# Ability to Pay (Self-Support Adjustment) and New Federal Requirements Relating to Low-Income Obligated Parents

*Submitted to:*
State of Minnesota Department of Human Services

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Points of view expressed in this document are those of the author and do not necessarily represent the official position of the Task Force, State or Court. The author is responsible for any errors and omissions.

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## PURPOSE

The purpose of this brief is review the ability-to-pay/self-support adjustment in the Minnesota child support guidelines. The topic is of concern because of new requirements of state guidelines imposed by the Flexibility, Efficiency, and Modernization Rule that was published December 2016.[1] Some of the new federal requirements address the treatment of low-income obligated parents in state child support guidelines.

The new requirements can be broken down into three areas.

- A state's guidelines must consider the basic subsistence needs of the [obligated parent] who has a limited ability to pay by incorporating a low-income adjustment, such as a self-support reserve;
- When imputing income, a state's guidelines must consider the specific circumstances of the [obligated parent] that may affect employability and earnings and also suggest 14 factors to consider that range from the obligated parent's health to the obligated parent's criminal record, and;
- A state's guidelines must provide that incarceration is not voluntary unemployment or underemployment for the purposes of setting a child support order.

States essentially have till the year after completing their next review commencing after 2016. Exhibit 1 provides excerpts of these federal requirements. Key phrases are highlighted in red font. The bottom half of Exhibit 1 also provides excerpts of new federal requirements that are not guidelines-specific but related (*i.e.*, the requirement to take reasonable steps to develop a factual basis of income for the determination of the support amount and the requirement about requests for reviews and incarceration.) Some states are incorporating these federal requirements into their state guidelines, albeit, it is not required.

This brief assesses whether Minnesota's current provisions fulfills the new federal requirements of state guidelines, summarizes relevant data from the case file review, and compares Minnesota's current approach to that of other states.

### EXHIBIT 1: FEDERAL REQUIREMENTS PERTAINING TO CHILD SUPPORT GUIDELINES (§ 302.56)

DECEMBER 2016 RULE (GUIDELINES REQUIREMENTS ARE EFFECTIVE AFTER NEXT QUADRENNIAL REVIEW

Within 1 year after completion of the State's next quadrennial review of its child support guidelines, that commences more than 1 year after publication of the final rule, in accordance with § 302.56(e), as a condition of approval of its State plan, the State must establish one set of child support guidelines by law or by judicial or administrative action for setting and modifying child support order amounts within the State that meet the requirements in this section.

… .

[1] U.S. Department of Health and Human Services. (Dec. 20, 2016). "Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs." *Federal Register*, Vol. 81, No. 244, p. 93562. https://www.gpo.gov/fdsys/pkg/FR-2016-12-20/pdf/2016-29598.pdf.

(c) The child support guidelines established under paragraph (a) of this section must at a minimum:
(1) Provide that the child support order is based on the noncustodial parent's earnings, income, and other evidence of ability to pay that:
… .
(ii) Takes 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; and
(iii) If imputation of income is authorized, takes into consideration the specific circumstances of the noncustodial parent (and at the State's discretion, the custodial parent) 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, prevailing earnings level in the local community, and other relevant background factors in the case.
… .
(3) Provide that incarceration may not be treated as voluntary unemployment in establishing or modifying support orders;

**Other Provisions of the New Federal Rule that Indirectly affect Low-Income Provisions of State Guidelines**

§303.4 Establishment of support obligations.
(b) Use appropriate State statutes, procedures, and legal processes in establishing and modifying support obligations in accordance with §302.56 of this chapter, which must include, at a minimum: (1) Taking reasonable steps to develop a sufficient factual basis for the support obligation, through such means as investigations, case conferencing, interviews with both parties, appear and disclose procedures, parent questionnaires, testimony, and electronic data sources; (2) Gathering information regarding the earnings and income of the noncustodial parent and, when earnings and income information is unavailable or insufficient in a case gathering available information about the specific circumstances of the noncustodial parent, including such factors as those listed under §302.56(c)(1)(iii) of this chapter; (3) Basing the support obligation or recommended support obligation amount on the earnings and income of the noncustodial parent whenever available. If evidence of earnings and income is unavailable or insufficient to use as the measure of the noncustodial parent's ability to pay, then the support obligation or recommended support obligation amount should be based on available information about the specific circumstances of the noncustodial parent, including such factors as those listed in §302.56(c)(1)(iii) of this chapter. (4) Documenting the factual basis for the support obligation or the recommended support obligation in the case record.

§303.8 Review and adjustment of child support orders. * * * * * (b) * * * (2) The State may elect in its State plan to initiate review of an order, after learning that a noncustodial parent will be incarcerated for more than 180 calendar days, without the need for a specific request and, upon notice to both parents, review, and if appropriate, adjust the order, in accordance with paragraph (b)(1)(i) of this section. * * * * *
(7) The State must provide notice— (i) Not less than once every 3 years to both parents subject to an order informing the parents of their right to request the State to review and, if appropriate, adjust the order consistent with this section. The notice must specify the place and manner in which the request should be made. The initial notice may be included in the order. (ii) If the State has not elected paragraph (b)(2) of this section, within 15 business days of when the IV–D agency learns that a noncustodial parent will be incarcerated for more than 180 calendar days, to both parents informing them of the right to request the State to review and, if appropriate, adjust the order, consistent with this section. The notice must specify, at a minimum, the place and manner in which the request should be made. Neither the notice nor a review is required under this paragraph if the State has a comparable law or rule that modifies a child support obligation upon incarceration by operation of State law. (c) * * * Such reasonable quantitative standard must not exclude incarceration as a basis for determining whether an inconsistency between the existing child support order amount and the amount of support determined as a result of a review is adequate grounds for petitioning for adjustment of the order.

Exhibit 2 provides excerpts from the current Minnesota child support guidelines relevant to the federal requirements. The reader should note that the Minnesota guidelines use the word, "potential income" when a parent is voluntarily unemployed or underemployed or there is no direct evidence of income. In contrast, the federal requirement refers to this as "income imputation." Many states limit the term, "income imputation" to refer to assigning income to an income-earning asset even though the earnings may not be realized until the asset is sold, although its purpose is to produce income later. Many states use "potential income," "presumed income," or "attributed income" when income is associated with earnings, such as when a parent is voluntarily unemployed or underemployed. The federal requirement aims to address at all sources of income, particularly earnings from work.

Minnesota's provision for potential income is excerpted in the first half of Exhibit 2. The bottom half of Exhibit 2 contains Minnesota's provision for ability-to-pay and the self-support adjustment. Incarceration is mentioned on the last line of Exhibit 2.

**Exhibit 2: Excerpts from Minnesota Child Support Guidelines**

518A.32 POTENTIAL INCOME

Subdivision 1.General. This section applies to child support orders, including orders for past support or reimbursement of public assistance, issued under this chapter, chapter 256, 257, 518B, or 518C. If a parent is voluntarily unemployed, underemployed, or employed on a less than full-time basis, or there is no direct evidence of any income, child support must be calculated based on a determination of potential income. For purposes of this determination, it is rebuttably presumed that a parent can be gainfully employed on a full-time basis. As used in this section, "full time" means 40 hours of work in a week except in those industries, trades, or professions in which most employers, due to custom, practice, or agreement, use a normal work week of more or less than 40 hours in a week.

Subd. 2.Methods.Determination of potential income must be made according to one of three methods, as appropriate:

(1) the parent's probable earnings level based on employment potential, recent work history, and occupational qualifications in light of prevailing job opportunities and earnings levels in the community;

(2) if a parent is receiving unemployment compensation or workers' compensation, that parent's income may be calculated using the actual amount of the unemployment compensation or workers' compensation benefit received; or

(3) the amount of income a parent could earn working 30 hours per week at 100 percent of the current federal or state minimum wage, whichever is higher.

Subd. 3.Parent not considered voluntarily unemployed, underemployed, or employed on a less than full-time basis.

A parent is not considered voluntarily unemployed, underemployed, or employed on a less than full-time basis upon a showing by the parent that:

(1) the unemployment, underemployment, or employment on a less than full-time basis is temporary and will ultimately lead to an increase in income;

(2) the unemployment, underemployment, or employment on a less than full-time basis represents a bona fide career change that outweighs the adverse effect of that parent's diminished income on the child; or

(3) the unemployment, underemployment, or employment on a less than full-time basis is because a parent is physically or mentally incapacitated or due to incarceration, except where the reason for incarceration is the parent's nonpayment of support.

Subd. 4.TANF recipient. If the parent of a joint child is a recipient of a temporary assistance to a needy family (TANF) cash grant, no potential income is to be imputed to that parent.

Subd. 5.Caretaker. If a parent stays at home to care for a child who is subject to the child support order, the court may consider the following factors when determining whether the parent is voluntarily unemployed, underemployed, or employed on a less than full-time basis:

(1) the parties' parenting and child care arrangements before the child support action;

(2) the stay-at-home parent's employment history, recency of employment, earnings, and the availability of jobs within the community for an individual with the parent's qualifications;

(3) the relationship between the employment-related expenses, including, but not limited to, child care and transportation costs required for the parent to be employed, and the income the stay-at-home parent could receive from available jobs within the community for an individual with the parent's qualifications;

(4) the child's age and health, including whether the child is physically or mentally disabled; and

(5) the availability of child care providers.
This subdivision does not apply if the parent stays at home only to care for other nonjoint children.
Subd. 6.Economic conditions. A self-employed parent is not considered to be voluntarily unemployed, underemployed, or employed on a less than full-time basis if that parent can show that the parent's net self-employment income is lower because of economic conditions that are directly related to the source or sources of that parent's income.

518A.42 ABILITY TO PAY; SELF-SUPPORT ADJUSTMENT.
Subdivision 1.Ability to pay.
(a) It is a rebuttable presumption that a child support order should not exceed the obligor's ability to pay. To determine the amount of child support the obligor has the ability to pay, the court shall follow the procedure set out in this section.
(b) The court shall calculate the obligor's income available for support by subtracting a monthly self-support reserve equal to 120 percent of the federal poverty guidelines for one person from the obligor's gross income. If the obligor's income available for support calculated under this paragraph is equal to or greater than the obligor's support obligation calculated under section 518A.34, the court shall order child support under section 518A.34.
(c) If the obligor's income available for support calculated under paragraph (b) is more than the minimum support amount under subdivision 2, but less than the guideline amount under section 518A.34, then the court shall apply a reduction to the child support obligation in the following order, until the support order is equal to the obligor's income available for support:
(1) medical support obligation;
(2) child care support obligation; and
(3) basic support obligation.
(d) If the obligor's income available for support calculated under paragraph (b) is equal to or less than the minimum support amount under subdivision 2 or if the obligor's gross income is less than 120 percent of the federal poverty guidelines for one person, the minimum support amount under subdivision 2 applies.
§ Subd. 2.Minimum basic support amount.
(a) If the basic support amount applies, the court must order the following amount as the minimum basic support obligation:
(1) for one or two children, the obligor's basic support obligation is $50 per month;
(2) for three or four children, the obligor's basic support obligation is $75 per month; and
(3) for five or more children, the obligor's basic support obligation is $100 per month.
(b) If the court orders the obligor to pay the minimum basic support amount under this subdivision, the obligor is presumed unable to pay child care support and medical support.
If the court finds the obligor receives no income and completely lacks the ability to earn income, the minimum basic support amount under this subdivision does not apply.
Subd. 3.Exception.This section does not apply to an obligor who is incarcerated.

## Do Minnesota's Current Provisions Fulfill the New Federal Requirements?

The Minnesota provisions are compared separately for each of the three new federal requirements of state guidelines affecting low-income parents:

- The basic subsistence needs of the [obligated parent];
- When imputing income, a state's guidelines must consider the specific circumstances of the [obligated parent], and;
- A state's guidelines must provide that incarceration is not voluntary unemployment or underemployment for the purposes of setting a child support order.

### Consideration of the Basic Subsistence Needs

Minnesota Statutes, section 518A.42 fulfill the federal requirement to consider the subsistence needs of the obligated parent. It specifically provides a monthly self-support reserve equal to 120 percent of the federal poverty guidelines for one person. The federal poverty guidelines are updated annually. The

updated amount is released in approximately February of each year. The 2018 federal poverty level for one person is $1,012 per month.

## Factors to Consider when Income Is Imputed

The Task Force may want to consider recommending edits to Minnesota Statutes, section 518A.32 to unambiguously consider the factors outlined in the federal requirements. As shown in Exhibit 3, to date, several states have already updated their guidelines since the 2016 federal requirements were released. Most have simply adopted the federal language to consider the 14 factors when imputing income. Those provisions are highlighted by red font. Red font is also used to highlight presumptions and findings of voluntary unemployment or underemployment.

**Exhibit 3: Excerpts from States that Recently Modified Their Income Imputation Provisions**

| State | Provision |
|---|---|
| MA | E. Attribution of Income 1. Income may be attributed where a finding has been made that either parent is capable of working and is unemployed or underemployed. 2. If the Court makes a determination that either parent is earning less than he or she could earn through reasonable effort, the Court should consider potential earning capacity rather than actual earnings in making its child support order. 3. The Court shall consider the age, number, needs and care of the children covered by the child support order. The Court shall also consider the specific circumstances of the parent, to the extent known and presented to the Court, including, but not limited to, the assets, residence, education, training, job skills, literacy, criminal record and other employment barriers, age, health, past employment and earnings history, as well as the parent's record of seeking work, and the availability of employment at the attributed income level, the availability of employers willing to hire the parent, and the relevant prevailing earnings level in the local community. |
| ND | 75-02-04.1-07. Imputing income based on earning capacity.<br>1. For purposes of this section:<br>a. "Earnings" includes in-kind income and amounts received in lieu of actual earnings, such as social security benefits, workers' compensation wage replacement benefits, unemployment insurance benefits, veterans' benefits, and earned income tax credits; and<br>b. An obligor is "underemployed" if the obligor's gross income from earnings is significantly less than this state's statewide average earnings for persons with similar work history and occupational qualifications.<br>2. An obligor is presumed to be underemployed if the obligor's gross income from earnings is less than the greater of:<br>a. Six-tenths of this state's statewide average earnings for persons with similar work history and occupational qualifications; or<br>b. A monthly amount equal to one hundred sixty-seven times the federal hourly minimum wage.<br>3. Except as provided in subsections 4, 5, 6, and 7, gross income based on earning capacity equal to the greatest of subdivisions a through c, less actual gross earnings, must be imputed to an obligor who is unemployed or underemployed.<br>a. A monthly amount equal to one hundred sixty-seven times the hourly federal minimum wage.<br>b. An amount equal to six-tenths of this state's statewide average earnings for persons with similar work history and occupational qualifications.<br>c. An amount equal to ninety percent of the obligor's greatest average gross monthly earnings, in any twelve consecutive months included in the current calendar year and the two previous calendar years before commencement of the proceeding before the court, for which reliable evidence is provided.<br>4. Monthly gross income based on earning capacity may not be imputed under subsection 3 if:<br>a. The reasonable cost of child care equals or exceeds seventy percent of the income which would otherwise be imputed where the care is for the obligor's child:<br>(1) For whom the obligor has primary residential responsibility;<br>(2) Who is under the age of thirteen; and<br>(3) For whom there is no other adult caretaker in the obligor's home available to meet the child's needs during absence due to employment.<br>b. Current medical records confirm the obligor suffers from a disability sufficient in severity to reasonably preclude the obligor from gainful employment that produces average monthly gross earnings equal to at least one hundred sixty-seven times the hourly federal minimum wage. |

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| | c. The unusual emotional or physical needs of a minor child of the obligor require the obligor's presence in the home for a proportion of the time so great as to preclude the obligor from gainful employment that produces average monthly gross earnings equal to one hundred sixty-seven times the hourly federal minimum wage.<br>d. The obligor has average monthly gross earnings equal to or greater than one hundred sixty-seven times the hourly federal minimum wage and is not underemployed.<br>e. The obligor is under eighteen years of age or is under nineteen years of age and enrolled in and attending high school.<br>f. The obligor is receiving:<br>(1) Supplemental security income payments;<br>(2) Social security disability payments;<br>(3) Workers' compensation wage replacement benefits;<br>(4) Total and permanent disability benefits paid by the railroad retirement board;<br>(5) Pension benefits, as defined in subsection 9, paid by the veterans benefits administration; or<br>(6) Disability compensation paid by the veterans benefits administration based on an overall disability rating of one hundred percent. g. It has been less than one hundred eighty days since the obligor was released from incarceration under a sentence of at least one hundred eighty days.<br>h. The obligor is incarcerated under a sentence of one hundred eighty days or longer, excluding credit for time served before sentencing.<br>5. If an unemployed or underemployed obligor shows that employment opportunities, which would provide earnings at least equal to the lesser of the amounts determined under subdivision b or c of subsection 3, are unavailable within one hundred miles [160.93 kilometers] of the obligor's actual place of residence, income must be imputed based on earning capacity equal to the amount determined under subdivision a of subsection 3, less actual gross earnings. 6. If the obligor fails, upon reasonable request made in any proceeding to establish or review a child support obligation, to furnish reliable information concerning the obligor's gross income from earnings, and if that information cannot be reasonably obtained from sources other than the obligor, income must be imputed based on the greatest of:<br>a. A monthly amount equal to one hundred sixty-seven times the hourly federal minimum wage.<br>b. An amount equal to one hundred percent of this state's statewide average earnings for persons with similar work history and occupational qualifications.<br>c. An amount equal to one hundred percent of the obligor's greatest average gross monthly earnings, in any twelve consecutive months included in the current calendar year and the two previous calendar years before commencement of the proceeding before the court, for which reliable evidence is provided.<br>7. Notwithstanding subsections 4, 5, and 6, if an obligor makes a voluntary change in employment resulting in reduction of income, monthly gross income equal to one hundred 10 percent of the obligor's greatest average monthly earnings, in any twelve consecutive months included in the current calendar year and the two previous calendar years before commencement of the proceeding before the court, for which reliable evidence is provided, less actual monthly gross earnings, may be imputed without a showing that the obligor is unemployed or underemployed. For purposes of this subsection, a voluntary change in employment is a change made for the purpose of reducing the obligor's child support obligation and may include becoming unemployed, taking into consideration the obligor's standard of living, work history, education, literacy, health, age, criminal record, barriers to employment, record of seeking employment, stated reason for change in employment, likely employment status if the family before the court were intact, and any other relevant factors. The burden of proof is on the obligor to show that the change in employment was not made for the purpose of reducing the obligor's child support obligation.<br>8. Imputed income based on earning capacity is an example of gross income and is subject to the deductions from gross income set forth in subsection 6 of section 75-02-04.1-01.<br>9. For purposes of paragraph 5 of subdivision f of subsection 4, "pension benefits" means only needs-based payments made by the veterans benefits administration to war-time veterans whose income is below a yearly limit set by Congress and who are age sixty-five or older or have a total and permanent disability. |
| RI | *Imputed Income*. If the Court, within its discretion, decides to impute income in a particular case, the Court shall take into consideration the specific circumstances of the noncustodial parent and the custodial parent 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, prevailing earnings level in the local community, and other relevant background factors in the case. |

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| UT | 8)(a)Income may not be imputed to a parent unless the parent stipulates to the amount imputed, the parent defaults, or, in contested cases, a hearing is held and the judge in a judicial proceeding or the presiding officer in an administrative proceeding enters findings of fact as to the evidentiary basis for the imputation.<br>(b)If income is imputed to a parent, the income shall be based upon employment potential and probable earnings considering, to the extent known:<br>(i)employment opportunities;<br>(ii)work history;<br>(iii)occupation qualifications;<br>(iv)educational attainment;<br>(v)literacy;<br>(vi)age;<br>(vii)health;<br>(viii)criminal record;<br>(ix)other employment barriers and background factors; and<br>(x)prevailing earnings and job availability for persons of similar backgrounds in the community.<br>(c)If a parent has no recent work history or a parent's occupation is unknown, that parent may be imputed an income at the federal minimum wage for a 40-hour work week. To impute a greater or lesser income, the judge in a judicial proceeding or the presiding officer in an administrative proceeding shall enter specific findings of fact as to the evidentiary basis for the imputation.<br>(d)Income may not be imputed if any of the following conditions exist and the condition is not of a temporary nature:<br>(i)the reasonable costs of child care for the parents' minor children approach or equal the amount of income the custodial parent can earn;<br>(ii)a parent is physically or mentally unable to earn minimum wage;<br>(iii)a parent is engaged in career or occupational training to establish basic job skills; or<br>(iv)unusual emotional or physical needs of a child require the custodial parent's presence in the home. |
| WI[2] | Calculation of Income Imputed Based on Earning Capacity<br>Instructions: If the parent's income is less than the parent's earning capacity or is unknown, the court may impute income at an amount that represents the parent's ability to earn, based on the parent's education, training and recent work experience, earnings during previous periods, current physical and mental health, history of child care responsibilities as the parent with primary physical placement, and the availability of work in or near the parent's community. If evidence is presented that due diligence has been exercised to ascertain information on the parent's actual income or ability to earn and that information is unavailable, the court may impute income of 35 hours per week at the federal minimum hourly wage. |

Exhibit 3 illustrates a wide range of approaches to when income is actually imputed. At one extreme is Massachusetts that provides that wages may imputed (attributed) based on a finding of voluntary under-employment. At the extreme end is North Dakota that provides a presumption of voluntary underemployment if the parent's earnings are a certain-percentage below average earnings for the parent's occupation, as reported in state wage data. One possible explanation for the extreme differences between the approaches of Massachusetts and North Dakota is that Massachusetts sets its guidelines in court rule so may be more comfortable with more court discretion than North Dakota, where the child support agency draft guidelines changes.

Ultimately, which approach a state adopts is a policy decision.

[2] It is not entirely clear whether Wisconsin modified its income imputation provisions since January 2017; however, Wisconsin did modify its low income adjustment since then.

## Treatment of Income to Incarcerated Parent

The Task Force may want to recommend striking Minnesota Statutes, section 518A.42 Subd. 3. "Exception. This section does not apply to an obligor who is incarcerated" and clearly stating that incarceration may not be treated as voluntary unemployment or underemployment in establishing or modifying support orders. Although the Minnesota sentence does not explicitly presume an incarcerated parent is voluntarily unemployed or underemployed, it does not provide specific detail on the determination of income for a parent who is incarcerated. The sentence appears to prohibit the application of the ability-to-pay calculation/self-support adjustment to an incarcerated parent. However, if the parent is incarcerated and has income in the range of $0 to $799 and the custodial parent has no income, the table amount for $0 to $799 are the same as the minimum order, as provided in ability-to-pay calculation/self-support adjustment. (See Exhibit 4, which shows the excerpted first line of the table.) In other words, a minimum order may be applied to an obligated parent who is incarcerated anyway.

**Exhibit 4: Excerpt from Minnesota Child Support Table**

| Combined Parental Income for Determining Child Support | One | Two | Three | Four | Five | Six |
|---|---|---|---|---|---|---|
| $0- $799 | $50 | $50 | $75 | $75 | $100 | $100 |

Exhibit 5 shows how other states are meeting the federal requirement. Utah and North Dakota essentially adopted the language of the federal requirement. Massachusetts essentially provides a codification of case law. It is not clear why Rhode Island only applies the provision to modification actions. It may be that Rhode Island does not establish orders for incarcerated parents. Some states do not establish an order when the parent is incarcerated.

**Exhibit 5: Excerpts from States that Recently Modified Their Income Imputation Provisions of Incarcerated Parents**

| State | Provision |
|---|---|
| MA | E. Attribution of Income The Task Force reorganized and refined this section for clarification and to distinguish attributed income from imputed income. Income is attributed to a parent when the Court determines a parent is capable of earning more than is currently being earned and assigns a hypothetical amount of income to the parent. The Task Force, in consideration of the January 2017 changes to 45 C.F.R. § 302.56 (c) (2017), revised the factors to be considered when attributing income to a parent. In P.F. v. Department of Revenue, 90 Mass. App. Ct. 707 (2016), the Appeals Court addressed attribution of income where the payor is incarcerated. "'Income may be attributed where a finding has been made that [the payor] is capable of working and is unemployed or underemployed,' . . . or where the payor owns 'substantial assets.'" P.F. v. Department of Revenue, 90 Mass. App. Ct. 707, 710 (2016) (quoting Wasson v. Wasson, 81 Mass. App. Ct. 574, 581 (2012), quoting from Flaherty v. Flaherty, 40 Mass. App. Ct. 289, 291 (1996)). However, where there is "no income or assets from which to pay child support", the Court may not attribute income to the payor based on the payor's prior earning capacity, even if the payor is incarcerated due to committing a crime against the child for whom child support is being paid. P.F. v. Department of Revenue, 90 Mass. App. Ct. 707, 710-11 (2016). |
| ND | 4. Monthly gross income based on earning capacity may not be imputed under subsection 3 if:<br>… .<br>g. It has been less than one hundred eighty days since the obligor was released from incarceration under a sentence of at least one hundred eighty days.<br>h. The obligor is incarcerated under a sentence of one hundred eighty days or longer, excluding credit for time served before sentencing. |
| RI | *Incarceration.* Incarceration considered by itself, may not be treated as voluntary unemployment for purposes of preventing someone from filing a motion to modify a child support order or denying a motion to modify. However, circumstances surrounding the incarceration of the obligor may be considered with all other factors and |

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| | circumstances related to the incarcerated obligor's ability to pay support and any other equitable considerations relevant to the specific circumstances of the case. |
| UT | 6) Incarceration of at least six months may not be treated as voluntary unemployment by the office in establishing or modifying a support order. |

## Relevant Findings from the Case File Data

The August briefing including findings from case file data collected from orders that were modified or established in 2015 and tracked on the Department of Human Services Child Support Enforcement Division (CSED) automated system. The data included a code indicating institutionalization of the obligated parent at a facility. Most appear to be Minnesota Department of Correction facilities, but there are also county jails and regional facilities, and what appears to be federal prisons. CPR's understanding is that the code would be populated if the obligated parent was institutionalized during the order establishment or became institutionalized before the data were extracted in 2017. The code indicates that 9.4 percent of obligated parents with newly established orders were institutionalized within this timeframe.

Exhibits 6, 7, 8 and 9 examine payment patterns among newly established orders; specifically, how payment patterns vary by the obligated parent's income for those with incomes less than $3,000 gross per month. A caveat to the analysis is that data on the guidelines income used to calculate the support amount were not readily available. Instead, quarterly wage data from 2015 and 2016 were used and converted to monthly amounts.

Exhibit 6 provides a scattergram examining the correlation between the gross monthly income of the obligated parent and the total amount paid in calendar year 2016. The red dotted lines illustrate two different patterns.

- The vertical line at zero income indicates that some obligated parents with zero income actually make payments. This may be because they actually have income. Quarterly wage data would show zero income if the parent works for an employer who is not required to report income to the state department of labor or the parent's income is unreported for another reason.
- The sloped line indicates that payments increase as income increases.

Exhibit 7 examines the number of months with payments in calendar year 2016 by the obligated parent's income. It shows that few parents with lower incomes pay all 12 months (as indicated by the few dots at 12) and that as income increases more parents pay all 12 months (as indicated by the solid blue line at 12 months once income exceeds about $1,500 per month).

Exhibit 7 also shows, however, that there is a lot of variation in the number of months paid at any income level. The only combination that appears infrequently is low-income parents (*e.g.*, incomes of around $500 per month) paying six or more months in calendar year 2016.

Exhibit 6: Relationship between Amount Paid and Obligated Parent's Income

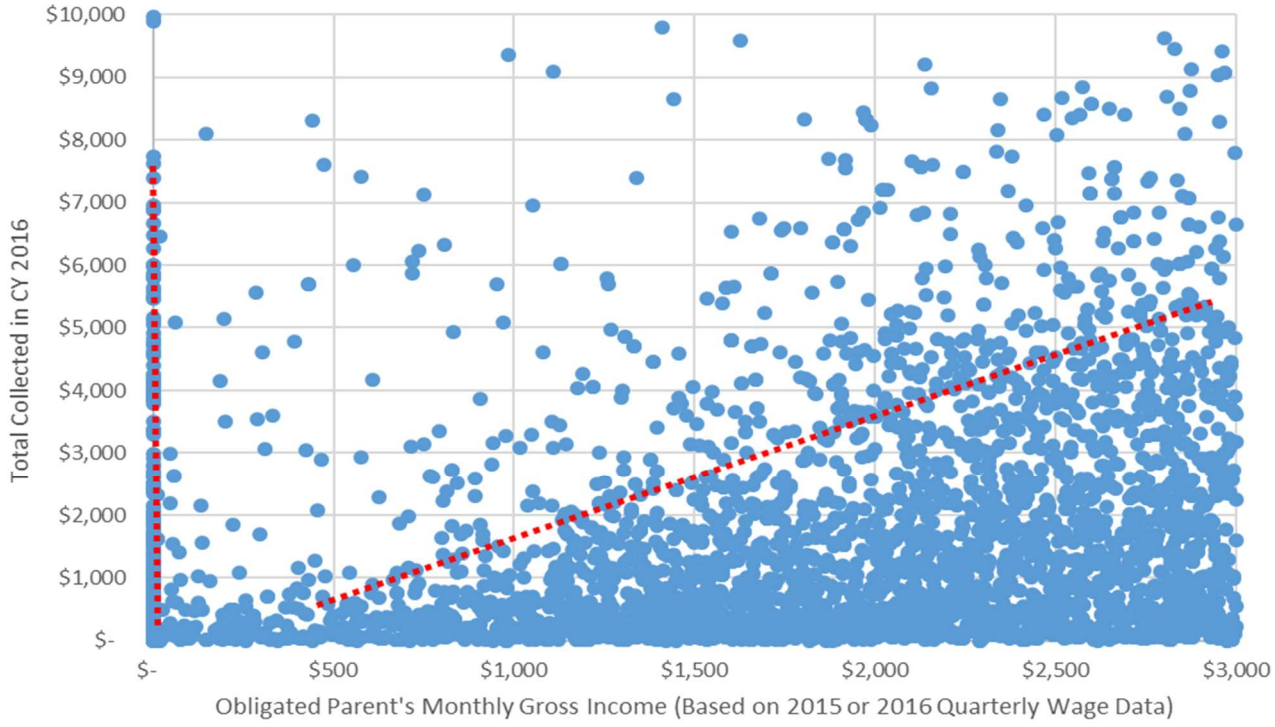



Exhibit 7: Relationship between Number of Months with Payment and Obligated Parent's Income

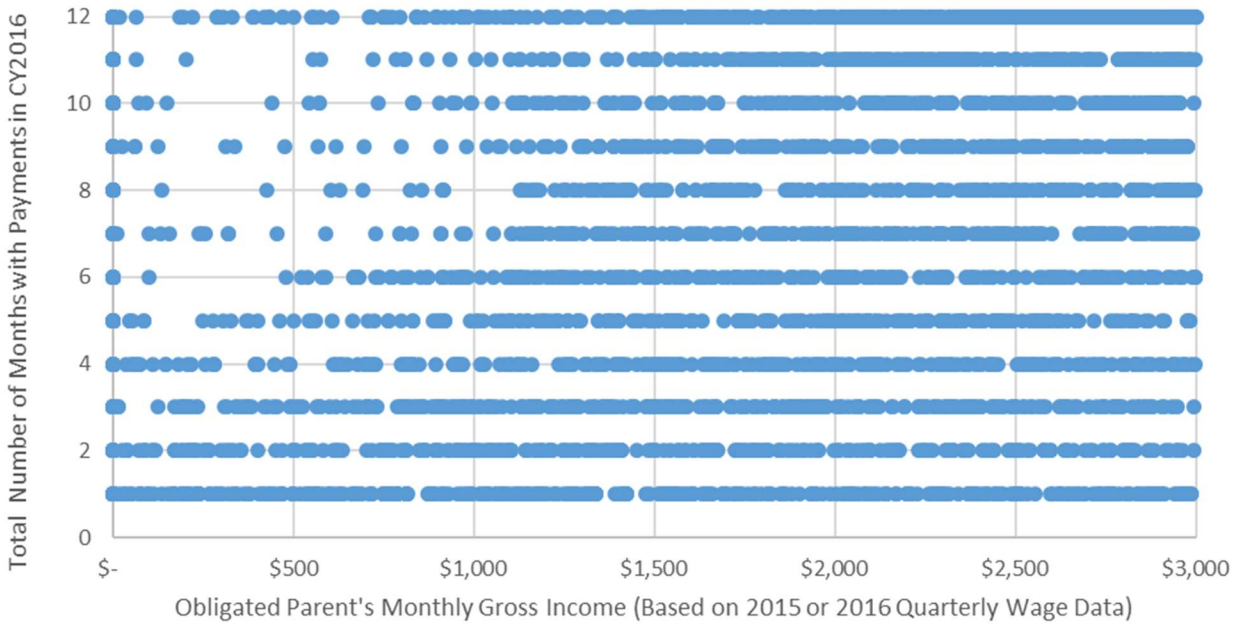


Exhibit 8 examines the percentage of support due that was paid in calendar year 2016. It shows that at higher incomes, there are more obligated parents paying 100 percent or nearly 100 percent of their obligation. (This is illustrated by the larger number of dots in the upper-right corner that appear almost solid.) However, as illustrated by the horizontal lines formed by the concentration of dots at 0 percent and 100 percent, there are still many obligated parents who pay nothing or all of what they owe regardless of their income level.

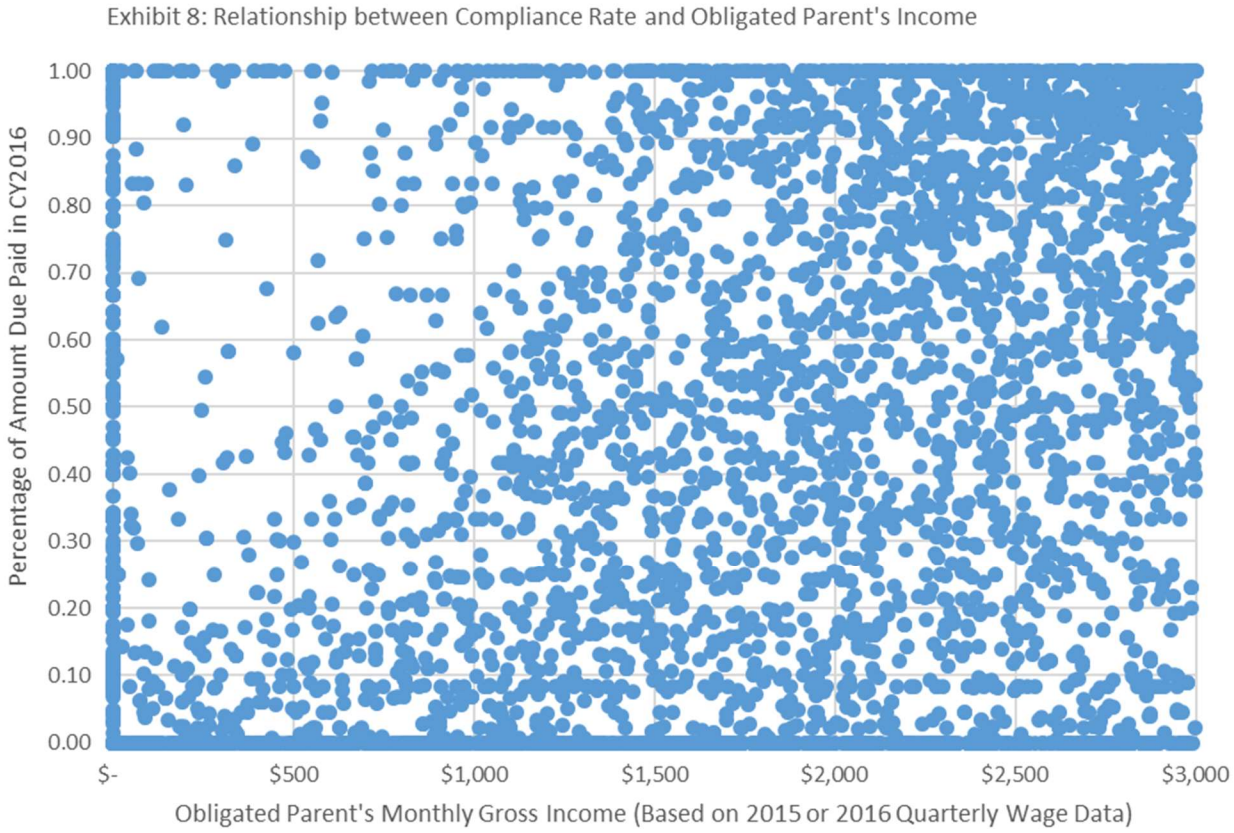
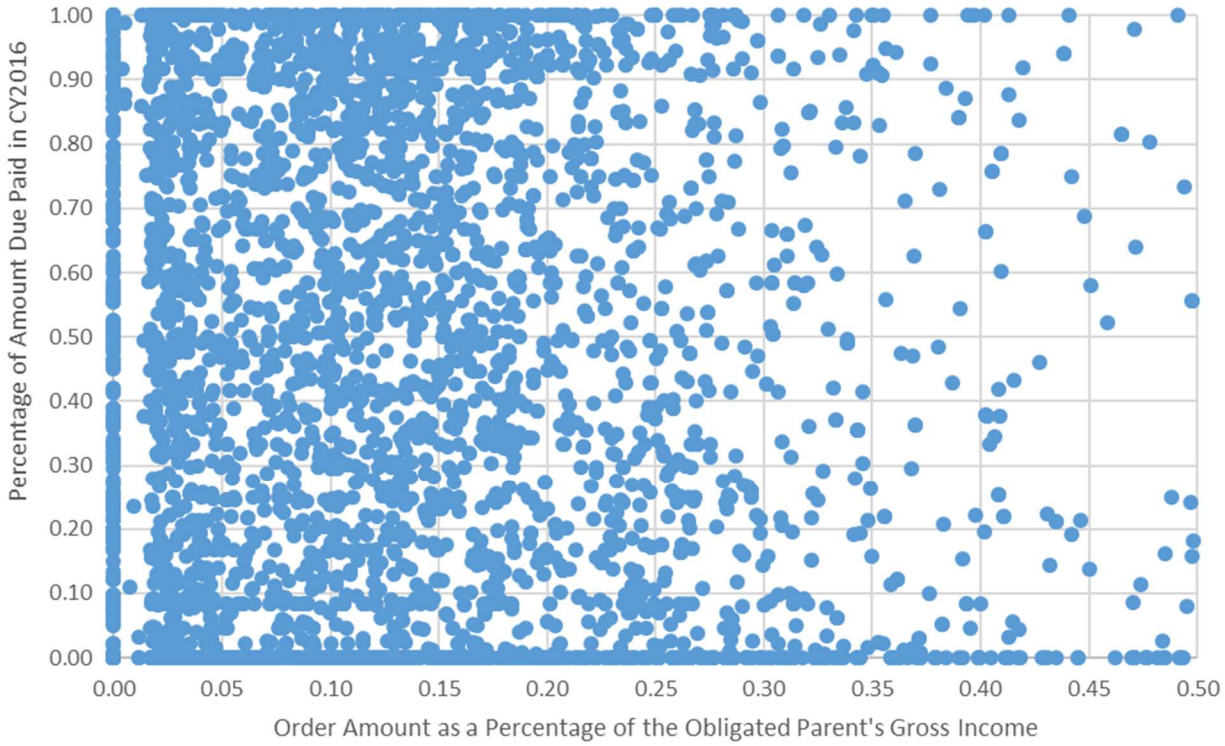



Exhibit 9 also examines the relationship between compliance and income only it considers the order amount as a percentage of obligated parent's gross income. Several studies cited by the federal Office of Child Support Enforcement in the proposed and final Modernization Rule found a correlation between nonpayment and child support orders of 20 percent or more of an obligated parent's gross income.

Exhibit 9 does not support that pattern. It shows a heavy concentration of orders of less than 20 percent of the obligated parent's income, but the percentage paid is either concentrated at zero payment, 100 percent payment, or scattered somewhere in between. In other words, there is a large variation in the percentage paid. Exhibit 9 also shows less concentration of orders exceeding 25 percent of the obligated parent's gross income.

Exhibit 9: Relationship between Compliance Rate and Order Amount as a Percentage of Obligated Parent's Income




## Ability-to-Pay/Self-Support Adjustment in Other States

Only a few states have made changes to their guidelines since the new federal rule was promulgated. States do not have to meet the new federal requirements of state guidelines until the year after completing their next review. States are required to review their guidelines at least once every four years.

Nonetheless, most state guidelines currently provide some sort of adjustment for low-income, obligated parents, albeit it is not always transparent or obvious. A self-support reserve (SSR) adjustment is the most common approach. There are many variations of it, so it looks different from state to state and is not always obvious. Most states with a SSR adjustment incorporate the adjustment into their child support table. The major advantage to incorporating into the child support table is that it is easier to calculate. The major disadvantage is it is not transparent or obvious. Given that it is a new federal requirement, it makes sense to make the SSR adjustment transparent and obvious, as Minnesota does.

Minnesota has one of the better SSR adjustments because:

- It is indexed to the federal poverty level; and
- It is clear how to handle add-ons for childcare and other expenses in the SSR test.

In contrast, most states set their SSR at the federal poverty level in the year that the state guidelines were last review and do not update it until the next review. Also, most states using the SSR apply it before add-ons for childcare and other expenses. The end result is that the obligated parent's share of the child care expenses can be large enough to void the impact of the SSR (*e.g.*, the obligated parent's share of child care expenses is $500 per month and the obligated parent's gross income is $1,500 per month; hence, the obligated parent's income remaining income after paying his share of the childcare expense is $1,000 per month, which is less than the SSR.)

Most states with a low-income adjustment that is not based on a SSR rely on a sliding percentage of dollar scale. This method is more common among percentage-of-obligor income guidelines. North Dakota and Wisconsin, two states that border Minnesota that also have percentage-of-obligor income guidelines, both use sliding scales.

## Possible Changes to Minnesota's SSR

As stated earlier, the Minnesota ability-to-pay/self-support adjustment fulfills the new federal requirement and is one of the better low-income adjustments among states. There are, however, at least three possible changes the Task Force could consider:

- The amount of the SSR;
- Whether to extend the application to the other parent; and
- The amount of the minimum order.

### Amount of the Self-Support Reserve

Besides Minnesota, seven other states (*i.e.*, Delaware, District of Columbia, Nebraska, New Jersey, Oregon, Washington, and New York) index their self-support reserve to the federal poverty level (FPL) for one person. Besides Minnesota, four other states use more than 100 percent of the FPL:

- New Jersey uses 105 percent of the FPL and compares it to the obligated parent's net income, which is the basis of its table;
- Oregon uses 116.7 percent of the FPL and compares it to the obligated parent's gross income, which is the basis of its table;
- Washington uses 125 percent of the FPL and compares it to the obligated parent's net income, which is the basis of its table; and
- New York uses 135 percent of the FPL and compares it to the obligated parent's gross income (less FICA), which is the basis of its formula.

Oregon is the only state to explain the rationale of its percentage increase. It increases the FPL by 116.7 percent to adjust for taxes since the FPL is an after-tax amount. For Minnesota, the comparable percentage would be about 110 percent considering 2018 federal and state income tax rates and FICA.

A few other states have self-support reserves or low-income adjustments more than the 2018 FPL, but none are more than 135 percent of the FPL (which is what New York uses). Further, none are tied to alternative measure, rather they are just dollar amounts that are not updated annually.

## Providing a Self-Support Reserve for Both Parents

The new federal rule provides that a state has discretion to provide a SSR for each parent. Exhibit 6 illustrates how a SSR could be applied to both parents. The adjustment is for appearance and to provide information that could be used by a judge or official with the authority to issue a child support order would reduce the custodial parent's income to a level at which the application of the SSR to the obligated parent would be unjust and not in the children's best interest. For example, New Jersey provides that the SSR adjustment not be applied if the custodial parent's household income is reduced below 105 percent of the federal poverty level for a family size equivalent to the number of children for whom support is being determined plus one (for the custodial parent).

**Exhibit 4: Illustration of How the SSR Can Be Applied to Both Parents**

| Lines from Current Worksheet | Parent A | Parent B | Combined |
|---|---|---|---|
| Line 1f. Monthly Gross Income | $1,500 | $1,500 | $3,000 |
| Line 3: Percentage Share of Income | 50% | 50% | |
| Line 5: Basic Child Support Obligation (table amt for 2 children) | | | $975 |
| Line 6: Pro Rata Basic Support Obligation | $472.50 | $472.50 | |
| Line 14: Total Child Support Obligation (after adjustments for medical support and other adjustments) | $472.50 | $472.50 | |
| NEW LINE: Self-Support Reserve (120% FPL = $1,214/mo) | $1,214 | $1,214 | |
| Line 15b: Income Available for Support (Line 1f minus above line) | $286 | $286 | |
| Line 21. Monthly Child Support Obligation after Adjustment (Lower of Line 14 and Line 15b) | $286 | $286 | |
| Line 22a. Presumptive Minimum Order | $50 | $50 | |
| NEW LINE: Order Amount (higher of Line 21 and Line 22a) | $286 | $286 | |

## Minimum Order and Zero Orders

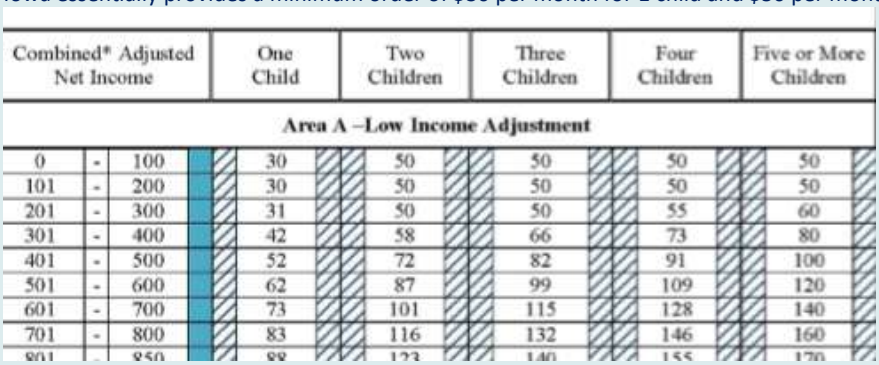
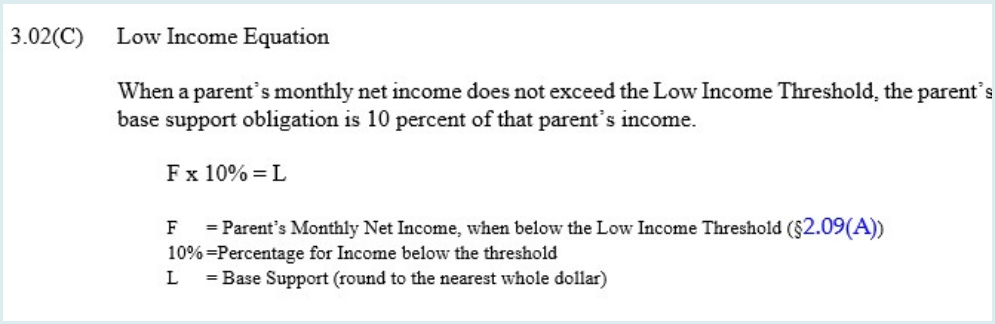
Whether to have a minimum order, and if so, the amount of the minimum order are policy decisions. Most states with a SSR, provide a minimum order if income is below the SSR, which is what Minnesota does, or provide it is $0, which is what North Dakota effectively does.

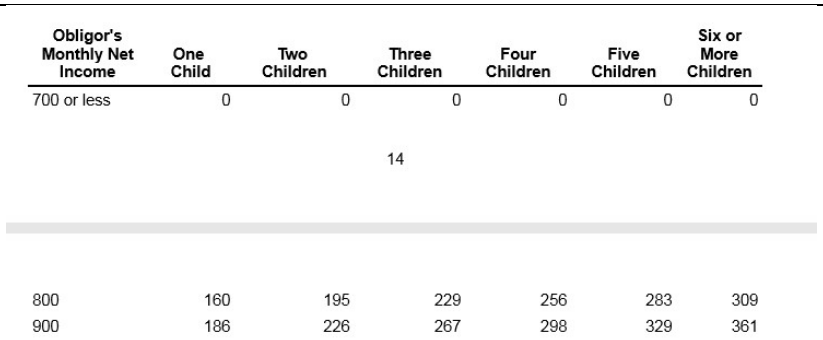
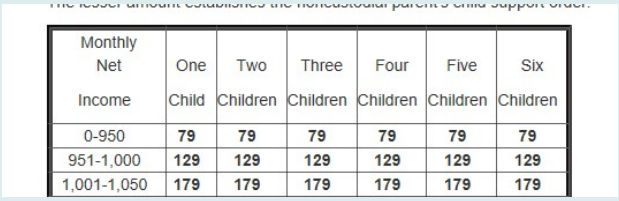
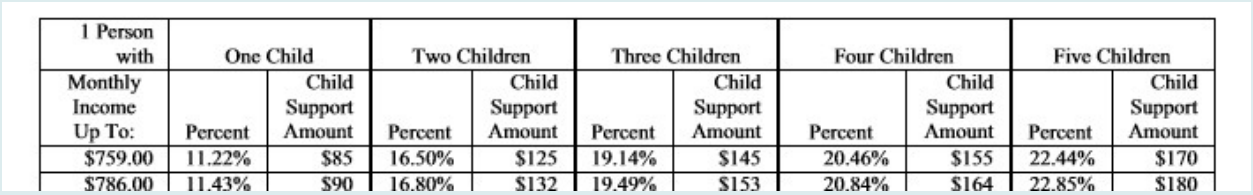
Several of Minnesota's bordering states provide a guidelines amount of zero when the obligated parent's income is zero. Michigan, Montana, North Dakota, and Wisconsin effectively provide for an zero order if the guidelines income is zero. For zero incomes,

- Iowa provides a minimum order of $30 or $50 per month depending on the number of children;
- Nebraska provides a minimum order of $50 per month; and
- South Dakota provides a minimum order of $70 per month.

Exhibit 10 provides more detail about these states' minimum orders.

**Exhibit 10: Minimum Orders in Neighboring States or States that Updated Their Guidelines Post-Modernization Rules**

| State | Effective Minimum Order Amount |
|---|---|
| IA | Iowa essentially provides a minimum order of $30 per month for 1 child and $50 per month for 2 or more children.<br>  |
| MA | • Min. order: $25/wk ($108/mo)<br>• SSR: $115/wk ($498/mo), not stated, is implicit |
| MI | MI essentially provides for a minimum order of 10% of after-tax income<br>  |
| MT | *Montana essentially provides a sliding-scale minimum order*<br>RULE 15: MINIMUM SUPPORT OBLIGATION (ARM 37.62.126) (1) A specific minimum contribution toward child support should be ordered in all cases when the parent's income, after deductions, is less than or equal to the parent's personal allowance or the parent's calculated child support obligation is less than 12% of that parent's income after deductions. (a) For parents whose income, as defined in ARM 37.62.105 and 37.62.106, after deductions, as defined in ARM 37.62.110, is less than or equal to the parent's personal allowance, the minimum contribution is a portion of the income after deductions and is determined by applying the table in (3) as follows: … |
| NE | 4-209. Minimum support.<br>It is recommended that even in very low income cases, a minimum support of $50, or 10 percent of the obligor's net income, whichever is greater, per month be set. This will help to maintain information on such obligor, such as his or her address, employment, etc., and, hopefully, encourage such person to understand the necessity, duty, and importance of supporting his or her children. |
| ND | • Min order: $0<br>• SSR: $700/mo, not stated, is implicit<br>• Also deviation criterion |

| | |
|---|---|
| |  <br>**Obligor's Monthly Net Income** / **One Child** / **Two Children** / **Three Children** / **Four Children** / **Five Children** / **Six or More Children**<br>700 or less: 0 / 0 / 0 / 0 / 0 / 0<br>14<br>800: 160 / 195 / 229 / 256 / 283 / 309<br>900: 186 / 226 / 267 / 298 / 329 / 361 |
| SD | SD essentially provides a minimum order if $79 per month.<br>  <br>The lesser amount establishes the noncustodial parent's child support order.<br>Monthly Net Income / One Child / Two Children / Three Children / Four Children / Five Children / Six Children<br>0-950: **79** / **79** / **79** / **79** / **79** / **79**<br>951-1,000: **129** / **129** / **129** / **129** / **129** / **129**<br>1,001-1,050: **179** / **179** / **179** / **179** / **179** / **179** |
| RI | • Min. order: $50/mo in chart; not stated, rather is implicit<br>• SSR: $1,005 (2017 FPL for 1 person)– states that it is incorporated into chart |
| WI | Excerpt from WI's low-income table<br>  <br>1 Person with Monthly Income Up To: / One Child: Percent, Child Support Amount / Two Children: Percent, Child Support Amount / Three Children: Percent, Child Support Amount / Four Children: Percent, Child Support Amount / Five Children: Percent, Child Support Amount<br>$759.00: 11.22% $85 / 16.50% $125 / 19.14% $145 / 20.46% $155 / 22.44% $170<br>$786.00: 11.43% $90 / 16.80% $132 / 19.49% $153 / 20.84% $164 / 22.85% $180 |

## SUMMARY OF RECOMMENDED CONSIDERATIONS

This brief recommends that the Task Force consider the following questions.

- *How to fulfill the new federal requirement on income imputation?*

  At a minimum, this brief recommends that Minnesota adopt the language naming the 14 factors in the federal requirements. The Task Force may also want to consider how to make a determination of voluntary unemployment/underemployment (*e.g.*, Massachusetts provides for a finding and North Dakota provides for a presumption based on a quantitative comparison to labor data) and whether the guidelines should prescribe what wage and hours per week worked to be presumed when income imputation is appropriate.

- *How to fulfill the new federal requirement limiting income imputation to incarcerated parents?*

  At a minimum, this brief recommends striking the existing sentence about incarcerated parents in the guidelines and inserting a provision identical to the federal requirement. The Task Force may also want to consider providing some time after release, as North Dakota does, when limiting income imputation.

- *Whether any changes to the ability-to-pay calculation/self-support adjustment are warranted; and, if so, what should they be (e.g., change to the SSR amount, providing that the SSR applies to the custodial parent as well, and provision of a zero order)?*