

**Commission on Child Support
Meeting Minutes**

Thursday, July 29, 2021

9am-12pm CDT

Kneip Building – Conference Room #3

700 Governors Drive

Pierre, SD 57501

Join Zoom Meeting

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Meeting ID: 956 4370 1143

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Commission Members Present: Chairman Justice Scott Myren; Virgena Wieseler, Department of Social Services (DSS) Chief of Children and Family Services; Lindsey Riter-Rapp, South Dakota State Bar. The following members participated via Zoom: Senator Arthur Rusch; Representative Mike Stevens; Terri Williams, Child Support Referee; Amber Kinney, Custodial Parent

Commission Members Absent: Michael Bierle, Non-custodial Parent

Others Present: Carmin Dean; Nichole Brooks; Jeremy Lippert; Marilyn Kinsman; Kristen Campbell; Suzanne Starr, Unified Judicial System; and Dr. Jane Venohr, Center for Policy Research (via Zoom). Tom Pischke and Jessica Seidel were present to provide public testimony via Zoom.

Call to Order: Chairman Justice Myren called the meeting to order at 9:03 AM CT. Roll was called and a quorum was determined. Commission members were welcomed and introductions were made.

Public Comment at 9:10 am - 10 minutes for the public to address the Commission: Tom Pischke and Jessica Steidl provided public testimony via Zoom. Tom Pischke introduced himself and asked who on the Commission is representing the non-custodial parent. Chairman Justice Myren stated Michael Bierle represents the non-custodial parent [on the Commission], however, he is not in attendance. Mr. Pischke provided remarks related to the current system being based on a society of the seventies and eighties and it needs to be updated; more parents are more involved in more money outside of the system. Jessica Steidl introduced herself and shared a little information about her personal experience with child support adding that she has reviewed laws back to 2000 and hopes to help the Commission create a more just system.

Duties of the Commission: Wieseler discussed duties of the 2021 Commission on Child Support. The Commission on Child Support was due to meet last year (2020), but due to COVID, was given another year to review guidelines. Duties of the Commission include attending Commission meetings and public hearings either in person or via Zoom; providing input in Commission discussions and votes; and reviewing draft legislation to prepare for the 2022 legislative session. Additionally, Dr. Jane Venohr, Center for Policy Research, will draft an initial report which will be provided to the Commission for input and final approval. The Commission will submit a final report to the Governor and the Legislature no later than December 31, 2021.

Summary of the Division of Child Support: Wieseler referred members to a summary of the Division of Child Support (DCS) that was included in their binders as an overview.

Chairman Justice Myren advised that members were also sent a link to a guidelines document, *State of South Dakota Boards and Commission Meeting Guidelines* and asked if there were any questions. Hearing none, Chairman Justice Myren asked for a motion to adopt the document as written. Motion to approve the *State of South Dakota Boards and Commissions Meeting Guidelines* as written by Rusch. Seconded by Riter-Rapp. The Commission voted by roll call. Myren, Wieseler, Riter-Rapp, Rusch, Stevens, Williams, and Kinney voted aye. Bierle was absent. Motion carried.

Dr. Jane Venohr, Center for Policy Research: An overview of federal and state requirements for a periodic review of child support guidelines was presented by Dr. Jane Venohr, Center for Policy Research. Dr. Venohr provided information on new federal requirements regarding how states must address income imputation and incarceration and new requirements on what must be considered in a review. In accordance with [SDCL 25-7-6.12](#), every four years the Commission is required to review child support guidelines and provide a report of its finding to the Governor and the Legislature. Due to the pandemic, an additional year was granted for the review making the final report due to the Governor and Legislature by December 31, 2021. Dr. Venohr provided information for the Commission to consider during their review of child support guidelines.

- **Consideration:** Dr. Venohr suggested members review the Supreme Court decision in [Turner v. Rogers, 564 U.S. II, 131 S Ct. 2507 \(2011\)](#) which involved incarceration of a low-income obligor for non-payment of child support.
- **Consideration:** The Commission should look at the ability to pay and set support orders at levels that can be paid to avoid referring cases to court for nonpayment.

Additionally, Federal requirements under [45 C.F.R. §302.56](#) were expanded in 2016. Most of the requirements are targeted to low-income parents in the IV-D caseload. In 1987, all states were required to have advisory guidelines; in 1989, every state was required to have rebuttable presumptive guidelines; and in 2016, there was a major expansion of federal requirements. It is important for states to meet these federal requirements and include them in the State Plan. If the requirements are not met, the federal Temporary Assistance for Needy Families (TANF) program could be affected.

- **Consideration:** As a result of the new requirements, South Dakota should consider other evidence of ability to pay such as using quarterly wage data, other income information available to the agency, and verbal testimony.
- **Consideration:** South Dakota should explicitly state it provides a self-support reserve (SSR) to fulfill the federal requirement to consider the subsistence needs of the obligated parent through a self-support reserve or a low-income adjustment. The existing South Dakota guideline schedule incorporates a SSR of \$871 per month in the emboldened area. One of Dr. Venohr's slides provided language from Kentucky and North Carolina for possible consideration. South Dakota could also meet the requirement by adding the following statement, or something similar, to SDCL 25-7-6.1: "The emboldened areas of the schedule include a self-support reserve of \$871 per month."
- **Consideration:** Review the list of 14 factors the federal government wants states to consider for imputing income. Many states are copying the verbiage of the federal wording directly into their state regulations.
- **Consideration:** Per 2020 rules, cannot treat incarceration as voluntary unemployment with non-finalized optional federal exception, e.g., violence against child or family, or incarcerated for nonpayment of support.

South Dakota may also want to consider updating its self-support reserve. South Dakota has a lower cost of living; for every dollar spent nationally on average, 90 cents is spent in South Dakota. South Dakota currently uses the 2016 federal poverty level (FPL) for one person as the basis of its SSR and this amount was adjusted for South Dakota prices. The 2021 FPL is \$1,073 per month. States have discretion on what amount to use for self-support reserve. States also have discretion on their minimum order and whether to have a minimum order. South Dakota's minimum order is \$79 per month. Per the current schedule, \$950 is the highest income of the first income bracket (\$871 self-support reserve plus \$79 = \$950).

- **Consideration:** Per the federal requirement [45 C.F.R. §302.56\(c\)](#), states should make the maximum use of improved methods of determining income and resources of non-custodial parents. South Dakota is comprehensive in the federal requirement of other evidence of ability to pay taking into consideration all earnings and income of the non-custodial parent.

States should take reasonable steps to develop factual basis of order including income used to determine the order per [45 C.F.R. §303.4](#) *Establishment of support obligations*. One state took language and plopped it into their child support guidelines.

Examples of actual income and other evidence of ability to pay from other states was discussed. Every state has labor market data.

- **Consideration:** South Dakota could expand the data resources used for income. For example, the South Dakota Department of Labor and Regulation (DLR) has information broken down by occupation – impute income at the wage for that particular occupation.

Federal requirement per [45 C.F.R. §302.56\(c\)\(1\)\(iii\)](#) includes such factors as the noncustodial parent's assets, residence, employment and earnings history, job skills, educational attainment, literacy, age, health, criminal record and other employment barriers, and record of seeking work, as well as the local job market, the availability of employers willing to hire the non-custodial parent, prevailing earnings level in the local community, and other relevant background factors in the case. Currently, [SDCL 25-7-6.4](#) *Rebuttable presumption of employment at minimum wage* states, "Except in cases of physical or mental disability, it is presumed for the purposes of determination of child support that a parent is capable of being employed a minimum of one thousand eight hundred twenty hours per year, including while incarcerated, and the parent's child support obligation shall be calculated at a rate not less than one thousand eight hundred twenty hours at the state minimum wage. Evidence to rebut this presumption may be presented by either parent."

- **Consideration:** Reference to incarceration should be removed from [SDCL 25-7-6.4](#). Consider using actual federal language.
- **Consideration:** The reference to 1,820 hours is equivalent to 35 hours per week. Carmin Dean will verify if 35 hours per week remains an accurate number.

Examples of factors to consider when computing income were provided from other states including Nebraska, Utah, Louisiana, Montana, North Dakota and Colorado. Several states are using language that is verbatim from the federal regulation. Some of these states provide further guidance on income imputation after the consideration of these factors.

- **Consideration:** Louisiana has clear language that lists all of the 14 factors the federal government wants states to consider for imputing income; however, may want to substitute a different word for "absent" in the example provided.

[45 C.F.R. §302.56\(c\)\(3\)](#) provides that incarceration may not be treated as voluntary unemployment in establishing or modifying support orders. There is a proposed federal rule

change that would give states the option to provide for exceptions to the prohibition against treating incarceration as voluntary unemployment. The exceptions concern domestic abuse and nonpayment of child support. The public comment period for this rule ended November 6, 2020.

The new federal requirements also address that the state agency, upon learning of an incarceration of an individual who has been incarcerated for at least 180 days, must provide the incarcerated, obligated parent with the information of their right to request a review and/or modify their child support order. The notification can be an automatic reduction or notification to the parent notifying them they are eligible for a modification to their child support order. South Dakota currently has a process in place to interface with the Department of Corrections and send a notification regarding modification of the child support order.

Examples from other states regarding incarceration not being voluntary unemployment were provided for the states of Nebraska, North Dakota, Colorado, Utah, Louisiana, Delaware, Pennsylvania (proposed), and Kansas. The states of Louisiana, North Dakota, and Utah provide that the period of incarceration be at least 180 days so it is consistent with [45 C.F.R. 303.8](#). Louisiana, North Dakota, and Oregon suspend the order when an obligated parent is incarcerated. Louisiana, Delaware, Pennsylvania (proposed), and Kansas provide exception depending on the crime of the incarcerated parent.

The plan to fulfill federal requirements of reviews includes new requirements such as:

- 1) Consider labor market data. During the last review, the Commission recommended to modify the minimum income presumptive requirement from a workweek of 40 hours to 35 hours (which is one thousand eight hundred twenty hours per year) based on the average hours worked according to U.S. Department of Labor which South Dakota Department of Labor follows.
- 2) Impact of guidelines policies on parent with low income. The Commission will need to see impact in order to make a recommendation.
- 3) Rates of default, imputation, and application of low-income adjustment. Division of Child Support is extracting the data for Center of Policy Research (CPR) to analyze. CPR will develop ways to get proxies when the information is not tracked in the automated system.
- 4) Comparison of payments by case characteristics including default, imputation, and application of the low-income adjustment.
- 5) Provide meaningful opportunity for public input, including input from low-income parties. This requirement is being met by public hearings as well as the legislative process. Both provide opportunities for public comment. It will not be known if people providing public comment are "low-income" and would be awkward to ask. South Dakota does a good job regarding notice of hearings.
- 6) Obtain the views and advice of the IV-D agency. The Commission has good representation of the agency, judges, referees, parents, etc.
- 7) Publish report on internet, membership of reviewing body, and effective date of the guidelines and next review. South Dakota has always published its report and will continue to do so.

A question was asked regarding Delaware's policy to automatically suspend the child support payment when someone is incarcerated. Why is it not automatic in other states? Is it due to income still being received (e.g., receiving farm rental income even though incarcerated, has a patent that provides ongoing income, etc.)? Dr. Venohr referred members to the slide regarding the state of Kansas, and will find language that's better for South Dakota to consider using for this situation.

A question was asked if a child support payment obligation is suspended while someone is incarcerated. Is the payment suspended for the duration of the incarceration, or does it go away? Carmin Dean explained in South Dakota, while dealing with interstate cases, when someone is incarcerated for 180 days or more, the order is stopped, and when released, starts up again. OCSE has made comments that states should use caution in this area as some individuals are not able to pay immediately after release. Some individuals cannot afford the high rate that is put back in place immediately following their release; they end up committing a crime and returning to prison. In this case, the child support payment is once again suspended.

New economic data on child-rearing costs and updating the schedule were also presented by Dr. Jane Venohr, Center for Policy Research. Dr. Venohr provided a list of economic data including assumptions underlying the schedule and noted what could be updated.

The child support schedule is partially based on economic data and partially based on policy. The existing schedule is based on how much it cost to raise children in South Dakota in 2016, for a family by the number of children they have and their combined income. The existing schedule excludes childcare expenses, health insurance expenses for the child, and medical out of pocket expenses except the first \$250 per child per year. These expenses are addressed on a case-by-case basis. Each parent is responsible for his or her prorated share of the schedule amount, where the prorated share is the parent's income divided by the combined parental income. The obligated parent's share establishes his or her base child support obligation. It may be adjusted for actual childcare expenses or the actual cost of the child's health care. This type of calculation is used in 41 states and is called the "income shares" model.

- **Consideration:** Update from 2016 to 2021 (12.5% increase in prices but not necessarily a 12.5% increase in schedule amount since income has also increased).
- **Consideration:** Use more current measurements of child-rearing expenditures. The existing schedule is based on an old study (called BR3 for short) that was published in 2006 and based on expenditures data collected from families surveyed in 1998-2004. The newest study using the same general methodology (called "BR5") was published in 2020 and uses expenditures data collected from families surveyed in 2013-2019. There are also other studies that South Dakota could use to update its schedule, but they use a different economic methodology to separate the child's share of expenditures from total household expenditures and older data.
- **Consideration:** There are two different methods to adjust for a specific state's lower cost of living: income realignment and price parity. An adjustment is appropriate because the economic measurements are based on national data and South Dakota has a lower cost of living than the national average. Venohr will discuss these two alternatives in more detail later including the pros and cons for the Commission to consider. The existing South Dakota adjustment is based on an income realignment. Nebraska uses price parity.
- **Consideration:** The low-income adjustment and minimum order for South Dakota currently incorporates a self-support reserve of \$871 per month, minimum order of \$79 per month for \$0-\$950 net combined, which applies to obligated parent. Some states are going to \$0 for those who have no ability to pay, e.g., disabled, mental health, caretaker for a disabled child or someone incapacitated in their home. Discuss whether to change this assumption.
- **Consideration:** When updating the existing schedule, there should be a gradual change in income. Work on the middle- and high-income brackets first, and then work on the low-income brackets. Specifically, Venohr would like the Commission to decide whether and how to update the middle- and high-income parts of the schedule (e.g., using BR5 realigned for South Dakota incomes); then, decide how to update the low-income

adjustment, so there is a gradual change between the low-income parts of the schedule to the higher incomes of the schedule.

During the last review in 2016, the South Dakota Legislature imposed a 4% cap that applies to incomes of about \$4,150-\$12,500. South Dakota went eight years without updating the schedule due to the Great Recession of 2007-2009 and its lingering adverse effects on income.

Calculations for child support varies state by state, but every state uses one of three models: 1) the income shares model (41 states); 2) the percentage of obligor income model (seven states); or 3) the Melson Formula model (three states including Montana, Delaware, and Hawaii). The income shares model presumes that both parents are responsible for the child, each parent is responsible for his or her prorated share (that parent's income divided by combined income) and the child is entitled to the same amount of expenditures the child would have received had the parents shared financial resources and raised the child in one home. The Melson Formula is a hybrid approach in that each parent is responsible for his or her share of the child's basic needs and then if there is any remaining income after considering the obligated parent's share as well as the obligated parent's basic needs, a percentage is taken. Venohr has an article published in the American Academy of Matrimonial Lawyers journal that finds guidelines models don't matter specifically at middle incomes. Rather, what matters is how often a state updates their guidelines. For lower incomes, the self-support reserve adjustment or low-income adjustment matters more than the guidelines model. At very high incomes, the income shares approach produces lower amounts than Melson and percentage-of-obligor income models. Venohr will provide a copy of the article.

Most states base their guidelines on studies of child-rearing costs includes continuity of expenditures studies, had the household been intact, rather than the minimum needs of the child. The premise is that if the obligated parent has a higher standard of living, the child should have that higher standard of living as well. In the area of studies of expenditures in single-parent households, it was found that more people live in poverty, so use of those measurements end up with a child support schedule for poverty. Some states (e.g., Minnesota, Nebraska) looked at the Comanor's Monetary method, which produces near poverty levels, but no state has adopted Comanor.

Economists don't agree on which methodology best measures child-rearing expenditures. The Federal report (Lewin 1990) and most states consider anything between lowest and highest of credible amounts appropriate for state guidelines. A total of thirty jurisdictions (28 states plus DC and Guam) use Betson-Rothbarth (BR) for their child-rearing expenditures methodology. The states of Minnesota, Maryland and Kansas partially use USDA. No other current study is used more frequently than the BR or USDA studies.

- **Consideration:** Comparisons of current studies for purposes of updating the schedule

Due to time constraints, Dr. Venohr will finish her presentation at the next meeting.

Schedule Future Meetings/Public Hearings: Future meetings were scheduled as follows:

- **Pierre:** Thursday, August 26, 2021 at 1:00 PM CT – evening public hearing.
- **Sioux Falls:** Thursday, September 30, 2021 at 1:00 CT – evening public hearing.
- **Rapid City:** Wednesday, October 27, 2021 at 1:00 MT – evening public hearing.
- **Pierre:** Thursday, November 18, 2021 at 1:00 PM CT.

Adjourn: Motion to adjourn by Riter-Rapp. Seconded by Wieseler. Members voted unanimously to adjourn. Bierle was absent. Motion carried. Meeting adjourned at 12:03 PM CT.