SCHALLER, J., concurring. Although I agree with the plurality opinion that reversal is the proper remedy in this case, I cannot agree with the rationale offered to support that result. In particular, I believe that the plurality incorrectly bases its decision on the presumed authority of the child support and arrearage guidelines (guidelines), established pursuant to General Statutes § 46b-215a, rather than on statutory authority itself. I believe that, in above guidelines cases[1] such as this one, General Statutes §§ 46b-84 (d) and 46b-56 (c) govern the trial courts' discretion. In applying the pertinent statutes, the guidelines are simply an additional factor that the trial courts are obligated to consider.

Although it would, of course, be preferable to present a unified approach to guide the trial courts, I feel compelled to write separately to clarify what I am convinced is the correct approach for trial courts to use in determining support awards in above guidelines cases. The difference in approach is not simply a matter of choosing among relatively equivalent alternatives. A matter of principle is at stake—the discretionary authority of the trial courts. The plurality's approach, by elevating the guidelines—which were created by a commission for child support guidelines (commission) set up by the legislature—to controlling authority, infringes upon the statutory authority of trial courts to determine support. My approach accords the trial courts their full statutory authority to exercise their discretion, unfettered by the strict "principles" of the guidelines, except as a factor that must be considered. As a result of my statutory analysis, I conclude that the award was improper and, accordingly, I would reverse the trial court's financial orders in their entirety and remand the case for further proceedings.

I begin by reviewing the rationale that supports the plurality's decision to reverse the judgment in this case. At the outset of its analysis, the plurality leaves no doubt about the primary basis for its reversal of the judgment of the trial court by stating emphatically: "We conclude that, although the trial court correctly acknowledged the general applicability of § 46b-84 and the guidelines, the child support order was improper because it was inconsistent with the statutory criteria and with *the principles expressed in the guidelines*." (Emphasis added.) In other words, even though the trial court followed precisely the language of General Statutes § 46b-215b (a), which requires the trial court to consider the guidelines, the plurality reverses the trial court's judgment because it did not strictly adhere to the "principles" of the guidelines. In part I A of its opinion, after reciting relevant language from §§ 46b-84 (d) and 46b-215b (a), as well as the guidelines, the

plurality calls attention to the preamble of the guidelines (preamble), which it acknowledges "is not part of the regulations . . . ."

The plurality proceeds to diverge from the proper approach by discussing various features of the preamble, including reference to the income shares model, along with lengthy quotations from out-of-state cases. The plurality then asserts categorically and, in my view, without support: "In sum, the applicable statutes, as well as the guidelines, provide that *all* child support awards must be made in accordance with the principles established therein to ensure that such awards promote 'equity,' 'uniformity' and 'consistency' for children 'at *all income levels*.' " (Emphasis in original.) This assertion is problematic because conflating the applicable statutes with the guidelines and asserting their *joint authority* is misleading. Although I fully agree that child support awards must be made in accordance with the relevant *statutes*, specifically § 46b-84, the *guidelines* have no such controlling effect in this situation. As the plurality itself acknowledges, the preamble has no regulatory authority whatsoever and the guidelines themselves are merely one factor that must be "considered"—that is "[thought] carefully about . . . [or taken] into account"; American Heritage Dictionary of the English Language (3d Ed. 1992); in the making of awards. The plurality overlooks the significance of the fact that the legislature used the phrase "shall be considered"; General Statutes § 46b-215b (a); rather than "shall control" or "are controlling," thus purposefully—and plainly—limiting the authority of the guidelines to a factor for consideration.

The plurality argues that my interpretation of § 46b-215b (a) employs two meanings of the statutory mandate to "consider" the guidelines. This contention is based on a misunderstanding of what I believe is the approach each trial court must take when fashioning a support order. As this court recognized in *Favrow* v. *Vargas*, 222 Conn. 699, 712, 610 A.2d 1267 (1992), § 46b-215b (a) made the following four changes to the application of the guidelines: (1) the guidelines " 'shall be considered in all determinations of child support amounts within the state' "; id.; (2) " 'there shall be a rebuttable presumption that the amount of such awards which resulted from the application of such guidelines is the amount of support to be ordered' "; id.; (3) in order for the trial court to rebut this presumption in a particular case, it must make a " 'specific finding on the record that the application of the guidelines would be inequitable or inappropriate' "; id., 712–13; and (4) such specific finding must be " 'determined under the criteria established by the commission.' " Id., 713. The first step for a trial court, then, is to consider the guidelines. Such consideration will result in one of two conclusions, depending on whether the parents' combined income falls within the guidelines' schedule—either the particu-

lar case falls within the guidelines' schedule or it does not. If the case falls within the guidelines' schedule, the next step in the court's process of determining the support amount is to apply the rebuttable presumption that the amount provided in the schedule is the proper amount. In contrast, if the case is above guidelines, the court applies § 46b-84 (d) rather than the remaining three steps in § 46b-215b (a). Accordingly, the term "consider" has the same meaning in cases that fall within the guidelines and cases that are above guidelines.

Contrary to the plurality's assertion that "any deviation from the schedule or the principles on which the guidelines are based must be accompanied by the court's explanation as to why the guidelines are inequitable or inappropriate and why the deviation is necessary to meet the needs of the child," the guidelines have no such controlling authority in above guidelines situations. *Battersby* v. *Battersby*, 218 Conn. 467, 470–71, 590 A.2d 427 (1991). In an effort presumably designed to provide to the trial courts more definite authority than exists presently in above guidelines situations, the plurality elevates and expands the authority of the preamble and the guidelines to a status that neither the legislature nor the commission accomplished. In doing so, it creates an unwarranted limitation on the trial courts' discretionary authority as well as an equally unwarranted expansion of the legislative and regulatory authority. Moreover, it overlooks the existing authority of § 46b-84 (d), which unmistakably gives the trial courts the discretion to determine above guidelines support, subject to *considering* the guidelines.

In part I B of its opinion, the plurality applies the principles that it has discovered in the preamble and the guidelines to determine that the award in this case is improper because it fails to follow those principles. Although I do not at this time take issue with the principles that the plurality has found and identified in the guidelines and preamble, those principles are open to more than one interpretation. The plurality goes on to evaluate the award in this case by direct application of the guidelines and with respect to the deviation criteria, concluding that the court should treat the highest percentage set out in the guidelines' schedule as the presumptive ceiling on the child support allocation. Despite passing references to § 46b-84 (d) and the need basis for support, the plurality consistently treats the guidelines, and even the preamble, as if they were applicable and *controlling* authority.

The plurality claims to find support for its conclusion in our case law. Specifically, the plurality reasons that *Battersby* instructs that the guidelines remain applicable in above guidelines cases. In so concluding, the plurality places great emphasis on the fact that this court, in *Battersby*, noted with approval that the trial

court had "considered the [g]uidelines, found the chart inapplicable for arriving at a presumptive support amount, and considered the statutory criteria and *other* [*g*]*uideline factors* in arriving at its decision." (Emphasis added.) *Battersby* v. *Battersby*, supra, 218 Conn. 472. The plurality reasons, therefore, that *Battersby*, through this endorsement of the trial court's consideration of the guidelines, supports its conclusion that " 'other [g]uideline factors' " are relevant to the determination of the support award in above guidelines cases. I do not read *Battersby* as standing for that proposition and find other statements by the court more persuasive—and more indicative—of the holding in *Battersby*.

In construing § 46b-215b, the court in *Battersby* stated: "The statute does not, despite . . . assertions to the contrary, require the trial courts to *apply* the [g]uidelines to all determinations of child support . . . . It requires only that the trial court consider the [g]uidelines. Moreover, the [g]uidelines do not contain provisions for disposable income in excess of $750. . . . Absent ambiguity, the courts cannot read into statutes, by construction, provisions that are not clearly stated. . . .

"*There are no provisions for extrapolating to higher income levels the percentages or award amounts set forth in the* [*g*]*uidelines* [*schedule*]. *If the legislature or commission had intended to provide for such extrapolation of the* [*schedule*], *it could have said so*. Two long-standing rules of statutory construction are that a court may not by construction supply omissions in a statute simply because it appears that good reasons exist for adding them . . . and that a court must construe a statute as it finds it, without reference to whether it thinks the statute would have been or could be improved by the inclusion of other provisions. . . . Regardless of what the parties or the court think the [g]uidelines should provide, the fact is inescapable that they contain no provisions for parties whose income exceeds $750 per week. The task of promulgating provisions to cover such a situation lies with the legislature or its commission, not with the court." (Citations omitted; emphasis altered.) *Battersby* v. *Battersby*, supra, 218 Conn. 469–71. This admonition is highly relevant to what the plurality attempts to accomplish. Clearly, *Battersby* cannot be read to bar the use of percentages greater than the highest provided for in the schedule. See id.

In its conclusion concerning this issue, the plurality asserts that "the guidelines do not cease to apply and permit trial courts unlimited discretion in setting child support awards merely because the income of a particular family exceeds some talismanic number on a chart." Indeed, I do not dispute that the guidelines apply to the extent that they must be considered, but the guidelines' schedule does not apply and the principles of the guide-

lines are not controlling. In cases such as this one, the trial courts do not have unlimited discretion because they are bound by statutory authority, namely, § 46b-84. This does not mean, of course, that the trial courts are free to disregard the progress in standardizing child support awards. Indeed, § 46-84 operates to constrain trial courts in a manner consistent with the movement away from the "flexible and nondirective approach" taken by the courts prior to the adoption of § 46b-215b. *Favrow* v. *Vargas*, supra, 222 Conn. 712. Given the statutory factors and the consideration of the guidelines, courts are hardly, as the plurality contends, "adrift, unanchored to . . . core principles" merely because their discretion is controlled by statute rather than by the guidelines.

The plurality's concern that "[r]emoving consideration of the guidelines from child support decisions deprives high income families of the fairness and consistency the guidelines require," is a legitimate one. Although it may be desirable to extend the guidelines criteria and principles—and perhaps the schedule—beyond the present income limits, such matters of policy are for the legislature to consider, not the court. See *Battersby* v. *Battersby*, supra, 218 Conn. 470 (guidelines contain no provisions for extrapolating guidelines chart to higher income indicating that legislature and commission did not intend for such extrapolation); see also *Favrow* v. *Vargas*, supra, 222 Conn. 716 (not function of trial court or this court to countermand legislative determination regarding guidelines). The plurality unduly limits the statutory authority of courts by elevating the authority of the guidelines and by relegating § 46b-84 to a minor role in order to correct what it perceives as a deficiency in the support scheme.

Neither the legislature nor the commission has ruled out taking the guidelines into account, nor specified how they should be taken into account in high income cases, other than to say that they must be "considered." The fact remains, however, that the current guidelines' schedule does not assist in the determination of or provide a rebuttable presumption for the support award in above guidelines situations. As a result, our courts must look for authority to the governing statutes, in particular, § 46b-84 (d), but also §§ 46b-56 (c) and 46b-215b (c), in above guidelines cases. See General Statutes § 46b-215b (c) ("[i]n any proceeding for the establishment . . . of a child support award, the . . . guidelines shall be considered in addition to and *not in lieu of* the criteria for such awards established in [section] 46b-84" [emphasis added]).

Whether the trial court improperly ordered the defendant, Frank A. Maturo, to pay 20 percent of his annual net cash bonus as child support to the plaintiff, Laura E. Maturo, requires the interpretation of the statutory scheme and due consideration of the regulations,

including the guidelines, which requires plenary review rather than abuse of discretion review. See *Unkelbach* v. *McNary*, 244 Conn. 350, 357, 710 A.2d 717 (1998). Based on this standard of review, I conclude that an order of a set percentage of a fluctuating income is not authorized under the applicable statutes.[2]

Because the guidelines do not control the financial scenario in this case, the question of statutory interpretation before the court is whether either § 46b-84 (d) or § 46b-56 (c) provides authority for the trial court to order a set percentage of bonus income that cannot be predicted before the end of any income year. The trial court incorrectly interpreted § 46b-84 (d) to provide a basis for its support order on an assumption that the guidelines did apply but that the deviation was justified. The trial court based the support order on several factors, including "the extraordinary disparity in parental income and *the significant and essential needs of the* [*plaintiff*] *including, but not limited to, the need to provide a home for the children.*" (Emphasis added.) Neither factor is a proper consideration for child support under either § 46b-84 (d) or § 46b-56 (c). Once it is determined that the guidelines do not control, courts are left to the statutory factors, which are explicit.

The trial court in this case failed to follow the principle of § 46b-84 (d) that need is the controlling force behind the elements listed in that statute.[3] In departing from that course, the trial court issued a support order that, by its very nature, is disconnected from the need factor. An order that permits an integral part of the support order to fluctuate widely and unpredictably from year to year as the bonus element of the defendant's income fluctuates widely and unpredictably from year to year is by its very nature unmoored from the need factor that underlies § 46b-84 (d).[4] In effect, the support order as to bonus income is "open-ended" and is not related to the children's need, as that concept is expressed in § 46b-84 (d).[5] The problem with the trial court's formulation is that it does not acknowledge that the factors of "amount and sources of income" and "status" are as driven by "need" as are the other factors. See General Statutes § 46b-84 (d). Fluctuating bonus income, or other such special income sources, including the tax refunds addressed in the defendant's claims, logically cannot qualify as a basis for a set percentage order and still fulfill the requirement of being need based.

What makes this case difficult is the fluctuating nature of the special income. Need is to be determined on the basis of statutory factors. Fluctuating need, driven by unpredictable, fluctuating income, is the antithesis of what the statutory factors are designed to do. Above the guidelines, need cannot logically be dependent on the factor of fluctuating income. It is certain that all the factors listed in § 46b-84 (d) must

be considered because they bear on need. The trial court, therefore, must interpret the statute as providing a correlation between income level and need. Other goals, such as entitling children to share in their parents' income or to live in financially equivalent homes, are not provided for in the statutory scheme.[6]

The trial court in this case did not decide the support award on the basis of the relationship of income to need. It simply entered a set percentage based order without explaining how it related to need, which is the crucial principle specified in the statute. The trial court did, as noted, give as reasons factors that do not appear in § 46b-84 (d), namely, "the extraordinary disparity in parental income *and the significant and essential needs of the* [*plaintiff*] including, but not limited to, the need to provide a home for the children." (Emphasis added.) The plaintiff's need appears to be a consideration that concerns the award of alimony. See General Statutes § 46b-82.[7]

The list of factors in § 46b-84 (d) is wide-ranging and includes many that are not cost based. Although the trial court's discretion in these matters is broad, it is not unlimited and it must be grounded on an accurate reading of the statutes. I recognize that § 46b-84 (d) includes station as well as amount and sources of income as factors to consider in determining need, but those factors do not open the door to making income based orders without demonstrating that those factors have a bearing on need.

It may be that the trial court could award a higher percentage of this special income to the plaintiff as alimony. Alimony obviously has an entirely different rationale and different consequences and is not limited to the same specific need requirement. See General Statutes § 46b-82. Currently, the present order is more in the nature of alimony, particularly because the court recited the plaintiff's needs as a reason for the order. I can fully appreciate a perception of unfairness if the defendant is allowed to retain his bonus income when, if the family were still intact, that income would have been shared and enjoyed by the spouse. My point, of course, is not that the defendant necessarily should retain the income, but that our statutory support scheme does not provide an appropriate vehicle for sharing that income. If the plaintiff, however, were able to demonstrate that a set percentage of special income has a bearing on need so that the statutory scheme is met, nothing stands in the way of such an order. As it now stands, that has not been established or explained by the trial court.

Until such time as the applicability of the guidelines to high income situations may be clarified by the legislature or the commission, I urge this court to instruct that, in above guideline income situations, courts look for authority first and foremost to the statutory factors

set forth in § 46b-84 (d) in light of the best interests standard of § 46b-56, while giving due *consideration* to the guidelines, along with other relevant factors. The statutory factors that are part of a need based analysis are fully adequate to guide our courts in the future and will avoid the confusion that will be produced by inflating the role of the guidelines beyond that specified by § 46b-215b (a). For the foregoing reasons, I would reverse the judgment of the trial court as to the support order and tax refund order, and remand the case for a new hearing on the financial issues.[8]

[1] By "above guidelines" cases, I am referring to cases involving families whose combined net weekly income exceeds the highest amount in the guidelines schedule. "Above guidelines," therefore, is synonymous with "above schedule."

[2] I would reach the same conclusion if the abuse of discretion standard of review were applied. Although I believe that statutory interpretation and, thus, the plenary standard of review, governs the issue, it is clear to me that under no circumstances did the trial court have discretion to award support that was unrelated to need under § 46b-84 (d).

[3] General Statutes § 46b-84 (d) provides: "In determining whether a child is in need of maintenance and, if in need, the respective abilities of the parents to provide such maintenance and the amount thereof, the court shall consider the age, health, station, occupation, earning capacity, amount and sources of income, estate, vocational skills and employability of each of the parents, and the age, health, station, occupation, educational status and expectation, amount and sources of income, vocational skills, employability, estate and needs of the child."

[4] Although the bonus is predictable based on the annual income calculation, it is not predictable in advance for purposes of structuring a support order.

[5] I would describe "need" as expressed in § 46b-84 (d), as *derived* need, that is, as derived from the combination of factors specified in § 46b-84 (d), which is not related to *actual* need, in an absolute sense of survival above the poverty level, for example.

[6] Although § 46b-56 (c) directs the court to keep in mind the best interests of the children, that important consideration does not override or supplant the factors listed in § 46b-84 (d). Surely a consideration of "best interests" does not give the court free rein to supplant the § 46b-84 (d) need based factors with a general "best interests" interpretation that would permit anything that might conceivably benefit the children. In light of the specific factors in § 46b-84 (d), the § 46b-56 (c) best interests principle seems to be no more than a *guiding light* for the § 46b-84 (d) analysis.

[7] General Statutes § 46b-82 (a) provides in relevant part that "[i]n determining whether alimony shall be awarded, and the duration and amount of the award, the court shall . . . consider the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate and needs of each of the parties . . . ."

[8] As to part II of the plurality opinion, I share the concerns expressed with regard to the bonus award.