

**Child Support Guidelines – Quadrennial Review  
Advisory Committee  
May 26, 2010  
Workforce Safety and Insurance Boardroom – Bismarck, ND**

**Members present:** Jim Fleming, Brad Davis, Tom Johnson, Lisa Kemmet, Sherry Mills Moore, Tammy Ness, Paulette Oberst, Cynthia Schaar, Referee Dale Thompson, and Bill Woods.

**Members absent:** Sen. Tom Fischer, Judge Donald Jorgensen, and Rep. Robin Weisz.

**Visitors:** Marie Hanken, Tove Mandigo, and Mike Schwindt.

**Call to order and introductions of members:** Fleming, as chairman, called the meeting to order and asked the members and visitors to briefly introduce themselves. He began by explaining that he is the deputy director for Child Support Enforcement (CSE), as well as the program's chief legal counsel. This is the second guidelines advisory committee he has chaired.

Oberst is the policy administrator for CSE. She has served on three previous guidelines advisory committees.

Woods is the attorney for the Three Affiliated Tribes comprehensive IV-D program, which is now in its third year of operations.

Ness is a social worker with the North Central Human Service Center in Minot. She also has a private practice. She works with families who are affected by child support and is also a parent who receives child support.

Johnson is a parent who pays child support. He is a self-employed businessman from Bismarck.

Moore is a private attorney in Bismarck. Her practice is concentrated in family law and she represents both child support obligors and obligees. She has served on many previous guidelines advisory committees.

Schaar is a staff attorney for the Jamestown Regional Child Support Enforcement Unit (RCSEU). Before that, she had a private practice in Jamestown for 18 years. That practice included family law.

Kemmet is a legal assistant for the Bismarck RCSEU. Her duties include doing guidelines calculations for the Unit's attorneys.

Davis is the administrator for the Dickinson RCSEU. He does the guidelines calculations in his Unit. He has served on several previous guidelines advisory committees.

Thompson is a referee for the Northeast Judicial District. He is based in Bottineau and has served on the bench for 24 years.

Hanken is the attorney for the Standing Rock Sioux Tribe start-up IV-D program. Previously, she worked in the Los Angeles County District Attorney's office and her duties included child support enforcement. She expressed appreciation at being invited to be an official observer of the advisory committee.

Mandigo is the director of Economic Assistance policy for the Department of Human Services (DHS) and a member of the DHS cabinet. She expressed appreciation to the members for being willing to serve on the advisory committee. She noted that more heads make for better policy and is looking forward to the committee's recommendations for improving the guidelines.

Schwindt is the director for CSE. He said he is pleased to see the advisory committee start up again. He welcomed all the members and mentioned that he is glad to see so many returning members, since they have knowledge of the guidelines' history.

**Housekeeping items and plan for the day:** Fleming explained the schedule for the meeting and briefly reviewed the agenda. He explained that travel reimbursement forms were available for members who came from out of town. He asked that they be completed and returned to CSE.

Fleming noted that the meeting is being tape recorded. Minutes will be prepared from the recording. These minutes are important as they will capture the essence of the committee's discussion and recommendations and, accordingly, will become part of the rulemaking history.

Fleming reminded the members that the meeting is public. Members of the public may attend and listen but may not participate unless invited to do so by a member.

**Overview of binder:** At Fleming's request, Oberst provided a section-by-section review of the contents of the binder that was given to each member. Section 1 has a membership list, including the name and email address of each member.

Section 2 contains the notice of public meeting. Oberst suggested that the meeting agenda also be filed in this section.

Section 3 will contain the meeting minutes as the minutes are finalized.

Section 4 contains guidelines-related authority references, including federal law (42 U.S.C. § 667), federal regulation (45 C.F.R. § 302.56), and state law (N.D.C.C. § 14-09-09.7). She suggested that the handout of key milestones in the rulemaking process, which will be discussed later in the meeting, also be filed in this section.

Section 5 contains the current guidelines, effective April 1, 2010, with case law annotations through February 2010.

Section 6 contains the worksheet and supporting schedules developed by CSE to facilitate guidelines calculations. Oberst explained that the worksheet and schedules are not officially part of the guidelines. Per program policy, CSE staff is required to use these forms when doing guidelines calculations in IV-D cases. The forms have been widely disseminated and are also available on CSE's website for use by individuals outside the IV-D program, if they choose.

Section 7 contains the list of issues for consideration for possible amendments to the guidelines. Oberst explained that this list should be considered a work in progress and will be amended if new items are added and as already-identified items are addressed by the committee. She explained that the identified issues come from a variety of sources, including trial court and Supreme Court decisions, questions from private attorneys, and concerns submitted by staff in the regional IV-D offices. Oberst said the list is basically unedited and that just because an item appears on the list, it does not necessarily mean CSE is advocating for a change to the guidelines.

Section 8 contains a document entitled "Child Support Guidelines/Quadrennial Review/Deviation Analysis." Oberst explained that the federal regulation relating to the guidelines requires that each quadrennial review include an analysis of case data, gathered through sampling or other means, on the application of and deviations from the guidelines. The document summarizes CSE's analysis. It will be discussed in more detail later in the meeting, time permitting, or in a subsequent meeting. Section 8 also contains a list of deviations (i.e., rebuttal criteria) authorized under the current guidelines.

Section 9 will contain a document analyzing economic data on the cost of raising children. This analysis is also required by federal regulation and will be discussed in detail in a subsequent meeting. Data from the U.S. Department of Agriculture (USDA) will be used for this analysis.

Section 10 contains drafts of proposed changes to the guidelines. This section will expand as issues for consideration are discussed and draft language requested.

Finally, there is a "Miscellaneous" section where materials that don't fit neatly in other sections can be filed so they don't get lost.

**Overview of rulemaking process:** Fleming said that the guidelines are in agency rule (i.e., they are found in the North Dakota Administrative Code) and are adopted through an administrative rulemaking process. He then provided a description of that process. The administrative rulemaking process will begin after the committee completes its advisory role and makes its recommendations for revised guidelines to the Executive Director for DHS. DHS will formally propose to amend the guidelines by filing a notice of rulemaking and related documents with legislative management (formerly known as the Legislative Council). The notice of rulemaking will be published in each county's official newspaper. There will be a public hearing at which interested individuals may give their views about the proposed amended guidelines. In addition to the public hearing, there is also a comment period during which interested individuals can submit their views in writing to DHS. Once the comment period has closed, DHS will prepare a written summary of all comments received – whether in writing or orally at the public hearing. DHS will formally adopt final proposed amendments (which might include additional changes based on comments received) and submit them to the Attorney General's office for an opinion as to their legality. They will also be filed with legislative management and, in due course, will be reviewed by the legislature's Administrative Rules Committee. Assuming the Administrative Rules Committee does not take adverse action (e.g., find that the proposed rule is void), amended guidelines will become effective at the beginning of the first calendar quarter following the meeting of the Administrative Rules Committee.

Fleming said that DHS has traditionally kept the rulemaking process open to allow for guidelines-related legislative action at the next session. This means that although the rulemaking process must begin by August 1, 2010, amended guidelines probably won't be finalized until after the 2011 legislative session ends.

**Section-by-section overview of the guidelines:** Fleming provided a brief description of the sections in the current guidelines. Section -01 is for definitions that are used throughout the guidelines. Key definitions include "gross income," and "net income."

Section -02 is for general instructions that are applicable throughout the guidelines. For example, there is a general instruction that each child support order must include a statement of the obligor's net income and how that net income was determined.

Section -03 addresses the calculation of support in split custody situations (i.e., where the parents have more than one child in common and each parent has physical custody of at least one child).

Section -04 expresses the public policy consideration that a support obligation should be established in each case where the obligor has any income, even if that obligation is far from sufficient to meet the child's needs.

Section -05 provides the framework for determining child support in cases in which the obligor is self-employed.

Sections -06 and -06.1 provide for determining child support in multiple-family situations (i.e., situations in which the obligor has a child living in his or her home or in which the obligor is responsible for children with obligees other than the obligee before the court).

Section -07 provides for imputing income to an obligor based on his or her earning capacity. Fleming said that this section is a source of frustration for some lawmakers. It has also resulted in numerous Supreme Court decisions over the years.

Section -08 provides that the income of the obligor's spouse is not considered as income to the obligor except in situations in which the obligor is in a position to significantly control the spouse's income (i.e., can shift income to the spouse).

Section -08.1 addresses the calculation of support when the obligor has court-ordered extended visitation.

Section -08.2 addresses the calculation of support when the parents have court-ordered equal physical custody of their children. Fleming explained that a support obligation is determined for each parent and then their obligations are offset by subtracting the lesser from the greater. The parent with the greater obligation then pays the difference. Fleming said he frequently sees orders where the parents have stipulated to equal physical custody and to having equivalent incomes such that offsetting the obligations nets out to zero.

Section -09 sets forth the criteria for rebuttal of the presumptively correct child support obligation. He said that one of the items the committee must address is to create a new rebuttal reason (also referred to as a "deviation") for situations in which the obligor's ability to pay support is increased because his or her income was decreased due to depreciation expenses. Creating this new rebuttal reason is required pursuant to 2009 HB 1329. Schaar said she believes that a local private attorney is appealing a case to the Supreme Court based on a deviation for depreciation, even though the deviation has not yet been incorporated into the guidelines.

Section -10 contains the schedule of the presumptively correct child support amount based on the obligor's net income and number of children.

(The following sections were not mentioned in Fleming's overview: Section -11, regarding determining support for children in foster care or guardianship care, Section -12, regarding the application of the guidelines to uncontested cases, and Section -13, regarding the application of the guidelines in general.)

**Review of issues for consideration:** Fleming directed members' attention to the list of issues that have already been identified for consideration. He commented that the list

does not include any medical support-related items. He explained that a separate workgroup has been meeting to develop draft rules in this area in response to federal medical support regulations.

Fleming asked members if there were any items they would like added to the list for discussion. He said that a legislative interim committee received testimony at one of its meetings about how child care costs are handled in child support cases. Fleming said he would like to review the deviation for child care costs and consider whether it should be revised.

Davis said he would like the guidelines to address how to attribute income to an obligor if the obligor is in business with a new spouse and the business income is reflected on a joint tax return. For example, should fifty percent of the business income automatically be attributed to the obligor? Oberst noted that this would not necessarily only be an issue in cases where the obligor and a new spouse operate a business together. It might also be an issue if they own joint investment property that results in dividend or interest income.

Woods said he would like to take a closer look at the schedule of amounts. He said that it seems to favor the poor and the rich obligors. He also wondered why USDA data is used to analyze the cost of raising children. In response to a question from Fleming, Oberst explained that using USDA data, instead of data from another source, is not required. She added that the USDA data is often used by IV-D programs for this purpose because it is readily available, it is relatively current information since it is updated annually, and, given that it is essentially an economic treatise, it is understandable and readable.

Woods said he would also like to discuss the multiple-family situation. He said it would be good to get all the families into court at the same time to level the playing field. Thompson commented that this is not always possible. For example, their orders may have been entered in different jurisdictions. Fleming said this is an example of an issue that may not be addressable within the context of the guidelines, which provide a methodology for how the amount to be paid for child support is determined. He added that some discussion of issues that are not guidelines issues, per se, is inevitable and worthwhile.

Schaar said that the formula for calculating the extended visitation adjustment needs to be looked at.

Oberst said that a revised list of issues for considerations, with these additions, will be prepared for the next meeting.

Fleming then initiated discussion of the items on the list of issues for consideration.

*Issue: Revisit the deduction for the hypothetical state income tax obligation?  
(Substantive change.)*

By way of background, the deduction for the hypothetical state income tax obligation is a function (14%) of the deduction for the hypothetical federal income tax obligation. At the time this provision was adopted in the guidelines, North Dakota state income tax liability was calculated at 14% of the taxpayer's federal income tax liability. Since then, however, a change to state law changed the method of calculating state income tax liability. Now, the starting point for the calculation is federal taxable income and then there are state-specific adjustments to arrive at state taxable income.

Oberst explained that a previous guidelines advisory committee considered whether to amend the guidelines in light of the state law change. At that time (2002), there was a certified public accountant on the committee who recommended no change to the guidelines because, although the method of computing state income tax had changed, the actual tax liability did not change for most people. Therefore, the previous committee decided no change to the guidelines was needed. Oberst said that there was legislation in 2009 that reduced the tax rates in North Dakota and, presumably, reduced the tax liability for most taxpayers. Therefore, she said, it is possible that the provision in the guidelines is now outdated.

There was discussion about how the existing provision is, operationally, easy to calculate but that the issue merited further discussion. A contact will be made with the state Tax Department to see if, despite law changes, the current provision (14% of hypothetical federal tax liability) still results in an accurate tax liability calculation for the average taxpayer. If 14% is no longer an appropriate percentage, maybe the Tax Department can suggest a more accurate rate.

*Issue: Specifically include "cash inheritances" in the list of examples of gross income?  
(Clarifying change.)*

Fleming said this issue was identified based on a contact to CSE by an obligee whose former spouse inherited a significant amount of money and was able to make lifestyle changes. The obligee said the children never benefitted from the inheritance windfall.

There was little, if any, support for this item. Moore said this would likely make people very angry. There was discussion that an inheritance is an asset, rather than income. Also, there was concern about disparate treatment: if an obligor received a quarter section of land as an inheritance, it would not be counted as gross income but if the will directed that the quarter section of land be sold and the proceeds given to the obligor, it would be counted as gross income.

The committee's collective decision was not to pursue a change to the guidelines.

*Issue: Specifically include “royalties” in the list of examples of gross income? (Clarifying change.)*

Oberst said this issue was identified when a district court judge contacted CSE about a case involving mineral royalties. The inquiry raised the question about how royalties should be treated. Oberst said that income from royalties is specifically included within the definition of “self-employment” and the “net income from self-employment” is already included in the list of examples of gross income. Therefore, royalty income may already be adequately addressed.

There was also some discussion about how royalties are taxed. For example, are they subject to self-employment tax? (Note: for purposes of the guidelines, whether an activity is considered “self-employment” and, thus, subject to self-employment tax under the Internal Revenue Code, is not determinative.)

To facilitate further discussion, the committee requested a draft to include royalties (and rents) in the list of examples of gross income. Also, it was decided to research how royalties are taxed for federal income tax purposes.

*Issue: Revise the definition of “obligee” to specify that this is a person to whom a duty of support is owed or alleged to be owed on behalf of a child? (Clarifying change.)*

Fleming said that he identified this issue and that there is merit in making it clear that the right to support belongs to the child and that the obligee receives such support in a representational capacity.

Oberst had prepared a draft in advance to add the words “on behalf of a child” to the current definition of “obligee.” Moore made a motion to accept the draft. Ness seconded the motion and all members voted “yes.” This change will be incorporated into the recommended revised guidelines.

*Issue: Update reference to “food stamps” to “Supplemental Nutrition Assistance Program.” (Technical change.)*

The words “food stamps” appears one place in the guidelines – among the items excluded from gross income. Oberst had prepared a draft in advance to replace “food stamps” with “supplemental nutrition assistance programs.” Schaar made a motion to accept the draft. Moore seconded the motion and all members voted “yes.” This change will be incorporated into the recommended revised guidelines.

*Issue: Revisit the amount of the deduction for lodging expenses? (Substantive change.)*

Oberst said the previous advisory committee (that met in 2006), recommended raising the lodging deduction from \$30 to \$50 per night. Fifty dollars per night was the reimbursement rate for state employees at that time. The committee also discussed whether the deduction should include taxes as well but decided not to recommend that approach since taxes can be variable (e.g., some cities have local sales taxes and others do not). Oberst said that the option for \$50 or actual documented [lodging] costs, whichever is greater, was added as a result of comments during the public comment period.

Oberst said that the current state reimbursement rate, according to information from the state Office of Management and Budget (OMB), is \$63. The state reimbursement rate is indexed, at 90%, to the U.S. General Services Administration lodging rate for North Dakota, which is currently set at \$70.

To facilitate discussion, Oberst had prepared drafts for \$63 and for \$70.

Committee discussion was mixed. Some members thought that using \$63 in the guidelines would be problematic because the deduction would remain frozen at that amount for four years (until the next quadrennial review) even though the actual rate would change during that time. Moore suggested that instead of using a flat dollar amount, the guidelines should incorporate a reference to the OMB rate, whatever that is at a given time. She suggested that CSE could display the OMB rate on its website so the practitioner would be able to access it. On the other hand, Kemmet thought the guidelines should provide for a flat dollar amount, whether that is \$63 or \$70 or some other amount.

There was a suggestion by several members to strike the "whichever is greater" language in the current guidelines as being unnecessary.

The committee would like to see a draft that incorporates a reference to the OMB rate and that strikes the "whichever is greater" language. Also, the committee would like information about how often the OMB rate changes.

*Issue: Revise subsection 11 [of section 2] to specify that a payment of children's benefits may only be credited as a payment toward the obligor's child support obligation if the children's benefits were included in gross income in determining that obligation? (Substantive change.)*

Fleming explained that because children's benefits, which include social security disability dependent's benefits, are treated as a credit toward the support obligation, it is common for the obligor's entire obligation to be met through the children's benefits. In other words, the amount the obligor actually pays out of pocket is zero. If the obligor is

required to go back to court to get the children's benefits included in gross income in order to get the credit toward the obligation, there will be a lot of paperwork and time consumed to get to the same outcome: i.e., the obligor's out-of-pocket payment will still be zero. Fleming said he can appreciate that there would be symmetry in having the children's benefits included in gross income on one side and treated as a credit toward the obligation on the other side but that he doesn't see any practical benefit. He added that having to go back to court could be a source of frustration for the obligor and that he doesn't think this is a population that we should "force" back into court.

The committee did not wish to pursue a change to the guidelines based on this item.

*Issue: In split custody cases, clarify that an obligation must be determined and specifically ordered for each parent?*

*Issue: In equal physical custody cases, clarify that an obligation must be determined and specifically ordered for each parent.*

By way of background, in split custody and equal physical custody cases, each parent is both an obligor and obligee. The guidelines provide that a support obligation must be determined for each parent and then the obligations are offset by subtracting the lesser from the greater. The parent with the greater obligation pays the difference.

Oberst said that this issue was submitted by the Bismarck RCSEU. Fleming added that he reviews all offset cases before they are implemented on CSE's automated system. He said that despite the language in the guidelines, he often sees that the order only reflects the difference. This becomes problematic if, for example, one parent goes on public assistance and assigns his or her support rights. If both obligations are not shown in the order, it is difficult to know what has been assigned.

The committee discussed that while the guidelines do provide for determining an obligation for each parent, this language may not go far enough. In fact, each obligation is probably being determined since it would not be possible to calculate the difference otherwise. However, determining the obligations and specifying both in the order are two different things.

To facilitate discussion, Oberst had prepared drafts adding "and specifically ordered" language to the split custody and equal physical custody sections. Woods made a motion to accept the drafts. Kemmet seconded the motion and all members voted "yes." These changes will be incorporated into the recommended revised guidelines.

As an aside, Fleming mentioned that CSE is convening an internal forms drafting workgroup that will, among other things, develop model language for split custody and equal physical custody orders.

*Issue: Amend subsections 6 and 7 [of section -05, regarding net income from self-employment] to replace "community" concept with "statewide average" concept. (Conforming change.)*

The guidelines drafting advisory committee that met in 2006 recommended a change to the imputation section to look at statewide average earnings for individuals with the obligor's work history and occupational qualifications instead of at earnings for those individuals within the obligor's community. The recommendation was eventually adopted and incorporated into the guidelines. A similar concept appears in subsections 6 and 7 of section -05, regarding situations in which a self-employment loss can be used to reduce an obligor's non-self-employment earnings. The change made to the imputation section was inadvertently not carried over to the self-employment section in 2006.

Oberst had prepared a draft to conform the self-employment section to the change previously made to the imputation section. Schaar made a motion to accept the draft. Kemmet seconded the motion and all members voted "yes." These changes will be incorporated into the recommended revised guidelines.

*Issue: Consider issue with ND state tax department – not receiving copies of schedules when requesting income tax records.*

This is an issue not directly related to the guidelines but was added to the list to make committee members aware of an operational problem CSE is having with the state Tax Department.

By way of background, by law and by agreement with the Tax Department, CSE is able to access state income tax returns of obligors. This authority is often used by CSE in cases involving guidelines calculations. Since a taxpayer's federal income tax return is required to be attached to the state income tax return, this is a way for CSE to obtain documentation of the obligor's income.

Unfortunately, when the obligor is a taxpayer who electronically filed his or her state income tax return, the Tax Department is only sending CSE a copy of the obligor's 1040 form. Any supporting schedules (such as Schedule C or Schedule F) are not being provided to CSE.

This issue was first identified by Davis. He confirmed, and Kemmet agreed, that this situation is still occurring. In response to a question, Davis said that getting a copy of the obligor's W-2 form from the Tax Department is hit-and-miss.

No action was taken by the committee as none was required.

*Issue: Specify that imputed income be reduced not only by actual gross earnings but also by amounts received in lieu of actual earnings, such as unemployment*

*compensation, workers' compensation, retirement or disability payments, veterans' benefits, and earned income tax credit? (Substantive change.)*

Oberst explained that this issue was submitted by the Bismarck RCSEU. She provided a scenario to illustrate how this change would affect the obligor's income: Assume the obligor, who is working part-time, has wages of \$5,000 and Title II disability payments of \$4,000. The obligor is underemployed and income is imputed to him based on a minimum wage equivalent of \$14,529. If the obligor's imputed income is reduced by only the wages, the obligor's total gross annual income will be \$18,529, computed as follows: \$5,000 in wages + \$4,000 in Title II payments + (\$14,529 - 5,000 in imputed income). On the other hand, if the obligor's imputed income is reduced by the wages and the Title II payments, his total gross annual income will be \$14,529, computed as follows: \$5,000 in wages + \$4,000 in Title II payments + (\$14,529 - 9,000 in imputed income).

In other words, by reducing the imputed income, the total gross annual income is also reduced. Since items such as disability payments and unemployment payments are essentially a substitute for earnings, Oberst said she thinks it makes sense to reduce imputed income by these earnings substitutes, just as imputed income is already reduced by actual earnings. She said this would be an obligor-friendly amendment.

The committee requested a draft to define "earnings" for purposes of imputing income as including the items listed above.

*Issue: Clarify that if extended visitation applies, the visitation schedule must be set out in the court order and may not be at odds with the definition of extended visitation.*

This issue was submitted by the Jamestown RCSEU. Schaar explained that she would like to see each order for extended visitation specify the total number of visitation nights. She said it is not enough that the court order set out the extended visitation schedule. She described a review and adjustment case that she worked on. The order provided for extended visitation but when she and the private attorney for the father and the private attorney for the mother counted up the number of visitation nights based on the schedule in the order, they all came up with different numbers. Kemmet agreed with Schaar that counting the number of visitation nights based on a schedule in the court order can be problematic because the schedules can be open to interpretation.

It was noted that the general instructions in the guidelines already require that the order include a statement of the obligor's net income and how that income was determined. This provision can be described as the "show your work" requirement. Instead of amending the extended visitation section to address Schaar's concern, the committee discussed expanding the general instruction beyond just showing how net income was determined. The extended visitation adjustment (and the multiple-family adjustment) come into play after net income has been determined. Therefore, it may be beneficial to have a "show your work" requirement for post-net income adjustments as well.

The committee requested a draft to amend the general instruction to expand on the "show your work" concept for adjustments such as multiple families, extended visitation, and other items that affect the child support amount after net income has been determined.

*Issue: Clarify that if equal physical custody applies, the custody schedule must be set out in the court order and may not be at odds with the definition of equal physical custody.*

This item was identified based on a case that is being serviced by the Jamestown RCSEU and that was appealed to the Supreme Court. Schaar explained that in the particular case, the parties had previously agreed to a physical custody schedule that was not equal. Yet their order also provided that for purposes of child support, the equal physical custody provision in the guidelines would apply. When the Jamestown RCSEU later reviewed the obligation, Schaar said they applied the equal physical custody provision. One of the parents objected, claiming that the custody order was not equal, that he had the child for the greater percentage of time, and that he should be

treated as the sole obligee. Schaar said this raised the question of whether and to what extent CSE must analyze the custody (or visitation) schedule when conducting a review.

Moore said she doesn't think this situation will be corrected by changing the guidelines. The district court judges should not sign off on orders approving stipulations in these situations. She said if it happens enough times (i.e., if the judges refuse to sign the orders), private attorneys will get the message that they shouldn't submit these kinds of orders.

The consensus of the committee was that no change to the guidelines would be recommended for this issue.

*Issue: Perform deviation analysis required by federal regulations.*

Oberst explained that as part of the review of the guidelines, federal regulations require an analysis of case data, gathered through sampling or other methods, on the application of and deviations from the guidelines. The regulations further require that the analysis must be used to ensure that deviations are limited.

For the analysis, CSE's quality assurance manager selected a random sample of 264 court orders that had been entered on CSE's automated system since August 1, 1999. The sample size was selected to be statistically valid. Clerks of court were then asked to send copies of these orders to Oberst for review. Five orders were eventually rejected from the sample for various reasons, leaving 259 orders that were reviewed and evaluated.

Oberst said she reviewed the child support paragraphs for each order to determine if the obligation was the result of a deviation. To do this, she looked for language indicating the obligor's net income, the presumptively correct child support amount, the criteria rebutting the presumption, and the child support amount after rebuttal of the presumption.

Oberst explained that the orders reviewed were initial or amended. Some were secured by IV-D, others through private attorneys, and at least one by the parties themselves acting pro se. There was a mix of stipulated versus contested versus default orders. All seven judicial districts were represented, as were 62 judges or referees.

Oberst said deviations occur infrequently. Of the 259 orders reviewed, a deviation was only explicitly referenced on 14 occasions (5%). In these 14 orders, four deviations clearly were among the deviation factors listed in the guidelines: three deviations were for visitation travel expenses and one deviation was for continued or fixed expenses over which the obligor has little or no control. The remaining ten deviations were essentially "judicially created." Three deviations were upward, ten were downward, and it was unclear whether the remaining deviation was upward or downward.

Oberst said that of the ten "judicially created" deviations, at least three resulted in a \$0 child support order. One of those \$0 orders was especially troubling to her since it occurred in an equal physical custody case where the parties' incomes were described as similar despite an \$8,000 difference in their annual incomes.

Oberst said that the occurrence of deviations might be understated since there were a number of orders (21 or 8%) where she could not determine from the language of the order whether a deviation had occurred.

Oberst said that the low occurrence of deviations is consistent with deviations analyses from previous quadrennial reviews. She said that she continues to be surprised by the low occurrence because the deviations are an allowable way for the court to customize child support obligations based on case specifics for certain factors, especially child care and visitation travel expenses.

Moore said that parents sometimes agree to handle things like child care, visitation travel, and private school tuition outside the child support context. For example, the parties might agree to split the child care or tuition expenses with the obligor making his or her share of the payment directly to the child care provider or private school. Regarding visitation travel, Schaar said that if the parties are going to split those expenses, the court will commonly not allow the obligor to have a deviation for his or her share. In response to a question from Fleming, Moore said the parties are aware that if they address these items outside of the child support context, they will not be able to look to CSE for enforcement if one party is not paying his or her share.

No action was taken regarding the deviation analysis because no action is required. Fleming noted that there are some other deviation-related issues on the list that will be discussed at a subsequent meeting. One of those items is the legislative directive (HB 1329) to create a deviation reason in depreciation cases. The committee asked to be provided with the text of HB 1329 for the next meeting.

*Issue: Update terminology to be consistent with SB 2042. For example, "custody," "custodial parent," and "visitation." (Technical change.)*

Oberst said she reviewed each section of the guidelines to look for terminology that is now outdated and out of favor as a result of 2009 SB 2042. She had prepared a draft in advance to replace "custodial parent" with "parent with primary residential responsibility," to replace "custody" or "physical custody" with "primary residential responsibility," and to replace "visitation" with "parenting time." Woods made a motion to accept the draft. Ness seconded the motion and all members voted "yes." These changes will be incorporated into the recommended revised guidelines.

The remaining items on the list of issues for consideration were mentioned by Fleming and sometimes there was brief discussion but no decisions were made. Those items are considered to be still pending.

**Next meetings:** Fleming said that the second meeting has been scheduled for Tuesday, June 15th. The committee agreed to start that meeting at 10:00 a.m. The third meeting has been scheduled for Tuesday, June 29th. The second and third meetings will be held in the Sakakawea Room at the Capitol.

**Action Items:**

1. Contact the Tax Department to ask if continuing to calculate the deduction for the hypothetical state income tax obligation at 14% of the hypothetical federal income tax obligation is still accurate. If not, ask if the Tax Department can suggest a more accurate rate. (Post-meeting note: Completed. Email sent to the Tax Department on May 27th and response received on June 1st.)
2. Prepare a draft to include "royalties" and "rents" in the list of examples of gross income and research whether royalties are subject to self-employment tax under the Internal Revenue Code.
3. Regarding the deduction for lodging expenses, prepare a draft that incorporates a reference to the OMB rate and that strikes the "whichever is greater" language. Also, contact OMB for information about how often the state reimbursement rate changes. (Post-meeting note: Completed. Email with information from OMB sent to members on May 27th.)

4. Prepare a draft to include unemployment compensation, workers' compensation, retirement or disability payments, veterans' benefits, and earned income tax credit in the definition of "earnings" for purposes of imputing income.
5. Prepare a draft to amend the general instruction in section -02(10) to expand on the "show your work" concept for adjustments such as multiple families, extended visitation, and other items that affect the child support amount after net income has been determined.
6. Provide the text from HB 1329 regarding a new deviation reason in cases involving depreciation. (Post-meeting note: Completed. Email with relevant text from HB 1329 sent to members on May 27th.)