setting all award amounts in the State. Deviation from the guidelines is allowed only if, based on a written or specific finding on the record, the application of the guidelines would be unjust or inappropriate in a particular case. Therefore, while deviation from the guidelines is allowable in cases with income above a specific level if the above condition is met, States may not categorically excuse cases with income above or below a certain level from application of the guidelines.

While we have not included the other recommendations as part of the required minimum elements of guidelines, we believe that they represent policy options which States could use in constructing guidelines, and encourage States to consider them in establishing and revising their guidelines.

Basically, this initiative does not conflict with 45 CFR 302.56 if it is viewed as setting constraints for what North Dakota's child support guidelines should be based upon instead of being viewed as eliminating guidelines. A guideline formula with a parenting

time adjustment based on input from parenting plans and with basic costs shared also according to shares of combined income would not violate federal regulations. The guidelines could have either a narrow or broad definition of basic costs with an appropriate underlying economic study.

Impact of Passage of Initiative on Receipt of Federal Monies

First, if the initiative involving 14-09-06.7 is implemented in terms of designing new guidelines based on basic costs, parenting time, and shares of combined income, there would be no conflict and no loss of federal monies.

Should there be conflict with federal regulations, there is time for the state to make corrections and not lose any federal monies. Before any penalty is imposed for non-compliance, there must be notice. At a minimum, the state would have a year for corrective action before losing federal funds. Additionally, should corrective action take somewhat longer, the penalties are very small and are only a fraction of federal monies received by the state. These views are corroborated with the federal regulations cited below.

[Code of Federal Regulations]

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TITLE 45--PUBLIC WELFARE

CHAPTER III--OFFICE OF CHILD SUPPORT ENFORCEMENT (CHILD SUPPORT

ENFORCEMENT PROGRAM), ADMINISTRATION FOR CHILDREN AND FAMILIES,

DEPARTMENT OF HEALTH AND HUMAN SERVICES

PART 305 PROGRAM PERFORMANCE MEASURES, STANDARDS, FINANCIAL INCENTIVES,

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Sec. 305.61 Penalty for failure to meet IV-D requirements.

(a) A State will be subject to a financial penalty and the amounts otherwise payable to the State under title IV-A of the Act will be reduced in accordance with Sec. 305.66:

(1) If on the basis of:

(i) Data submitted by the State or the results of an audit conducted under Sec. 305.60 of this part, the State's program failed to achieve the paternity establishment percentages, as defined in section 452(g)(2) of the Act and Sec. 305.40 of this part, or to meet the support order establishment and current collections performance measures as set forth in Sec. 305.40 of this part; or

(ii) The results of an audit under Sec. 305.60 of this part, the State did not submit complete and reliable data, as defined in Sec. 305.1 of the part; or

(iii) The results of an audit under Sec. 305.60 of this part, the State failed to substantially comply with one or more of the requirements of the IV-D program, as defined in Sec. 305.63; and

(2) With respect to the immediately succeeding fiscal year, the State failed to take sufficient corrective action to achieve the appropriate performance levels or compliance or the data submitted by the State are still incomplete and unreliable.

(b) The reductions under paragraph (c) of this section will be made for quarters following the end of the corrective action year and will continue until the end of the first quarter throughout which the State, as appropriate:

(1) Has achieved the paternity establishment percentages, the order establishment or the current collections performance measures set forth in Sec. 305.40 of this part;

(2) Is in substantial compliance with IV-D requirements as defined in Sec. 305.63 of this part; or

(3) Has submitted data that are determined to be complete and reliable.

(c) The payments for a fiscal year under title IV-A of the Act will be reduced by the following percentages:

(1) One to two percent for the first finding under paragraph (a) of this section;

(2) Two to three percent for the second consecutive finding; and

(3) Not less than three percent and not more than 5 percent for the third or a subsequent consecutive finding.

(d) The reduction will be made in accordance with the provisions of

45 CFR 262.1(b)-(e) and 262.7.

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PART 305 PROGRAM PERFORMANCE MEASURES, STANDARDS, FINANCIAL
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Sec. 305.63 Standards for determining substantial compliance with

IV-D requirements.

For the purposes of a determination under Sec. 305.61(a)(1)(iii) of this part, in order to be found to be in substantial compliance with one or more of the IV-D requirements as a result of an audit conducted under Sec. 305.60 of this part, a State must meet the standards set forth below for each specific IV-D State plan requirement or requirements being audited and contained in parts 302 and 303 of this chapter, measured as follows:

(a) The State must meet the requirements under the following areas:

(1) Statewide operations, Sec. 302.10 of this chapter;

(2) Reports and maintenance of records, Sec. 302.15(a) of this chapter;

(3) Separation of cash handling and accounting functions, Sec. 302.20 of this chapter; and

(4) Notice of collection of assigned support, Sec. 302.54 of this chapter.

(b) The State must provide services required under the following areas in at least 90 percent of the cases reviewed:

(1) Establishment of cases, Sec. 303.2(a) of this chapter; and

(2) Case closure criteria, Sec. 303.11 of this chapter.

(c) The State must provide services required under the following areas in at least 75 percent of the cases reviewed:

(1) Collection and distribution of support payments, including:
collection and distribution of support payments by the IV-D agency under Sec. 302.32(b) of this chapter; distribution of support collections under Sec. 302.51 of this chapter; and distribution of support collected in title IV-E foster care maintenance cases under Sec. 302.52 of this chapter;

(2) Establishment of paternity and support orders, including:
Establishment of a case under Sec. 303.2(b) of this chapter; services to individuals not receiving TANF or title IV-E foster care assistance, under Sec. 302.33(a)(1) through (4) of this chapter; provision of services in interstate IV-D cases under Sec. 303.7(a), (b) and (c)(1) through (6) and (c)(8) through (10) of this chapter; location of non-custodial parents under Sec. 303.3 of this chapter; establishment of paternity under Sec. 303.5(a) and (f) of this chapter; guidelines for setting child support awards under Sec. 302.56 of this chapter; and establishment of support obligations under Sec. 303.4(d), (e) and (f) of this chapter;

(3) Enforcement of support obligations, including, in all appropriate cases: establishment of a case under Sec. 303.2(b) of this chapter; services to individuals not receiving TANF or title IV-E foster care assistance, under Sec. 302.33(a)(1) through (4) of this chapter; provision of services in interstate IV-D cases under Sec. 303.7(a), (b) and (c)(1) through (6) and (c)(8) through (10) of this chapter; location

of non-custodial parents under Sec. 303.3 of this chapter; enforcement of support obligations under Sec. 303.6 of this chapter and State laws enacted under section 466 of the Act, including submitting once a year all appropriate cases in accordance with Sec. 303.6(c)(3) of this chapter to State and Federal income tax refund offset; and wage withholding under Sec. 303.100 of this chapter. In cases in which wage withholding cannot be implemented or is not available and the non-custodial parent has been located, States must use or attempt to use at least one enforcement technique available under State law in addition to Federal and State tax refund offset, in accordance with State laws and procedures and applicable State guidelines developed under Sec. 302.70(b) of this chapter;

(4) Review and adjustment of child support orders, including: Establishment of a case under Sec. 303.2(b) of this chapter; services to individuals not receiving TANF or title IV-E foster care assistance, under Sec. 302.33(a)(1) through (4) of this chapter; provision of services in interstate IV-D cases under Sec. 303.7(a), (b) and (c)(1) through (6) and (c)(8) through (10) of this chapter; location of

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non-custodial parents under Sec. 303.3 of this chapter; guidelines for setting child support awards under Sec. 302.56 of this chapter; and

review and adjustment of support obligations under Sec. 303.8 of this chapter; and

(5) Medical support, including: establishment of a case under Sec. 303.2(b) of this chapter; services to individuals not receiving TANF or title IV-E foster care assistance, under Sec. 302.33(a)(1) through (4) of this chapter; provision of services in interstate IV-D cases under Sec. 303.7(a), (b) and (c)(1) through (6) and (c)(8) through (10) of this chapter; location of non-custodial parents under Sec. 303.3 of this chapter; securing medical support information under Sec. 303.30 of this chapter; and securing and enforcing medical support obligations under Sec. 303.31 of this chapter; and

(6) Disbursement of support payments in accordance with the timeframes in section 454B of the Act and Sec. 302.32 of this chapter.

(d) With respect to the 75 percent standard in paragraph (b) of this section:

(1) Notwithstanding timeframes for establishment of cases in Sec. 303.2(b) of this chapter; provision of services in interstate IV-D cases under Sec. 303.7(a), (b) and (c)(4) through (6), (c)(8) and (9) of this chapter; location and support order establishment under Sec. 303.3(b)(3) and (5), and Sec. 303.4(d) of this chapter, if a support order needs to be established in a case and an order is established during the audit period in accordance with the State's guidelines for setting child support awards, the State will be considered to have taken

appropriate action in that case for audit purposes.

(2) Notwithstanding timeframes for establishment of cases in Sec. 303.2(b) of this chapter; provision of services in interstate IV-D cases under Sec. 303.7(a), (b) and (c)(4) through (6), and (c)(8) and (9) of this chapter; and location and review and adjustment of support orders contained in Sec. 303.3(b)(3) and (5), and Sec. 303.8 of this chapter, if a particular case has been reviewed and meets the conditions for adjustment under State laws and procedures and Sec. 303.8 of this chapter, and the order is adjusted, or a determination is made, as a result of a review, during the audit period, that an adjustment is not needed, in accordance with the State's guidelines for setting child support awards, the State will be considered to have taken appropriate action in that case for audit purposes.

(3) Notwithstanding timeframes for establishment of cases in Sec. 303.2(b) of this chapter; provision of services in interstate IV-D cases under Sec. 303.7 (a), (b) and (c) (4) through (6), and (c)(8) and (9) of this chapter; and location and wage withholding in Sec. 303.3(b) (3) and (5), and Sec. 303.100 of this chapter, if wage withholding is appropriate in a particular case and wage withholding is implemented and wages are withheld during the audit period, the State will be considered to have taken appropriate action in that case for audit purposes.

(4) Notwithstanding timeframes for establishment of cases in Sec. 303.2(b) of this chapter; provision of services in interstate IV-D cases

under Sec. 303.7 (a), (b) and (c) (4) through (6), and (c)(8) and (9) of this chapter; and location and enforcement of support obligations in Sec. 303.3(b) (3) and (5), and Sec. 303.6 of this chapter, if wage withholding is not appropriate in a particular case, and the State uses at least one enforcement technique available under State law, in addition to Federal and State income tax refund offset, which results in a collection received during the audit period, the State will be considered to have taken appropriate action in the case for audit purposes.

(e) The State must meet the requirements for expedited processes under Sec. 303.101(b)(2)(i) and (iii), and (e) of this chapter.

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PART 305_PROGRAM PERFORMANCE MEASURES, STANDARDS, FINANCIAL
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Sec. 305.66 Notice, corrective action year, and imposition of penalty.

(a) If a State is found by the Secretary to be subject to a penalty
as described in Sec. 305.61 of this part, the OCSE will notify the
State in writing of such finding.

(b) The notice will:

(1) Explain the deficiency or deficiencies which result in the State
being subject to a penalty, indicate the amount of the potential
penalty, and give reasons for the finding; and

(2) Specify that the penalty will be assessed in accordance with the
provisions of 45 CFR 262.1(b) through (e) and 262.7 if the State is
found to have failed to correct the deficiency or deficiencies cited in
the notice during the automatic corrective action year (i.e., the

succeeding fiscal year following the year with respect to which the deficiency occurred.)

(c) The penalty under Sec. 305.61 of this part will be assessed if the Secretary determines that the State has not corrected the deficiency or deficiencies cited in the notice by the end of the corrective action year.

(d) Only one corrective action period is provided to a State with respect to a given deficiency where consecutive findings of noncompliance are made with respect to that deficiency. In the case of a State against which the penalty is assessed and which failed to correct the deficiency or deficiencies cited in the notice by the end of the corrective action year, the penalty will be effective for any quarter after the end of the corrective action year and ends for the first full quarter throughout which the State IV-D program is determined to have corrected the deficiency or deficiencies cited in the notice.

(e) A consecutive finding occurs only when the State does not meet the same criterion or criteria cited in the notice in paragraph (a) of this section.

