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CC: SCOTT F. WEBER
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FROM: JOSH S. OURS
Sr. Assistant Attorney General

Date: July 27, 2023

Re: Submission to Amend 22VAC40-880 Child Support Enforcement Regulations

I have reviewed the attached amendments to 22VAC40-880. Pursuant to Office of Regulatory Management’s review procedures issued in accordance with Executive Order 19 (2022), the Office of the Attorney General (OAG) is charged with reviewing the proposed amendments and producing “a memorandum assessing the agency’s legal authority to promulgate the regulation, identifying any specific mandate¹ that requires the regulation, and determining that the content of the proposed regulation does not conflict with applicable law.” The OAG “may also provide any advice, recommendations, or other comments for consideration by the Governor with respect to” the regulation.

Authority: Virginia Code § 63.2-217 states that the State Board of Social Services shall adopt regulations “as may be necessary or desirable to carry out the purpose of this title.” Therefore, the State Board has the authority to amend 22VAC40-880 as proposed, subject to compliance with Article 2 of the Administrative Process Act, Executive Order 19 (2022), and the procedures of the Office of Regulatory Management.

¹ Per the Office of Regulatory Management’s regulation review procedures, “‘mandate’ refers to a directive from the General Assembly, the federal government, or a court that requires that a regulation be promulgated, amended, or repealed in whole or part.”

Mandate: Virginia Code § 2.2-4101 defines “regulation” as “any statement of general application, having the force of law, affecting the rights or conduct of any person, promulgated by an agency. . . .” Though no new regulations are proposed in this action, the regulations being amended arguably impact the rights or conduct of persons. Therefore, to the extent that DCSE desires to utilize and memorialize the policies and procedures set forth in the proposal, promulgation of regulations is the correct method to do so. Further, the proposed amendment to 22VAC40-880-240 is mandated by 45 USC § 302.56(c)(iii), which sets forth specific requirements for the imputation of income under state child support guidelines. The proposed amendment incorporates the methods and considerations which are required by the federal statute and which have been recommended for addition to the Code of Virginia by the Virginia Child Support Guidelines Review Panel.

Conflicts with applicable law: None.

Comments: Regarding 880-320, the regulation could be discarded without negatively impacting DCSE’s administrative processes. The first part of the amended regulation states that “[i]n all initial and modified administrative support orders, [DCSE] shall initiate an income withholding order unless the parties agree to an alternative payment arrangement or good cause is shown.” Similar language is found in Va. Code § 63.2-1923(A), which states, “[e]very administrative support order . . . shall provide for immediate income withholding . . . unless the obligor and the Department, on behalf of the obligee, agree to a written alternative payment arrangement, or good cause is shown.” The second part of the amended regulation requires DCSE to send an income withholding order to the noncustodial parent’s employer “[when a payment is delinquent in an amount equal to or exceeding one month’s child support obligation]” or when “[t]he support order includes a provision for immediate income withholding.” Again, similar language is found in the Code. Va. Code § 63.2-1924 reiterates that all administrative support orders must contain provision for income withholding, provides a procedure for issuing a withholding (when none has been previously ordered) in the event of default, and references DCSE’s authority to issue income withholdings when required by a court order. Because the powers addressed in the amended regulation are stated in the Code, the regulation is arguably redundant and unnecessary.

Regarding 880-430, the amended regulation sets forth when administrative appeals will be considered valid and timely by DCSE. The regulation provides that the appeals must be in writing, states that timeliness will be determined by actual receipt of the writing by DCSE or the date of the postmark, and sets forth the deadlines for various types of appeals. As the deadlines are set forth in state and federal code and in forms received by DCSE customers, there is technically no need to restate the deadlines in the Virginia Administrative Code.

The remaining provisions of the regulation are beneficial, in that some of the state and federal code provisions are unclear as to what suffices to timely notify DCSE of a hearing request. A simple replacement to the existing language of 880-430 which accomplishes the desired result could be, for example, “To the extent not otherwise provided for in state or federal law, requests for administrative hearings and appeals shall be in writing and shall be deemed timely filed if postmarked or if received by the Department within the applicable deadline.”

Please contact me if you have any questions.