

WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #2

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NOTICE OF A COMMENT PERIOD ON A PROPOSED RULE

AGENCY: Department of Human Services TITLE NUMBER: 78

RULE TYPE: LEGISLATIVE; CITE AUTHORITY WVC §48A-2-8

AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 16

TITLE OF RULE BEING AMENDED: Guidelines for Child Support Awards

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: _____

TITLE OF RULE BEING PROPOSED: _____

IN LIEU OF A PUBLIC HEARING, A COMMENT PERIOD HAS BEEN ESTABLISHED DURING WHICH ANY INTERESTED PERSON MAY SEND COMMENTS CONCERNING THESE PROPOSED RULES. THIS COMMENT PERIOD WILL END ON December 7, 1987 AT 12:00 PM

ONLY WRITTEN COMMENTS WILL BE ACCEPTED AND ARE TO BE MAILED TO THE FOLLOWING ADDRESS.

Sandra K. Gilmore

Child Advocate Office

1900 Washington Street, East

Charleston, WV 25305

THE ISSUES TO BE HEARD SHALL BE LIMITED TO THIS PROPOSED RULE.



Sandra K. Gilmore, Director
Child Advocate Office

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

BRIEF SUMMARY OF RULE CONTENT

This rule discusses the requirements which the legislature established for the Child Advocate Office to consider in writing the child support guidelines and then a written description of the guidelines with an accompanying appendix of a guidelines worksheet.

WEST VIRGINIA LEGISLATIVE RULE
DEPARTMENT OF HUMAN SERVICES
CHAPTER 48A-2-8
SERIES 16

TITLE: Guidelines for Child Support Awards

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CLERK OF COURT

WEST VIRGINIA LEGISLATIVE RULE
DEPARTMENT OF HUMAN SERVICES
CHAPTER 48A-2-8
SERIES 16

Title: Guidelines for Child Support Awards

Section 1. General

- 1.1 Scope--This legislative rule establishes guidelines for child support award amounts so as to ensure greater uniformity by those persons who make child support recommendations and enter child support orders and to increase predictability for parents, children, and other persons who are directly affected by child support orders.
- 1.2 Authority and Related Code Citation--West Virginia Code §48A-2-8, 42 U.S.C. §667, 45 C.F.R. §302.56.
- 1.3 Filing Date--
- 1.4 Effective Date--
- 1.5 Repeal of Former Rule--This legislative rule repeals the following West Virginia Legislative Rule: "Department of Human Services, Series 16, Guidelines for Child Support Awards," filed September 23, 1987.

Section 2. Guidelines for Child Support Awards

- 2.1 Federal law (42 U.S.C. §667) requires each state to develop guidelines for establishing amounts of child support obligations. The guidelines must be made available to all persons in the State who set child support award amounts, i.e., all Circuit Court Judges and Family Law Masters.
- 2.2 West Virginia Code §48A-2-8 requires guidelines for child support award amounts to insure greater uniformity by those persons recommending and entering child support orders and to increase the predictability for parents, children and other persons who are directly affected by child support orders. The guidelines must be

followed by the Child Advocate Office, Family Law Master and Circuit Court Judge unless they set forth in writing reasons for not following the guidelines in the particular case involved.

2.3 West Virginia Code §48A-2-8 also establishes criteria to be considered in formulating the guidelines. These are as follows:

1. In order to insure that children properly share in their parents' resources, the guidelines shall provide that, after a consideration of respective parental incomes, child support will be related to the level of living which the children would enjoy if they were living in a household with both parents present.
2. The guidelines shall take into consideration the financial contribution of both parents. They are to provide for examining the financial contributions of both parents in relationship to total income so as to establish and equitably apportion the child support obligation.
3. The guidelines shall take into consideration any pre-existing support orders.
4. The guidelines are to provide direction in cases involving split or shared custody.
5. Alimony is not to be included in the amount set as child support.

2.4 In addition to these criteria, the law requires the guidelines for child support awards to take into consideration the following underlying principles:

1. That parental expenditures on children represent a relatively constant percentage of family consumption as family consumption increases, so that as family income increases, the family's level of consumption increases, and the children should share in and benefit from this increase;
2. That parental expenditures on children represent a declining proportion of family income as the gross income of the family increases, so that while total dollar outlays for children have a positive relationship to the family's gross income, the proportion of gross family income allotted for the children has a negative relationship to gross income;
3. That expenditures on children vary according to the number of children in the family, and as the number of children in the family increase, the expenditures for the children as a group increase, and the expenditures on each individual child decrease; so that due to increasing economies of scale and the increased sharing of resources among family members, spending will not increase in direct proportion to the number of children;
4. That as children grow older, expenditures on children increase,

particularly during the teenage years.

2.5 The Melson Formula, devised by a Delaware Judge and used in that State, incorporates the basic guidelines and principles necessary to satisfy both the federal and state laws. Thus, the Melson Formula is the basis for the guidelines established for the State of West Virginia.

2.6 The guidelines and procedures for their use are outlined as follows:

Part I. PRIMARY CHILD SUPPORT CALCULATION

STEP A. AVAILABLE NET FOR PRIMARY SUPPORT

1. DETERMINE EACH SUPPORT OBLIGOR'S MONTHLY NET INCOME.

- This is determined for each parent's income - the obligee and obligor. Both parents are referred to as obligors for this calculation.

- To do this add:

- a. Income from employment, as well as all other sources (such as pensions, dividends, interest, etc.); and
- b. Business expense accounts to the extent that they provide the support obligor with something he would otherwise have to provide (such as automobile, lunches, etc.).

- Subtract:

- a. Income taxes figured on the basis of the maximum allowable exemptions;
- b. Other deductions required by law, including child support payments made pursuant to a Court order;
- c. Deductions required by the employer, e.g., pensions, hospitalization, etc;
- d. Legitimate business expenses (for the self-employed obligor);
- e. Benefits such as hospitalization insurance which are maintained for the obligor's dependents.

- The guidelines are to be completed using the obligor's net monthly income. In instances where the obligor is paid other than monthly, the monthly gross is to be determined as follows:

1. Obligor paid weekly: multiply by 52 weeks and divide

- by 12 months
2. Obligor paid weekly,
but amounts vary: add the four
checks together,
divide by four,
multiply by 52
and divide by 12
 3. Obligor paid twice
a month: multiply one
check by two
 4. Biweekly: multiply by 26
weeks and divide
by 12

- Deductions for payments on consumer debts or loans will not be recognized except to the extent that such debts were incurred for indispensable items in use by the dependents or for necessary health care. Support obligors will not be allowed to reduce the child support obligation by incurring debts other than for necessities of life.
- Income so established will then be used to determine the obligor's monthly net income for the purpose of calculating child support.
- ALL INFORMATION PRESENTED IN THESE CALCULATIONS SHOULD BE BASED ON MONTHLY AMOUNTS. WHERE A PARTY IS PAID WEEKLY, THE PAY SHOULD BE MULTIPLIED BY 52 AND DIVIDED BY 12 TO ARRIVE AT A CORRECT MONTHLY AMOUNT. LIKEWISE, IN ORDER TO BE CONSIDERED, ALL CHILD CARE EXPENSES, MEDICAL INSURANCE PAYMENTS, ETC., MUST BE PRESENTED IN ACCURATE MONTHLY AMOUNTS.

2. SUBTRACT THE OBLIGOR'S SELF-SUPPORT DEDUCTION.

- Four hundred fifty dollars (\$450) a month is established as the self-support deduction for each obligor. This amount represents the minimum amount required for an adult's subsistence requirements.
- Income remaining after subtraction of the self-support deduction amount is deemed available for payment of child support. If no amount is left after subtraction of the self-support deduction, the child support amount will be set at \$50 per month.

STEP B. DETERMINE THE PRIMARY CHILD SUPPORT NEED

- The next step is to compute the PRIMARY SUPPORT NEED for each dependent child. Like the self-support

deduction, the primary support need represents the minimum amount required to maintain a child at a subsistence level.

- The primary child support need of each child in question will be considered by first determining that child's rank in the custodial parent's household and then using the appropriate figure shown below.
- The minimum needs of the several members of a household are established below. The order of household members is ranked on the basis of age:

First member (usually a parent)	\$450 a month
Second member, 40% thereof, or	\$180 a month
Third & Fourth members, 30% thereof, or	\$135 a month
Each additional member, 20% thereof, or	\$ 90 a month

- Primary support is currently set at \$180 per month for the second member of the household (a second adult or first child in a single adult family), \$135 per month for the third and fourth members, and \$90 for each member thereafter. In a case where the custodial parent lives with his/her parents or other separate family, he/she and the children will be considered to be in a household by themselves.
- Add to the total primary needs of all the children in question the cost of child care needed to allow a custodial parent to work.

STEP C. DETERMINE THE PRIMARY SUPPORT OBLIGATION OF EACH OBLIGOR

- The child's primary support needs are pro-rated between the parents based on available net income as determined in Step A.
- To arrive at the percentage for each parent, divide each support obligor's available net income for child support by the total available net income for child support. The resulting percentage (%) establishes the burden each obligor should carry with respect to their children's primary support. This percentage should then be multiplied by the total primary child support need in order to arrive at the PRIMARY SUPPORT OBLIGATION of each obligor.

PART II. STANDARD OF LIVING ADJUSTMENT (SOLA) CHILD SUPPORT CALCULATION

- SOLA is designed to apportion, as equitable considerations require, the income available to a support obligor after he has met his own primary needs and those of his dependents. This standard of living

allowance enables the child to benefit from the higher living standard of a parent.

STEP A. DETERMINE THE AVAILABLE NET INCOME FOR SOLA SUPPORT

- From each parent's AVAILABLE NET FOR PRIMARY SUPPORT established in Part I, Step A,
- Subtract:
 - a. The PRIMARY SUPPORT OBLIGATION calculated in Part I, Step C;
 - b. Where the support obligor has other dependents, the support obligor may be entitled to a deduction for such a dependent before calculating the SOLA obligation. If a parent does have dependents other than the child for whom support is being sought, and such other dependents are not covered by a court order, primary support amounts for such dependents are to be deducted from obligor income available for the SOLA. Thus, if a non-custodial parent has two other natural or adopted children living in the same household, and support is being calculated for one child living with the custodial parent, income available for SOLA would be reduced by the primary support amount for those two children (most likely \$270 - \$135 each as the Third and Fourth members of the household). To do this calculation, use a second form and complete Part I, Steps A, B, and C to determine the Primary Support Obligation for the children. The primary support obligations for all of these children are to be combined and deducted from the AVAILABLE NET FOR PRIMARY SUPPORT in Part II, Step A.

STEP B. CALCULATE SOLA SUPPORT OBLIGATION

- Where income is available, both support obligors shall be required to pay 15% for the first child, plus 10% each for the second and third child, plus 5% each for the fourth, fifth, and sixth child, of the AVAILABLE NET FOR SOLA SUPPORT established in Part II, Step A. Thus, the percentages used for the standard of living allowance are currently set at the following levels:

One child	15 percent
Two children	25 percent
Three children	35 percent
Four children	40 percent
Five children	45 percent
Six children	50 percent

- Total SOLA ordered shall not exceed 50% of the discretionary income.

STEP C. CALCULATE THE PER-CHILD SHARE OF SOLA SUPPORT

- Divide the total SOLA Support Obligation (mother's and father's added together) by the number of children for whom support is sought to arrive at this figure.

PART III. DETERMINATION OF PARENTS' TOTAL MONTHLY SUPPORT OBLIGATIONS

- To determine the TOTAL MONTHLY CHILD SUPPORT OBLIGATION, add the Primary Support Obligation and the individual SOLA Support Obligation together.
- Where a support obligor is also the custodial parent, the obligor retains that share of the support obligation owed to the child in his custody and pays the difference, if any, to the other custodial parent for the benefit of other children.
- The obligation will be set at \$50.00 if, according to the calculating, the obligor's total monthly child support obligation is less than \$50.00.
- These guidelines contemplate normal visitation arrangements, but non-traditional custody arrangements are recognized.
- Where parties share physical joint custody on an equal basis, each will be considered to have the child for six months during the course of a year. To avoid unnecessary transfers of funds, the "pay out" of each parent for the year should be determined by multiplying the monthly support obligation times six months. If one parent's yearly obligation is greater than that owed by the other, the excess amount shall be divided by 12 and paid monthly over the course of the year, unless the parties agree otherwise. In other words, the obligation is pro-rated based on the proportion of total time spent by the child in the physical custody of the other parent. Obligations for each of the parents are netted out, with the remainder specified as the support amount for the parent with the greater obligation.

2.7 A guidelines worksheet is attached as Appendix A.



WEST VIRGINIA DEPARTMENT OF HUMAN SERVICES

1900 Washington Street, East

Arch A. Moore, Jr.
Governor

Charleston, WV 25305

Telephone (304) 348-2400

Reginia S. Lipscomb
Commissioner

CHILD ADVOCATE OFFICE

CHILD SUPPORT FORMULA

DATE: _____

Obligor's Name: _____ Number: _____

PART I. PRIMARY CHILD SUPPORT

<u>STEP A</u>	<u>FATHER</u>	<u>MOTHER</u>	<u>TOTAL</u>
Monthly Net Income	\$ _____	\$ _____	
Less Self Support	- _____	- _____	
= Individual Available Net for Primary Support	\$ _____	\$ _____	
= TOTAL AVAILABLE NET FOR PRIMARY CHILD SUPPORT.....			\$ _____

STEP B

_____, as _____ person in _____'s household \$ _____

+ _____, as _____ person in _____'s household + _____

+ _____, as _____ person in _____'s household + _____

Sub-total \$ _____

+ MONTHLY CHILD CARE EXPENSES OF WORKING CUSTODIAL PARENT..... + _____

= TOTAL PRIMARY CHILD SUPPORT NEED..... \$ _____

STEP C

	<u>FATHER</u>	<u>MOTHER</u>
Individual Available Net	\$ _____	\$ _____
+ Total Available Net	+ _____	+ _____
= Share of Primary Support	_____ %	_____ %
x Primary Child Support Need	x _____	x _____
= PRIMARY SUPPORT OBLIGATION	\$ _____	\$ _____

PART II. STANDARD OF LIVING ADJUSTMENT (SOLA) CHILD SUPPORT

STEP A

	<u>FATHER</u>	<u>MOTHER</u>
Individual Available Net for Primary Support	\$ _____	\$ _____
Less Individual Primary Support Obligation	- _____	- _____
= Individual Available Net for SOLA Support	-\$ _____	\$ _____

STEP B

Individual Available Net for SOLA Support	\$ _____	\$ _____
x Total SOLA Support Percentage	x _____ %	x _____ %
= Individual SOLA Support Obligation	\$ _____	\$ _____
= TOTAL SOLA SUPPORT OBLIGATION.....		\$ _____

STEP C

PER-CHILD SHARE OF SOLA SUPPORT..... \$ _____

PART III. TOTAL MONTHLY SUPPORT OBLIGATIONS

	<u>FATHER</u>	<u>MOTHER</u>
Individual Primary Support	\$ _____	\$ _____
+ Individual SOLA Support	+ _____	+ _____
= Total Monthly Child Support Obligation	\$ _____	\$ _____
Less Amount Retained by Custodial Parent	- _____	- _____
= TOTAL MONTHLY ORDERED CHILD SUPPORT	\$ _____	\$ _____

This child support obligation formula has been explained to me, and

FATHER

MOTHER

I agree with this amount.

I do not agree with this amount and wish to make the court aware that I do not agree with the amount.

(Mother and Father's Signatures)

(Date)

(Paralegal)

(Typed Names of Obligors)

M E M O R A N D U M

October 27, 1987

From: M. E. Mowery, Counsel

To: Members, Legislative Rule-Making Review Committee

Re: Child Support Guidelines

This memorandum is written to apprise the Committee of the legal issues related to the child support guidelines which the Department of Human Services filed with the Secretary of State on September 23, 1987. The Department maintains that the rule establishing the support guidelines is not subject to rule-making review.

Initially, counsel would direct the attention of the Committee to two sections of the Code which govern the promulgation of rules regarding child support enforcement.

W.Va. Code, §48A-2-7(a) reads as follows:

The director may promulgate legislative rules in accordance with the provisions of article three, chapter twenty-nine-a of this code where such rules are required to implement the provisions of this chapter.

W.Va. Code, §48A-2-8, relating specifically to child support guidelines, reads as follows:

(a) On or before the first day of October, one thousand nine hundred eighty-seven, the director of the child advocate office shall, by legislative rule, establish guidelines for child support award amounts so as to insure greater uniformity by those persons who make child support recommendations and enter child support orders, and to increase predictability for parents, children and other persons who are directly affected by child support orders.

You will note that in each of the cited sections, the Director of the Child Advocate Office is given the authority to promulgate legislative rules. Notwithstanding this clear language, the filing of September 23, 1987 purports to be "the official rule adopted by the Department of Human Services" and was filed by the Commissioner, rather than by the Director of the Child Advocate Office.

Additionally, it would appear that the filing by someone other than the Director is a violation of Federal Law. 42 U.S.C §654(3), which sets forth the requirements for a state plan for child and spousal support, reads as follows:

A state plan for child and spousal support must---

(1) . . .

(2) . . .

(3) provide for the establishment or designation of a single and separate organizational unit, which meets such staffing and organizational requirements as the Secretary may by regulation prescribe, within the State to administer such plan;

By statute in this State, the "single and separate organizational unit" which the Federal statute speaks of is the Child Advocate Office. W.Va. Code, §48A-1-3(3) clearly establishes this fact:

(3) "Child advocate office" means the office within the department of human services created under the provisions of article two of this chapter, intended by the Legislature to be the single and separate organizational unit of state government administering programs of child and spousal support enforcement and meeting the staffing and organizational requirements of the secretary of the federal department of health and human services.

Given the above statutory law, it appears clear that the Director of the Child Advocate Office, and not the Commissioner of the Department of Human Services, is the "agency" authorized by law to make rules relating to child support enforcement. [See the definition of "agency" in W.Va. Code, §29A-1-2(a).] It is therefore inappropriate for the Department or the Commissioner to propose or promulgate rules relating to child support enforcement.

Further, in the Notice of Agency Adoption, the Commissioner states that the rule is filed pursuant to W.Va. Code, §29A-1-3(c) "as a receipt of public assistance exemption to the provisions of West Virginia Code §29A." W.Va. Code, §29A-1-3(c) states, "The provisions of this chapter do not apply to rules relating to . . . the receipt of public assistance."

It is presumed that the Commissioner is claiming an exemption to the rule-making review process based upon the decision of the Supreme Court of Appeals in State ex rel. Ginsberg v. Watt, 168 W.Va. 503, 297 S.E.2d 367 (1981), wherein the Supreme Court held that under the then-existing provisions of W.Va. Code, §29A-1-2, the Administrative Procedures Act did not apply to the Department of Welfare. The language of that statutory section was, with regard to the exemption for rules relating to the receipt of public assistance, the same as the present provisions of W.Va. Code, §29A-1-3, cited above.

There are a number of reasons why the public assistance exemption does not apply in the case of rules relating to child support enforcement. Those reasons are as follows:

(1) The great majority of the support cases in this state would not involve persons who are receiving public assistance. Further, in those cases

which did involve public assistance recipients, child support guidelines would have an indirect or incidental relationship to the receipt of public assistance.

(2) In addition to the Federal and State provisions which make the Child Advocate Office a "single and separate organizational unit of state government," the Child Advocate Office, by another statute, has no involvement with the Department's programs relating to public assistance. In creating the Child Advocate Office, the Legislature expressly intended to separate its functions from those of the Department. In this regard, W.Va. Code, §48A-2-6(a) reads, in part, as follows:

(a) Within limits of state appropriations and federal grants and subject to provisions of state and federal laws, rules and regulations, the director shall organize the office into appropriate administrative units which shall be operationally and functionally distinct and separate from any other units or programs of the department of human services so that employees of the office shall not be required to perform functions or duties of the department which are outside the scope of activities of the child advocate office as defined in this chapter.

(3) Notwithstanding any general exemption from rule-making review claimed by the Department of Human Services, the Legislature, in enacting W.Va. Code, §§48A-2-7(a) and 8(a), as cited above, clearly intended that the rules of the Director of the Child Advocate Office would be subject to rule-making review. This specific language, directing the promulgation of legislative rules, would govern, rather than the general language of the public assistance exemption. The statutory definition of "legislative rule" contained in W.Va. Code, §29A-1-2(d) reads, in part, as follows:

(d) "Legislative rule" means every rule, as defined in subsection (i) of this section, proposed or promulgated by an agency pursuant to this chapter. Legislative rule includes every rule which, when promulgated after or pursuant to authorization of the Legislature, has (1) the force of law, or (2) supplies a basis for the imposition of civil or criminal liability, or (3) grants or denies a specific benefit. Every rule which, when effective, is determinative on any issue affecting private rights, privileges or interests is a legislative rule. Unless lawfully promulgated as an emergency rule, a legislative rule is only a proposal by the agency and has no legal force or effect until promulgated by specific authorization of the Legislature.

Given these statutory provisions, counsel believes the Commissioner's contention that the support guidelines are not subject to rule-making review is untenable.