SUMMARY OF COMMENTS
RECEIVED IN REGARD TO PROPOSED AMENDMENTS TO
N.D. ADMIN. CODE CH. 75-02-04.1
CHILD SUPPORT GUIDELINES

The North Dakota Department of Human Services (the Department) held a public hearing on October 28, 2010, in Bismarck, concerning proposed amendments to N.D. Admin. Code ch. 75-02-04.1, Child Support Guidelines. No one, except for Department staff, attended the public hearing.

Written comments on the proposed amendments could be offered through 5:00 p.m., on November 8, 2010. Written comments were received from eight individuals and one group, either during or after the comment period.

The commentors and their addresses, if provided, were:

1. Leann Bertsch, Director, North Dakota Department of Corrections and Rehabilitation, P.O. Box 1898, Bismarck, ND 58502-1898

2. Karen Braaten, District Judge, Northeast Central Judicial District, P.O. Box 6347, Grand Forks, ND 58206-6347

3. Sonja Clapp, District Judge, Northeast Central Judicial District, P.O. Box 6347, Grand Forks, ND 58206-6347

4. Tina Heinrich, Minot Regional Child Support Enforcement Unit

5. Lisa Kemmet, Bismarck Regional Child Support Enforcement Unit

6. Paulette Oberst, Policy Administrator, Central Child Support Enforcement Office, P.O. Box 7190, Bismarck, ND 58507-7190

7. Barbara Siegel, Policy Analyst, Central Child Support Enforcement Office, P.O. Box 7190, Bismarck, ND 58507-7190

8. John Waller, Fargo Regional Child Support Enforcement Unit

9. Bismarck Regional Child Support Enforcement Unit, P.O. Box 7310, Bismarck, ND 58507-7310

Comments Regarding N.D. Admin. Code § 75-02-04.1-01

-01(4)(b) (Currently -01(5)(b))

One commentor suggested that this provision be amended to specify that social security benefits be included in gross income to the extent that these benefits exceed the

"Federal Benefit Rate." The commentor said the reason for this change would be to exclude a portion of the obligor's social security benefits from consideration for child support purposes.

It is assumed that the commentor's reference to "Federal Benefit Rate" means the maximum dollar amount paid to an aged, blind, or disabled person who receives benefits under Supplemental Security Income (SSI) program. Under the guidelines, SSI payments, which are means tested, are specifically exempt from gross income.

No change to this provision was proposed.

No change based on this comment is recommended. The definition of gross income under the guidelines is deliberately broad. Unlike SSI payments, social security benefits in the form of disability and retirement payments are not means tested; they are intended to replace lost earnings and are available to the obligor for paying child support. Thus, it is appropriate that these payments continue to be included in gross income without limitation, in the same way that, for example, wages and salaries are included.

-01(6)(a)(3) (Currently -01(7)(a)(3))

There were five comments regarding this provision, which addresses the number children's exemptions used in determining the deduction from gross income for the hypothetical federal income tax obligation. The gist of the comments was that the proposed language is confusing. For example, two of the commentors noted that it appears to provide an obligor with 1.5 exemptions for a child whose exemption the obligor is allowed to claim pursuant to a court order.

The commentors are correct. Language to distinguish treatment of the exemptions for children covered by an order for the exemptions versus children not covered by an order for the exemptions was inadvertently omitted from the proposed amendments. Based on these comments, we recommend a revision to the proposed amendment to make the necessary distinction.

Revised proposed amendment:

(3) (a) One additional exemption for each child, as defined in this section, that the obligor is allowed to claim pursuant to a court order unless the obligor and obligee alternate claiming the exemption for the child pursuant to the court order, in which case, an amount equal to one-half of the exemption; ~~or~~ and

(b) ~~If there is no court order allocating the exemption, or if it is unknown whether there is such a court order, then one additional exemption for~~ For each child, as defined in this section, for whom there is no court order allocating the exemption or for whom it is unknown whether there is such an order, an amount equal to one-half of the exemption if that child is

actually claimed on a disclosed tax return or ~~one additional exemption for each child, as defined in this section,~~ an amount equal to one-half of the exemption if a tax return is not disclosed; and

Comments Regarding N.D Admin. Code § 75-02-04.1-02

-02(1)

There was one comment regarding this provision, which, as proposed to be amended, would authorize the court in equal residential responsibility cases to apportion specific child-related expenses between the parents. Because of the placement of the new language, the commentors are assuming that these apportionments are intended to be in addition to the child support obligation and that they may not be a basis for deviating from the presumptively correct amount. They suggest that specific language be added to clarify the treatment of these apportionments.

The commentors are correct that these apportionments are intended to be in addition to the amount ordered as child support based on application of the guidelines. Consistent with the comment, we recommend a revision to the proposed amendment to make the suggested clarification.

Revised proposed amendment:

1. Except as provided in section 75-02-04.1-08.2, calculations of child support obligations provided for under this chapter consider and assume that one parent acts as a primary caregiver and the other parent contributes a payment of child support to the child's care. Calculation of a child support obligation under section 75-02-04.1-08.2 does not preclude a court from apportioning specific expenses related to the care of the child, such as child care expenses and school activity fees, between the parents. Any such apportionment is in addition to the child support amount determined by application of this chapter.

-02(10)

There were two comments regarding this provision, which, as proposed to be amended, would require that any support order with an adjustment for extended parenting time specify the number of parenting time nights. The proposed amendment is as follows:

Each child support order must include a statement of the net income of the obligor used to determine the child support obligation, and how that net income was determined. If a child support order includes an adjustment for extended parenting time under section 75-02-04.1-08.1, the order must specify the number of parenting nights.

One commentor was not sure whether it is the child support order or the parenting time order that must specify the number of parenting time nights.

No change based on this comment is recommended. When the proposed new language is read in its entirety and in context, it is clear that "the order" that must specify the number of parenting nights refers back to the "child support order."

The other commentor suggested additional new language to make it clear that the specified number of parenting time nights were used for child support calculation purposes.

No change based on this comment is recommended. When the provision, including the proposed new language, is read in its entirety, it is clear that the number of parenting time nights were used in calculating the extended parenting time adjustment. The commentor's suggested additional language is redundant.

Comments Regarding N.D. Admin. Code § 75-02-04.1-03

There were two comments regarding this section, which addresses the determination of child support obligations in split custody cases. One comment noted that since the term "custody" is proposed to be replaced with "primary residential responsibility" in the body of the section, it would be appropriate to update the terminology in the caption as well.

The other commentor noted that the term "primary residential responsibility" may imply that there is a court order for such and that, accordingly, the term may be too limiting since split custody situations can exist even without a court order.

Based on these comments, we recommend a revision to the proposed amendment as follows:

Revised proposed amendment:

75-02-04.1-03. Determination of child support obligation – Split custody or primary residential responsibility. A child support obligation must be determined and specifically ordered for the child or children ~~in~~ for whom each ~~parent's custody~~ parent has primary residential responsibility pursuant to a court order or, if there is no court order, for whom each parent has primary physical custody. The lesser obligation is then subtracted from the greater. The difference is the child support amount owed by the parent with the greater obligation. The offset of child support obligations in this section is for payment purposes only and must be discontinued for any month in which the rights to support of a child for whom the obligation was determined are assigned to a government agency as a condition of receiving public assistance.

Comments Regarding N.D. Admin. Code § 75-02-04.1-05

-05(6) and (7)

One commentor noted that subsections 6 and 7, which specify the conditions that must be met for a self-employment loss to reduce other income, is limited to situations in which the "other income" is not from self-employment. The commentor went on to note that, according to these subsections, a loss from one self-employment activity may not be used to reduce income from a separate self-employment activity. The commentor suggested removing this limitation in both subsections by deleting the "not related to self-employment" language.

No change based on this comment is recommended. The proposed amendments to subsections 6 and 7 were intended only to conform to changes that were made elsewhere during the previous quadrennial review of the guidelines and were inadvertently omitted from the self-employment section at the time. The commentor's suggestion would materially change the application and effect of subsections 6 and 7 and, accordingly, is determined to be beyond the scope of this rulemaking. The Department will note this comment as an issue to be considered during the next quadrennial review.

Comments Regarding N.D. Admin. Code § 75-02-04.1-07

-07(1)

There was one comment on this subsection, which defines "earnings" for purposes of imputing income based on earning capacity. Pursuant to the proposed amendment, the definition was expanded to include various types of income received in lieu of actual earnings, such as earned income tax credits. The commentor questioned whether all "refundable tax credits," rather than only earned income tax credits should be specifically listed in the expanded definition.

No change based on this comment is recommended. The category of refundable tax credits is a broad category that includes the earned income tax credit as well as several other types of credits, such the first-time homebuyer credit, the making work pay credit, and the refundable adoption credit. For guidelines purposes, the earned income tax credit is proposed to be included in the expanded definition of earnings because it is available to and intended to benefit certain low-income individuals, because it has been in effect for many years, and because the amount of the credit is directly based on the individual's earned income. These factors make it appropriate for consideration when determining whether to impute income based on an obligor's earning capacity.

Not all refundable tax credits are based on the same factors. For example, the first-time homebuyer credit program has already expired. And neither the first-time homebuyer credit nor the making work pay credit was necessarily limited to low-income individuals.

Allowing consideration of all refundable tax credits when determining whether to impute income based on earning capacity could have unintended consequences.

-07(4)(b)

One commentor suggested adding language to avoid potential confusion between this provision, which gives the court discretion whether or not to impute income to an obligor who claims to be suffering from a disability, and subsection 7, which, as proposed to be amended, would preclude imputation altogether if the obligor is receiving certain types of disability-related payments.

The comment is well-taken. The Department's intent is for subdivision b of subsection 4 and for subsection 7 to cover different situations. Subsection 7 applies when an obligor has already been approved for certain disability-related payments. In other words, the existence of the obligor's disability has been confirmed and is evidenced by receipt of these payments. On the other hand, subdivision b of subsection 4 can be used by the court, in its discretion, to provide relief to an obligor who can show that he or she suffers from a disability that precludes gainful employment but who has not yet been approved to receive any of the payment types listed in subsection 7. For example, subdivision b of subsection 4 might be applicable in the case of an obligor whose social security disability claim is still pending but who can show, through medical records, that he or she is unable to engage in gainful employment.

Based on this comment, we recommend an amendment to subdivision b of subsection 4 as follows:

Proposed amendment:

4. b. 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 one hundred sixty-seven times the hourly federal minimum wage and subdivision b of subsection 7 does not apply.

-07(7)

Two commentors expressed concern that the "workers' compensation benefits" terminology is too broad. For example, the broad terminology would include medical-only benefits. Unless the terminology is qualified, it could result in unintended consequences. One of these commentors also suggested that the subsection be reformatted to improve readability.

Based on these comments, we recommend a revision to the proposed amendment as follows:

Revised proposed amendment:

7. a. Monthly gross income based on earning capacity may not be imputed under subsection 3 in an amount greater than one-half of one hundred sixty-seven times the federal hourly minimum wage, less actual gross earnings, if the obligor is under eighteen years of age or is under nineteen years of age and enrolled in and attending high school.

   b. Monthly gross income based on earning capacity may not be imputed under subsection 3 if the obligor is receiving:

      (1) Supplemental security income payments;

      (2) Social security disability payments;

      (3) Workers' compensation wage replacement benefits; or

      (4) Total and permanent disability benefits paid by the railroad retirement board.

-07(8)

Seven commentors addressed this provision, which is proposed to create a methodology for imputing income to an obligor who is incarcerated. As drafted, the provision makes a correlation between the amount to be imputed and the length of time the obligor has been incarcerated: the longer the obligor has been incarcerated, the less income may be imputed to him or her.

One of the commentors supported this provision, stating that it will provide for a more realistic amount to be imputed to an incarcerated obligor and expressing appreciation that the guidelines will recognize the low wages paid to inmates. The commentor noted that most inmates in the North Dakota prison system earn only $1.25 to $1.60 per day. Thus, the commentor said that even if the amount to be imputed is limited, a large number of inmates still will not be able to meet their child support obligations.

The remaining commentors either expressed concern about or opposition to the provision. Although variously stated, their comments can be grouped into three main areas of concern or opposition. First, it was noted that the provision looks at the past ("has been incarcerated") rather than prospectively at the length of the sentence, including the amount of time yet to be served. One commentor is concerned that if the guidelines do not look at the amount of time yet to be served, an obligor could seek a modification just before being released from incarceration, which would deprive a child of support after the obligor's release when the obligor has greater ability to work and to earn income than while incarcerated.

No change based on these comments is recommended. Even if support is modified shortly before the obligor is released from incarceration, the release would constitute a material change of circumstances. This means, for example, the obligee could pursue another modification based on the obligor's post-release income or earning capacity.

Second, the provision was seen as "highly labor intensive," "cumbersome," or "burdensome" to apply. Regarding this area of concern or opposition, some commentors interpret the language as requiring the obligor to seek a re-calculation of the child support obligation each year for up to five years.

No change based on these comments is recommended. Even if it is true that an obligor will have to seek re-calculation each time another year of incarceration has passed, the situation is not materially different than, for example, an obligor with multiple children seeking recalculation each time one of the children reaches age 18 or graduates from high school.

Third, it was noted that "incarcerated" is not defined so it is unclear whether or how to treat time served, good time earned, work release, and concurrent versus consecutive sentences.

Based on these comments, we recommend further revisions to the provision to define what it means to be "incarcerated" for purposes of the provision and to specify that work release may not be considered in determining how long an obligor has been incarcerated. We are also recommending adding language to clarify that the obligor must be currently and continuously incarcerated in order for the provision to apply.

Revised proposed amendment:

8. a. If an obligor is currently incarcerated, monthly gross income based on earning capacity may not be imputed under subsection 3:

(1) In an amount greater than one hundred sixty-seven times the federal hourly minimum wage, less actual gross earnings, if the obligor has been incarcerated for less than one year;

(2) In an amount greater than eighty percent of one hundred sixty-seven times the federal hourly minimum wage, less actual gross earnings, if the obligor has been incarcerated for at least one year but less than two years;

(3) In an amount greater than sixty percent of one hundred sixty-seven times the federal hourly minimum wage, less actual gross earnings, if the obligor has been incarcerated for at least two years but less than three years;

(4) In an amount greater than forty percent of one hundred sixty-seven times the federal hourly minimum wage, less actual gross earnings, if the obligor has been incarcerated for at least three years but less than four years;

(5) In an amount greater than twenty percent of one hundred sixty-seven times the federal hourly minimum wage, less actual gross earnings, if the obligor has been incarcerated for at least four years but less than five years; or

(6) In any amount if the obligor has been incarcerated for at least five years.

b. For purposes of this subsection, "incarcerated" means physically confined to a prison, jail, or other correctional facility.

c. In determining the length of time an obligor has been incarcerated for purposes of applying subsection a, only continuous periods of actual confinement may be considered, except that any periods representing work release may not be considered.

One of these commentors suggested retaining the current treatment under the guidelines for incarcerated obligors (i.e., that income is imputed based on minimum wage). Another suggestion was to treat the incarcerated obligor the same as the high school student obligor (i.e., limit the amount to be imputed to one-half of minimum wage).

No change based on either comment is recommended. Minimum wage has increased dramatically over the past few years so that imputing at minimum wage or even imputing at one-half of minimum wage for the entire time that an obligor is incarcerated will likely result in uncollectible child support debt, especially if the obligor has been incarcerated pursuant to a lengthy sentence.

Comments Regarding N.D. Admin. Code § 75-02-04.1-09

-09(2)(j) (Currently -09(2)(i))

One commentor questioned whether it is necessary or advisable to limit the deviation for parenting time travel expenses to situations in which the obligor is responsible for all such expenses.

No change based on this comment is recommended. It is reasonable to limit the deviation in accordance with the proposed amendment. Allowing the obligor to have a downward deviation in the amount of the child support obligation while requiring the obligee to share responsibility for the parenting time travel expenses will have a twofold effect on the child's household. First, the funds coming into the child's household in the

form of child support are less than they would be otherwise. Second, the funds going out of the household in the form of the obligee's share of the parenting time travel expenses are more than they would be otherwise. The proposed amendment is one way to balance the interests and needs of both the obligor and the child's household.

Comments Regarding N.D. Admin. Code § 75-02-04.1-10

One commentor noted that a common result of the changes to the schedule of amounts is that an obligor would be ordered to pay more at a certain income level if there is one child before the court yet would be ordered to pay less at the same income level if there were multiple children before the court. The commentor questioned whether this outcome is simply the result of the formula that was used to determine the table amounts and is, accordingly, appropriate or whether it means the formula may have been applied incorrectly.

No change based on this comment is recommended. When presumptively correct guidelines were first adopted in 1991, the percent of an obligor's net income to be paid as child support peaked at 150% of minimum wage. Minimum wage has increased significantly since 1991. Accordingly, the Department adopted the guidelines drafting advisory committee's recommendations to reapply the new peak percentage at 150% of the current minimum wage and to reduce the peak percentage by two percentage points (e.g., for one child the peak percentage is reduced from 25% to 23%). Subject to these manipulations, the formula for determining the amounts at each $100 net income increment is the same as in 1991. The result is that for many of the net income amounts, the child support amount for one child increased while for the same net income amounts the child support amounts for two or more children decreased.

Another result of the change to the schedule is that for some of the lower-income obligors (i.e., those with net income between $800 and $1,300 per month), the child support amounts decreased across the board, including amounts for one child.

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