

*Reaching Common Ground*

# Dollars and Sense:

Improving the  
Determination of  
Child Support  
Obligations for  
Low-Income  
Mothers, Fathers  
and Children

*Dollars and Sense: Improving the Determination of Child Support Obligations for Low-Income Mothers, Fathers and Children* was written by the National Women's Law Center and the Center on Fathers, Families, and Public Policy as the second report on the special concerns of low-income mothers and fathers — and public policy recommendations to address these concerns — in several areas of family law and policy. The report is based on the discussions of the participants in the Centers' collaborative Common Ground project.

The National Women's Law Center is a non-profit organization working to expand opportunities and eliminate barriers for women and their families, with a major emphasis on the areas of family economic security, education, employment and health.

The Center on Fathers, Families, and Public Policy is a non-profit organization working to improve outcomes for low-income families, especially by advancing policies to help parents, whether married or not, work together to support their children emotionally and financially.

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## I. THE COMMON GROUND PROJECT

The Common Ground project is a collaboration of the National Women’s Law Center (NWLC) and the Center on Fathers, Families and Public Policy (CFFPP). The goal of the project is to bring together individuals who work with low-income mothers and fathers to develop and advance public policy recommendations on child support and interrelated welfare and family law issues that promote effective co-parenting relationships and ensure emotional and financial support for children.

Although low-income mothers and fathers<sup>1</sup> often share a desire to support their children, public policies often do not recognize their needs or the complexity of their relationships and family structures, and may end up pitting parents against each other rather than helping them work together to provide for their children. Moreover, the public discussion of these issues tends to highlight the points of disagreement and conflict between low-income mothers and fathers, rather than their common interests. Similarly, advocates working on these issues tend to work either on behalf of low-income mothers or fathers. While in some instances these groups support the same policies, they are often — just like low-income mothers and fathers — confined in the public policy arena to staking out adversarial positions on either side of an issue. The Common Ground project provides a rare opportunity for advocates, practitioners, and researchers who work primarily with low-income mothers, and those who work primarily with low-income fathers, to come together, explain their concerns, reach a better understanding of the issues, and, in many instances, forge solutions that meet the needs of all family members. The goal is to achieve policies that reflect the perspectives — and the areas of common ground — of both mothers and fathers in these fragile families, which should improve outcomes for their families.

The first Common Ground meeting focused on paternity issues because the establishment of paternity is a “gateway” to other child support and family law issues. The first report, *Family Ties: Improving Paternity Establishment Practices and Procedures*

*for Low-Income Mothers, Fathers and Children*,<sup>2</sup> provides insights into the hopes and concerns that low-income mothers and fathers have about paternity establishment. *Family Ties* makes a series of recommendations to improve the paternity establishment process. However, it also recognizes that it is impossible to discuss reforms to paternity establishment without considering its economic, social, and other legal consequences, and recommends that “the policies associated with paternity establishment should increase the economic and emotional support available to children of low-income parents.”<sup>3</sup>

This second Common Ground report grew out of a series of meetings that explored the economic issues around child support in greater depth: policies that would give more child support payments to children, rather than use them to reimburse public assistance and Medicaid costs; set child support awards in a fair and realistic way; modify awards to reflect changing circumstances; manage arrears; and increase family income. The diverse and distinguished public policy advocates, practitioners, and researchers who participated in the meetings are listed in the Appendix.

NWLC and CFFPP have prepared this report in consultation with the participants at the meetings on economic issues, but are solely responsible for the final product. The goals are to capture the discussion at the meetings and to present the recommendations that are supported by a majority of participants. Despite the tensions around these economic issues, there are several areas of common ground. In the areas in which there is no consensus, the effort is to capture the arguments on both sides of the issue. Both by describing and explaining the particular concerns of low-income mothers and fathers, and making concrete recommendations to address these concerns, when possible, this report is intended to contribute to on-going efforts to improve the policies that can make such a difference in the lives of these mothers and fathers, and the children for whom they are responsible.

*The goal is to achieve public policies that promote effective co-parenting relationships for low-income mothers and fathers and ensure emotional and financial support for children.*

## II. SETTING CHILD SUPPORT AWARDS FOR LOW-INCOME FAMILIES

*When both parents are poor, small differences in the amount of child support paid — and received — may make the difference, in either household, between having enough to eat or going hungry.*

When there is not enough income to go around, making decisions about how to divide it is inherently difficult. When both parents are poor, small differences in the amount of child support paid — and received, when children receive the payments — can matter deeply. They may make the difference, in either household, between having enough to eat or going hungry that week, between making that month's rent payment or being evicted. Yet when both parents are poor, despite the struggles and hardships of both parents, child support payments still may fall short of meeting children's needs. Setting support obligations at a level that far exceeds a low-income parent's ability to pay may do nothing to increase the amount of child support that children receive, and may even decrease it. And, if the children are current or former recipients of public assistance, the child support payments made on their behalf may go to the state and federal government to reimburse public assistance costs, rather than to the family.

The size of the initial child support obligation is a function of several different policies: the guidelines, or formula, the state uses to calculate child support; the way the state determines the amount of income to which the guidelines should be applied; what contributions count toward satisfaction of the obligation; how the responsibility to provide medical support is addressed; and whether, in addition to a prospective award for cash and medical child support, the initial award includes a retroactive obligation to reimburse birthing costs, past welfare assistance, or child support for the period before the order was established. The sections that follow provide some background information on these issues, then summarize the discussions of the participants at the Common Ground meetings as they worked to develop recommendations on these issues.

### I. Setting Child Support Awards: The Legal and Policy Context

#### a. *The Development of Child Support Guidelines*

Twenty-five years ago, child support issues were almost entirely matters of state law.<sup>4</sup> However, in 1975, with the primary goal of increasing child support collections to reimburse federal and state welfare costs, the federal government assumed a more active role by establishing the federal/state child support enforcement program. As a condition of receiving federal funding for their welfare programs (then Aid to Families with Dependent Children, or AFDC, now Temporary Assistance for Needy Families, or TANF), and to receive federal matching funds for child support enforcement, states must comply with federal child support enforcement requirements. Since 1975, the mission of the program has expanded; Congress has provided additional tools and incentives to states to improve services to families not receiving public assistance, who now represent over 80% of the program's caseload.<sup>5</sup> And, with numerous amendments to the law since 1975, Congress has changed the way states establish paternity, enforce child support, and determine the amount of a child support award.<sup>6</sup>

Historically, the amount of a child support award was at the discretion of individual judges. Awards varied dramatically from judge to judge,<sup>7</sup> and generally were inadequate. On average, the support paid to custodial mothers was significantly less than half of what a typical two-parent household would spend on children.<sup>8</sup> One study found that fathers' child support awards often amounted to less than their car payments.<sup>9</sup> However, by the early 1980s, a few states had begun using numerical guidelines to set child support awards. Studies showed that the use of such guidelines helped to make child support awards more consistent and adequate.<sup>10</sup>

In 1984, Congress required that all states develop child support guidelines — numerical formulas for the calculation of child support awards — for state

judges to consider in setting child support awards.<sup>11</sup> In 1988, Congress went further and required that state child support guidelines operate as a rebuttable presumption in any judicial or administrative proceeding for the award of child support.<sup>12</sup> In addition, the 1988 amendments required that states review their guidelines every four years, to ensure that their application results in appropriate award amounts.<sup>13</sup> However, states were given great discretion in developing the content of their guidelines.<sup>14</sup>

***b. Basic Models for Child Support Guidelines***

States have adopted different types of guidelines to determine award amounts.<sup>15</sup> The simplest model is the “percentage-of-income” guideline used by about 15 states.<sup>16</sup> Under this model, a percentage of the noncustodial parent’s income is awarded as child support, based on estimates of the percentage of income devoted to expenditures on children in two-parent families. Percentages increase for additional children (for example, 17% of gross income for one child, 25% for two, 29% for three). The custodial parent is assumed to spend her proportional share of expenses directly on the children. Because percentage-of-income guidelines assume that the percentage of parental income devoted to expenditures on children remains constant across a wide range of incomes, it is not necessary to include the custodial parent’s income in the calculation.<sup>17</sup>

Percentage-of-income guidelines address low-income obligors in different ways. Some apply the same flat percentages to all levels of income. Others apply a lower percentage to low levels of income, or below a certain threshold set a minimum order or leave the award to judicial discretion.

“Income-shares” guidelines are used by a majority of states (31).<sup>18</sup> Under this model, the parents’ incomes are combined, the amount of child support corresponding to that level of combined income is determined from a table, and the basic support obligation is prorated between the parents based upon the ratio of their incomes. Other costs, such as child

care, may be prorated and added to the basic support obligation.

The table that determines the amount of support is based on estimates of the percentage of income devoted to expenditures on children in two-parent families with similar income. However, unlike the percentage-of-income guidelines, income-shares guidelines assume that the percentage of parental income spent on children decreases, rather than remains constant, as total income rises, beginning at fairly low levels of parental income. Thus, under income-shares guidelines, lower-income obligors are required to pay a higher percentage of their income as child support than higher-income obligors.<sup>19</sup>

Many income-shares guidelines have a low-income threshold below which the guidelines do not apply. However, when the threshold is based on the parents’ combined income, it may have peculiar effects. For example, if the threshold is \$700 per month in combined income, when the noncustodial parent earns \$500 and the custodial parent earns \$150, only a minimum amount of support may be due. However, a modest increase in the custodial parent’s earnings to \$300 per month, because it increases the combined income above the threshold, may substantially increase the support obligation of a noncustodial parent whose income is unchanged. Similarly, a decline in the custodial parent’s income that lowers combined income below the threshold may greatly reduce the support obligation of a noncustodial parent, even though his income is unchanged and the custodial parent’s ability to provide support has decreased.

The “Delaware” or “Melson” model guidelines used by a few states provide for a self-support reserve for both parents, then allocate parental income above that reserve to meet their children’s minimum needs, and finally, if there is additional income available, add a percentage of that income to the award.

Some jurisdictions, such as Massachusetts and the District of Columbia, use hybrid models. They use a varying percentage of noncustodial parent income that increases as noncustodial parent income in-

*Federal law requires all states to have child support guidelines that operate as a rebuttable presumption.*

## II. SETTING CHILD SUPPORT AWARDS FOR LOW-INCOME FAMILIES

*State policies and practices vary greatly in the way they address the child support obligations of low-income parents.*

creases, so that the guidelines are progressive rather than regressive in effect. Once the income of the custodial parent and children has increased above a certain threshold net of child care expenses, it may reduce the amount of the noncustodial parent's child support obligation.

***c. The Treatment of Low-Income Noncustodial Parents Under State Guidelines***

State policies and practices concerning the determination of the child support obligations of low-income noncustodial parents vary widely. According to a survey of state policies on this issue by the Office of Inspector General (OIG) of the U.S. Department of Health and Human Services, 30 states specify an income threshold below which orders are established differently than under the state's regular guideline principles.<sup>20</sup> Threshold levels range from \$400/month, to the federal poverty level (\$716/month for one person in 2001), to \$1,000/month.<sup>21</sup>

The OIG survey also found that states use their thresholds in different ways. In about eight states, the setting of awards for obligors with income below the threshold is left to the discretion of the decision-maker (some states without defined thresholds also leave the setting of awards for "low-income" obligors to the discretion of the decision-maker).<sup>22</sup> Over half the states set minimum awards for low-income obligors (some of these states apply the minimum below a specific income threshold, others do not use an income threshold).<sup>23</sup> Minimum awards range from \$20/month (or a range of \$20-\$50/month) to over \$100/month, with \$50/month being the most common minimum award.<sup>24</sup>

Several states describe their minimum awards as mandatory. This is an apparent violation of federal law which requires that guidelines operate as a rebuttable presumption. The federal Office of Child Support Enforcement (OCSE) has advised states that guidelines that must be followed without the possibility of rebuttal do not comply with federal law,<sup>25</sup> and, specifically, that "[w]hile states are allowed to

use minimum awards, the minimum amount must be rebuttable."<sup>26</sup>

In addition to differences between states in the way child support guidelines address low-income noncustodial parents, there are significant variations within states in the way guidelines are applied, especially to low-income noncustodial parents. A multi-state study that analyzed how decision-makers within states are applying child support guidelines found that deviations from guidelines are more extreme — in both directions — when obligors are low-income.<sup>27</sup>

***d. Imputing Income***

All child support guidelines in the United States use parental income as a key factor in calculating support obligations.<sup>28</sup> For individuals whose income is derived from stable, reported employment, obtaining evidence of actual earnings and determining the income to be used in the child support calculation is fairly straightforward.<sup>29</sup> However, stable jobs are not common among low-income mothers<sup>30</sup> or fathers.<sup>31</sup> When information about actual income is unknown or believed to be unreliable, or when a decision-maker believes an individual's low income is the result of voluntary unemployment or underemployment, a decision-maker may attribute income to the parent, and base the guideline calculation on that imputed income. (Technically, using indirect information to estimate the actual income of someone who is working off the books is not income imputation. In practice, however, because indirect information is often limited, the practices are hard to distinguish, and judicial decisions often fail to do so.<sup>32</sup>)

Income may be imputed to custodial parents as well as noncustodial parents in states that use guidelines that consider the income of both parents in setting awards. Some guidelines specifically provide that income shall not be imputed to a parent who is providing care to a child of the parties below a certain age (ages range from under six months to under six years); in other states, decision-makers determine whether a parent who stays at home or works in the

paid labor force part-time to provide care for a child should be considered voluntarily unemployed or underemployed and should have income imputed.<sup>33</sup> A few states consider the costs of child care in deciding whether income should be imputed to a custodial parent.<sup>34</sup> Ironically, if the costs of child care were imputed along with income to a custodial parent who was a full-time or part-time caregiver, and prorated between the parents as many guidelines provide, the total child support obligation of the noncustodial parent would likely increase rather than decrease. This is because the noncustodial parent's share of the additional (imputed) child care costs would more than offset any reduction in the basic child support obligation due to an increase in the custodial parent's (imputed) earnings, assuming typical child care costs and typical earnings for the custodial parent.<sup>35</sup>

The OIG survey of state policies on setting awards for low-income noncustodial parents found that every state except Connecticut, Mississippi, and the District of Columbia allows for the imputation of income.<sup>36</sup> Policies vary on the circumstances in which imputation will be allowed and the factors considered in determining the amount to be imputed. Thirty states impute income if the noncustodial parent fails to provide relevant information or is currently unemployed or underemployed.<sup>37</sup> Five states impute income only if the noncustodial parent fails to provide relevant information; 13 states impute income only if the noncustodial parent is unemployed or underemployed.<sup>38</sup> However, several states prohibit the imputation of income to parents receiving means-tested public assistance, unless there is a determination that the failure to impute such income would be unjust or inappropriate.<sup>39</sup>

States determine the amount of income to be imputed in various ways, and may use more than one method. Thirty-five states impute income on the assumption that noncustodial parents should be able to work 40 hours per week, full year, at minimum wage.<sup>40</sup> This is the most frequently used method.<sup>41</sup> Fifteen states consider the area wage rate, and ten

states consider the area employment rate.<sup>42</sup> When some information about the noncustodial parent is available, more than 30 states also base imputed income on the noncustodial parent's work history, skills, or experience.<sup>43</sup>

The rationale for imputing income is to ensure that a parent cannot avoid the establishment of a child support obligation by failing to provide information about income or voluntarily reducing it. However, establishing an obligation based on imputed income does not ensure that payment will be made. In addition to surveying state policies concerning the setting of awards for low-income noncustodial parents, the OIG conducted a more in-depth analysis in ten states of how those policies affected the actual payment of child support.<sup>44</sup> It found that cases in which income had been imputed were four times more likely to have generated no payments during a 32-month period than cases in which income had not been imputed (44% to 11%).<sup>45</sup> The OIG noted that this finding did not show that imputation of income was the cause of nonpayment; noncustodial parents who fail to provide information or are unemployed may be less likely to pay support than those who appear in court or are employed.<sup>46</sup> However, the finding does indicate that imputing income is not a very effective method of getting them to pay. Some states that have analyzed their hard-to-collect cases have concluded that the combination of frequently setting awards by default and imputing a high level of income to absent obligors is an important factor in increasing the amount of uncollectible debt.<sup>47</sup>

While using imputed income to set support awards may not be an effective way to increase collections, determining actual income for individuals who work in unstable, temporary or seasonal jobs, are self-employed, or for whom income is unreported, is also difficult. The wage information available to state child support enforcement agencies through their automated systems may be incomplete. For example, employers subject to the state Unemployment Insurance (UI) tax are required to re-

*Basing awards on imputed income is not an effective way to increase collections, but it is difficult to determine actual income for individuals who work in unstable jobs or whose income is not reported.*

## II. SETTING CHILD SUPPORT AWARDS FOR LOW-INCOME FAMILIES

*Current medical support policies are not well-suited to the realities of today's health insurance market and the circumstances of many low- and moderate-income parents.*

port employee earnings to the state UI agency. However, even for covered employment within the state, researchers note that UI administrative records are likely to be incomplete, since employers have incentives to underreport employment and earnings.<sup>48</sup> The types of employers most likely to underreport are small firms with high turnover rates, which also are the most likely to employ low-skilled, low-income workers.<sup>49</sup> In addition, state UI systems do not include information about self-employed individuals, most independent contractors, federal and military employees, and individuals working out of state.<sup>50</sup> Although the development of the National Directory of New Hires has made more information about out-of-state earnings available to state child support agencies, in states where automated systems have not been fully implemented, information through this national automated interface may not always be readily available to caseworkers.<sup>51</sup> Moreover, the extent to which states try to develop possible sources of information about income beyond what the automated system supplies, especially in default cases, differs.<sup>52</sup>

For some low-income parents, work in the informal economy is an important source of additional income. For example, based on interviews with unmarried fathers in several cities, the Fragile Families and Child Wellbeing Study found that almost three in ten unmarried fathers (28%) participated in the informal economy, including unreported earnings from self-employment, under-the-table work for cash, “hustling,” etc.<sup>53</sup> For these fathers, such work raised their earnings by \$3,293 a year on average or 23%.<sup>54</sup> Very few unmarried fathers in the Fragile Families study (1.3%) worked solely in the informal economy; about 2% reported no earnings.<sup>55</sup>

Imputing income based on full-time, full-year minimum wage work — \$10,300 per year based on 40 hours per week, 50 weeks per year, at \$5.15 per hour — underestimates the earnings of some unmarried fathers, and overestimates the earnings of others. Average earnings of unmarried fathers in the Fragile Families study were \$18,554 in 1999 for fathers with regular-sector employment only, and \$19,416 for

those with earnings from regular-sector employment and the informal economy.<sup>56</sup> However, 40% of unmarried fathers in the sample had regular-sector earnings below \$9,000, and 15.5% had regular-sector earnings between \$9,000 and \$12,999.<sup>57</sup> A study of fathers of children receiving assistance under Wisconsin’s Temporary Assistance for Needy Families program found that the average amount for those with earnings (based on earnings as reported to the researchers, which were higher than earnings reflected in UI records) was \$14,600; however, 22% of the sample reported no earnings to the researchers; 38% had no earnings reflected in state UI records.<sup>58</sup>

### ***e. Medical Child Support***

Federal law requires state child support agencies to petition for the inclusion of medical support as part of a child support order whenever health care coverage for the child is available to the noncustodial parent at “reasonable cost.”<sup>59</sup> The relevant regulation defines health care coverage to be available at reasonable cost if it is employment-related or available through other group health insurance.<sup>60</sup> State child support guidelines generally address the cost of health insurance in two ways: by deducting the cost of the insurance from the income of the paying parent or by adding the cost to the child support award (in states using income-shares or Delaware-Melson guidelines, the cost is prorated between the parents and, if the obligor provides the insurance, the cost is deducted from child support obligation).<sup>61</sup>

Current child support rules and practices are in many ways not well-suited to the realities of today’s health insurance market and the circumstances of many low- and moderate-income workers, as the Medical Child Support Working Group — created by Congress through the Child Support Performance and Incentive Act of 1998 — recognized as it developed recommendations to the Secretaries of Health and Human Services and Labor on ways to improve medical child support enforcement.<sup>62</sup> Coverage through employment or a group plan is not necessarily affordable; the cost of health insurance has

risen dramatically since the regulation defining “reasonable cost” was adopted, as has the percentage of the premium employees are required to contribute.<sup>63</sup> Many employers require employees to pay for more than a third of the cost of family coverage.<sup>64</sup> In addition, an increasing number of health plans provide access to services only in a geographically limited area.<sup>65</sup> Enrolling a child in the noncustodial parent’s health plan will not provide the child with access to health care if the child lives outside the plan’s service area. But some child support agencies will only pursue health care coverage through the noncustodial parent, without regard to the accessibility of services for the child. Finally, even though the child may be receiving no benefit from the insurance coverage, under many states’ child support guidelines the cost of the premium will reduce the monetary child support owed to the child and custodial parent.

Although affordable, accessible private health insurance coverage may be less available to the children of low- and moderate-income parents, options for publicly subsidized coverage have expanded. With funding from the federal government, all states have developed State Children’s Health Insurance Programs (S-CHIP) to expand children’s access to health insurance coverage; however, many eligible children are still not enrolled in S-CHIP. Child support agencies could play a much more significant role in enrolling uninsured children in these programs. A study of this issue by the OIG found, for example, that by improving coordination among the state child support, S-CHIP, and Medicaid agencies, Connecticut could have enrolled over 13,000 additional uninsured children in the S-CHIP program between March 2000 through February 2001, reaching 95% of its enrollment target instead of just 36%.<sup>66</sup>

***f. Retroactive Child Support and Medicaid Debt***

An initial child support order may go beyond a prospective award of monetary child support and health insurance coverage. It also may include an order for payment of retroactive child support to the

state as reimbursement for public assistance provided to the children, and an order for reimbursement of Medicaid costs related to pregnancy and childbirth. Thus, even before the first support payment under the order comes due, an obligor can find himself owing large debts to the state.

The OIG survey on setting awards for low-income noncustodial parents found that the policies of 46 states authorize orders for the payment of retroactive support to the state as reimbursement for public assistance for periods prior to the establishment of the order.<sup>67</sup> States vary in how far back they may go in assessing this retroactive support; some states are restricted to a limited number of years, others can impose a support obligation back to the birth of the child.<sup>68</sup>

The way the retroactive support order is calculated also affects the size of the total retroactive obligation. The congressional requirement that states use child support guidelines in *all* cases means that the amount of retroactive support owed to the state as reimbursement for public assistance must be calculated under the state’s income-based child support guidelines, not based on the amount of public assistance paid.<sup>69</sup> However, older arrears may be based on the amount of public assistance paid;<sup>70</sup> it was not until 1993 that the federal Office of Child Support issued formal guidance to the states clarifying that this is impermissible.<sup>71</sup> Even now, decision-makers can reach a similar result by “imputing” to the noncustodial parent sufficient income to pay an award equal to the public assistance grant.<sup>72</sup>

As with income imputation, the reasons for imposing a retroactive support obligation are to recognize and enforce the responsibility of both parents to provide support and to remove incentives for obligors to evade the child support system. However, there is no evidence that adding an order for payment of retroactive support to the state increases the likelihood that support will be paid.

An OIG study in ten states of how policies concerning the setting of awards for low-income obligors were applied, and the relationship of those policies

*By coordinating with Medicaid and S-CHIP agencies, child support agencies could help uninsured children obtain health care coverage.*

## II. SETTING CHILD SUPPORT AWARDS FOR LOW-INCOME FAMILIES

*Ordering payment of retroactive support to the state does not increase child support compliance, and the longer the period of retroactivity, the less likely the parent is to pay any support.*

to actual collections, found that ordering payment of retroactive support to the state is not an effective method to secure compliance with child support orders.<sup>73</sup> Indeed, the longer the period of retroactivity, the less likely the parent is to pay any support.<sup>74</sup> This correlation does not establish that retroactive support awards cause poor compliance; the same factors that lead to retroactive orders, such as unstable income and living arrangements, are associated with poor compliance. However, a later study by the OIG does suggest that *not* including an order for payment of retroactive support to the state can improve child support compliance by poor noncustodial parents, at least when the monthly child support obligation is low (less than 15% of income).<sup>75</sup> That study found that when a noncustodial parent had reported earnings below the poverty line, no increase in income over the study period, and an order for payment of retroactive support to the state was added to a low order, predicted compliance was 19%.<sup>76</sup> For poor noncustodial parents with no increase in income over the study period, a low order and no order for payment of retroactive support to the state, compliance was higher — 29%.<sup>77</sup> Increases in earnings were the most important factor in improved compliance, but the presence of a retroactive support award still had a negative effect. Compliance by low-income noncustodial parents who increased earnings and had an order for payment of retroactive support to the state was 44%; compliance by low-income noncustodial parents who increased earnings and had no such order for retroactive support was 54%.<sup>78</sup>

A study in Colorado did not find any difference in compliance rates for cases that were randomly assigned to two groups — one in which an order for payment of retroactive support to the state was added, one without such an order.<sup>79</sup> Researchers noted, however, that the group that was not ordered to pay such retroactive support was unaware they were receiving favorable treatment, and many of the obligors did not have enough income to pay their monthly orders.<sup>80</sup> If monthly awards by themselves greatly exceed the ability of a low-income parent to

pay, the Colorado study suggests that adding even more debt may not make much of a difference in payments one way or the other. But if monthly awards are reasonable, keeping them from becoming unreasonable by adding an order for payment of retroactive support to the state may help improve compliance.

For most low-income obligors with cases in the state child support system, the only retroactive support they are likely to be ordered to pay is support owed to the state as reimbursement for public assistance provided before a child support order was sought.<sup>81</sup> In many states, custodial parents may only seek prospective child support. Even in states that allow custodial parents to seek retroactive child support, the state's ability to seek retroactive support as reimbursement for welfare costs may exceed that of custodial parents. For example, states may be able to go back further in time in seeking retroactive support than custodial parents may.<sup>82</sup> And custodial parents — but not states — may be barred from receiving retroactive support because of delays in seeking a child support order, or for other equitable reasons.<sup>83</sup>

In addition to ordering payment of retroactive child support to the state, initial child support orders may include a provision that the father reimburse Medicaid for the costs related to pregnancy and childbirth. Most states (39) authorize the collection of Medicaid birthing costs; however, actual practice varies among and even within states.<sup>84</sup> The OIG study of how ten states applied their policies concerning setting obligations for low-income obligors found that six of the ten states had a policy of collecting for Medicaid birth-related costs, but only two reported they did so in practice.<sup>85</sup> In Wisconsin, one of the states that routinely assesses Medicaid birthing costs, the child support agency will assess and try to collect such costs even when there is no active child support order because the parents are married or cohabiting.<sup>86</sup> States estimated that when such costs are included, a typical uncomplicated birth adds about

\$3,100 to the child support obligation while a Caesarean delivery adds \$6,700.<sup>87</sup>

***g. When Child Support Goes to Children***

As a condition of receiving TANF, families must sign over to the state their rights to child support as reimbursement to the federal and state governments for public assistance provided to the family.<sup>88</sup> Under the old AFDC program, families also were required to assign their rights to child support to the state; however, in 1984, Congress required states to give families some of the child support collected while they were receiving welfare. States were required to pass through to families the first \$50 of child support collected each month and to disregard that amount when calculating the family's AFDC benefit;<sup>89</sup> the rest of the support collected was retained by the state and federal governments as reimbursement for public assistance. This mandatory \$50 pass-through and disregard was eliminated by Congress in 1996, leaving states free to set their own policies.<sup>90</sup> Most states eliminated the pass-through and disregard;<sup>91</sup> thus, in a majority of states *none* of the child support paid by noncustodial parents, many of whom are low-income themselves, goes to the children while families are receiving TANF. Cases involving current TANF recipients represent 19% of the caseload of the child support program.<sup>92</sup>

After families leave TANF, they are entitled to receive all current support payments made on their behalf.<sup>93</sup> In general, former TANF recipients also have the right to have their claims to past-due child support paid ahead of the government's, but there are several exceptions (for example, when past-due child support is collected by intercepting the noncustodial parent's federal tax refund, the money will go to repay government arrears before the family's).<sup>94</sup> Overall, the various exceptions to "family first" child support distribution mean that families that have left welfare get to keep only half of the child support arrearages collected.<sup>95</sup> Cases involving former TANF or AFDC recipients represent 46% of the caseload of the child support program.<sup>96</sup> Families served by the

public child support program who never received TANF or AFDC are entitled to receive all child support collected on their behalf.<sup>97</sup>

Research demonstrates the multiple benefits of giving child support to children rather than to the state. Wisconsin undertook a unique experiment as part of its public assistance program. Families receiving TANF benefits receive all of the child support paid on their behalf, and those payments are disregarded in calculating their TANF benefits. Comparing the families who received a full pass-through and disregard of child support with the control group of families who received just the \$50 pass-through and disregard, researchers found that when all child support payments go to benefit their children, paternity is more likely to be established,<sup>98</sup> support is more likely to be paid, and in higher amounts,<sup>99</sup> and there is little if any overall increase in government cost.<sup>100</sup> Wisconsin researchers also found some evidence of improved family functioning: increased paternal contact,<sup>101</sup> reduced levels of serious conflict between parents,<sup>102</sup> and improved children's educational outcomes.<sup>103</sup>

Other research has found that in general, child support contributes substantially to family income and child well-being, when families receive it. For all poor families who receive child support, it provides over a quarter of total income; and for poor children not on welfare, whose parents may keep all current support collected, child support provides, on average, 35% of family income — when families receive it.<sup>104</sup> Receipt of child support reduces reliance on public assistance, by helping families leave and avoid a return to welfare.<sup>105</sup> Effective child support enforcement also is linked to reductions in divorce and non-marital birth rates,<sup>106</sup> and to increases in children's educational attainment.<sup>107</sup>

**2. Reaching Common Ground on Setting Support Awards**

As Common Ground participants began their discussions of setting support awards, they emphasized that their comments and recommendations on these

*When support payments go to children, rather than to reimburse the government for welfare costs, paternity is more likely to be established, and support is more likely to be paid, and in higher amounts.*

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*When both parents have very limited resources, states should supplement child support policies with policies to help increase the income of both households.*

issues should be viewed in the context of other needed policy changes.

First, in making recommendations about the size of the child support obligations of low-income parents, participants emphasized, as they had in discussions about improving paternity establishment, the importance of changing public policies to give child support to children to increase their well-being, rather than to the government as reimbursement for public assistance.<sup>108</sup> Participants observed that it is hard to tell poor noncustodial parents who cannot meet their own basic needs that, as responsible parents, they must pay formal child support when those payments go to the state and do not directly benefit their children. And it is hard to see some of the poorest children and custodial parents — current and former TANF recipients — deprived of the benefits of child support.

Second, participants highlighted the importance of setting awards through a fair process, whatever the substantive standards are. Both parents need to receive notice of the proceedings at which awards will be set, information about how guidelines work, and the opportunity to participate and provide information about their income and circumstances. Participants also urged that there be broader public education about the responsibilities of parenthood, financial and emotional, to avoid the shock that many now experience when they first encounter the child support system.

Third, participants noted that concerns about how initial awards are set intensify when parents fear that they will have to live with the consequences of an award that is too low or too high for years to come. Participants emphasized the importance of improving procedures for modifying awards, in addition to improving the way initial awards are set (see Chapter III, *infra*), and noted that improvements in these areas can reduce the build-up of arrears (see Chapter IV, *infra*).

Finally, participants stressed that when both parents have very limited resources, policies concerning the transfer of child support income must be supple-

mented by policies that increase the income and resources of both parents to ensure children an adequate standard of living. Participants emphasized that services to help mothers and fathers increase their income need to be improved. Most TANF programs serving custodial mothers emphasize caseload reduction and “work first” approaches rather than the mix of education, training and employment services that could help parents obtain jobs that will enable them to support their children.<sup>109</sup> The number of fatherhood programs has expanded greatly in recent years, including small community-based programs, state and local programs using welfare-to-work funds, and larger national initiatives such as the Responsible Fatherhood demonstration of the federal Office of Child Support Enforcement and the multi-state Partners for Fragile Families demonstration. However, many poor fathers are not receiving services, and additional research is needed to improve strategies for reaching and helping them.<sup>110</sup> Programs for child support assurance and incentive payments could boost low or irregular child support payments into a more adequate and stable source of family income;<sup>111</sup> participants urged the development of programs that would test these promising approaches.

#### ***a. Improving Child Support Guidelines for Low-Income Families***

Common Ground participants generally thought that states should develop presumptive guidelines that apply at all income levels, rather than leave the treatment of low-income families entirely to judicial discretion. Several participants noted that Congress mandated the development and use of guidelines partly in response to the capricious way in which orders had been set before guidelines, and that both research and their own experiences have confirmed that there still are substantial disparities in the way low-income obligors are treated by decision-makers.

Common Ground participants struggled to develop recommendations for setting awards for the poorest obligors. A number of participants thought that guidelines must recognize that unless noncusto-

dial parents have enough income to support themselves, they cannot be expected to pay support at more than a minimum level, if that. They emphasized that while parents have a responsibility to provide for their children, the well-being of children is also a social responsibility. When parents — custodial or noncustodial — lack the income to support their children, society must help them increase their capacity to provide for their children and, in the meantime, ensure that the children are adequately provided for.

Other participants shared these goals, but noted that in many states, only minimal assistance is available for custodial parents and children. The TANF grant in most states provides a mother and children with income of less than half the federal poverty level.<sup>112</sup> Failure to comply with any of a number of strict requirements can lead to the cutoff of assistance to the entire family.<sup>113</sup> Participants noted that custodial parents, however poor, share what little they have with the children living with them; they have no “self-support reserve.” In the absence of adequate policies to support custodial parents and children, these participants thought that exempting poor noncustodial parents from paying child support simply shifted more of the burden to poor custodial parents. Some participants thought that guidelines should ensure children a standard of living at least equal to that of the noncustodial parent who, with a poverty-level income, might be better off than the children. However, all participants were frustrated by a debate about whether the standards of living in both households should be equalized at a level below poverty.

Participants moved closer to common ground as they approached the issues pragmatically. Whatever philosophical statement they thought the guidelines should make about the obligations of each parent and society for the support of children, they recognized that setting awards for low-income noncustodial parents at an unrealistic level is unlikely to produce much additional income, and could be counterproductive. Research based on large national

data sets shows that in general, child support enforcement does not discourage men who owe support from working.<sup>114</sup> However, researchers note that the low-income, noncustodial fathers who are missing from these national data sets may be more likely to respond to child support enforcement by working less or entering the underground economy.<sup>115</sup> And the experience of some Common Ground participants with very low-income noncustodial parents who have both unstable jobs and unstable living situations is that setting child support awards too high can drive these parents away from the formal child support system and from the formal economy. While recognizing that research is inconclusive,<sup>116</sup> these participants thought that setting awards for low-income fathers at a more manageable level would be unlikely to decrease, and might even increase, payments to children.

***b. Minimum and Zero Orders***

Recognizing the harsh realities confronting poor fathers and mothers, participants discussed appropriate awards for the poorest obligors: those with incomes under 50% of the federal poverty level. Despite the low income level, many participants felt that, except in cases in which noncustodial parents are poor and clearly unable to work — for example, incarcerated, disabled or institutionalized — there should be a low presumptive award, but not zero. They emphasized the difference that even small amounts of child support can make, when the payments go to children. They also saw the establishment of some monetary obligation as an affirmation that noncustodial parents, however poor, must find a way to provide economic support to their children just as custodial parents, however poor, must provide economic support. In addition, participants noted that having an order with an amount in the system increases the likelihood that the case will be tracked and the order modified if income changes. Finally, having the guidelines establish presumptive minimum orders could protect the poorest obligors, if decision-makers set awards at the minimum level

*Setting awards for low-income noncustodial parents at a realistic level is unlikely to decrease, and might even increase, payments to children.*

## II. SETTING CHILD SUPPORT AWARDS FOR LOW-INCOME FAMILIES

*Consideration of minimum or zero orders should take into account the difficulty of modifying an award once it has been set.*

instead of basing them on unrealistically high levels of imputed income. (See discussion of imputed income, *infra*.)

Other participants argued that setting awards presumptively at zero when obligors are extremely poor is important both as a matter of principle and for practical reasons. Some of these participants argued that zero orders acknowledge that some parents cannot provide support to their children without some assistance themselves, and underscore the need to increase the commitment of public resources to support poor individuals and families. Others emphasized that minimum orders are dangerous in practice, because some noncustodial parents — individuals who are homeless, with incomes well below the poverty level — will be unable to pay even the minimum amounts ordered. Participants who work with low-income fathers emphasized the very real risk of incarceration for failure to pay child support.<sup>117</sup>

Concerns on both sides of the debate about minimum or zero orders were heightened by participants' awareness of the difficulty of modifying an award once it has been set. Under current law, parents are assured of an opportunity to seek a review of an order only once every three years (see Chapter III, *infra*). Research shows that over a three-year period, the incomes of the poorest noncustodial parents tend to increase; however, many remain poor and a few have no reported earnings throughout.<sup>118</sup> Rather than having to choose between an unvarying zero or an unvarying minimum award, participants wished for a system where awards would reflect changes in income and efforts would be made to help noncustodial and custodial parents increase their earning capacity.

After much discussion, a majority of participants agreed that, in acknowledgment of the burdens placed on custodial parents, guidelines should provide that noncustodial parents with incomes below 50% of the federal poverty level receive a minimum order in the amount of \$20–50 per month. Participants agreed that guidelines should provide that set-

ting a zero order would be appropriate in some types of cases; for example, poor incarcerated or institutionalized noncustodial parents. And in all cases, as required by federal law, a minimum amount in the guidelines would operate as a presumptive amount, not a mandate.

### **c. Setting Awards for Low-Income Families**

Moving slightly up the income scale, from the very poor to the merely low-income, participants continued to struggle to develop the principles that should govern the division of income between hard-pressed households. Only a few of the participants had worked on the development of child support guidelines, a complex exercise that has challenged policy makers and decision-makers across the country. And participants in these relatively brief Common Ground meetings did not have the opportunity to develop their ideas in detail, or test what they would mean for families in different circumstances. Nor was there time available to resolve the complex issue of how child support guidelines should address the obligations of mothers and fathers who are responsible for supporting children other than those they have in common. But, guided by a sense of what was fair and what would work for low-income families, participants moved toward agreement on some principles.

Many participants were concerned that under most existing guidelines, poor noncustodial parents who manage to increase their income to just above the low-income threshold are required to pay such high percentages of their income as child support — in most states, higher percentages than middle- and upper-income noncustodial parents are required to pay<sup>119</sup> — that they may be discouraged from continuing or increasing their work “on-the-books.” In order to provide a better work incentive for these parents, most participants recommended a progressive guideline that would gradually increase the percentage of income that low-income noncustodial parents are required to provide as child support. Percentages would start at the level represented by the minimum order the state chooses for an obligor at 50% of

poverty, and phase in gradually, with the full guideline percentages applying when the noncustodial parent's income reaches about 150% of poverty. For example, if the minimum order is \$20 per month, the effective percentage of income required for an obligor with income equal to 50% of poverty would be about 5.6%.<sup>120</sup> Under this proposal, the percentage of income required to be paid as support would increase gradually, with the full guideline percentages applying when the noncustodial parent's income reaches about 150% of poverty.

Other participants disagreed; they thought that most guidelines already allow noncustodial parents to pay a smaller percentage of income toward the support of their children than custodial parents do. They were concerned that a recommendation that states reduce guideline percentages below current levels for low-income noncustodial parents would not adequately balance the needs and responsibilities of equally poor (or poorer) custodial parents and their children.

Many participants also were concerned about the work disincentives for low-income custodial parents under the income-shares guidelines used by a majority of states. Because income-shares guidelines reduce the percentage of income that is due as child support as combined parental income increases, modest increases in earnings by a custodial parent can reduce the amount of child support owed by the noncustodial parent, even though the latter's income and ability to provide child support is unchanged. A majority of participants recommended that in states using income-shares guidelines, increases in the income of the custodial parent should not affect the child support award until the custodial family has income at least 150 or 200% of the poverty line, net of child care expenses. That would assure low-income custodial parents that increases in their income to moderate levels would not lead to a reduction in child support.

After intense discussions, a majority of participants agreed to the following proposals for the structure of child support guidelines: for noncustodial

parents with incomes less than 50% of the federal poverty level, guidelines should provide for presumptive minimum orders in the range of \$20–\$50 per month. Guidelines should provide for presumptive zero orders for poor noncustodial parents who are unable to work, such as incarcerated or institutionalized parents. Above the minimum level, the percentages payable as support by noncustodial parents should phase in gradually, with the full guideline percentages applying when noncustodial parent income reached about 150% of the federal poverty level. The income of custodial parents should not be taken into account in setting award levels unless the income of the custodial household is at least 150% of the federal poverty level, net of child care costs. Participants thought that a structure of the kind described above could be integrated with different guideline models, with some adjustments. The hybrid approach outlined by participants has similarities to the approach utilized in the Massachusetts and District of Columbia guidelines, and the “Enhanced Marginal Expenditure” model developed by the American Law Institute.<sup>121</sup> In addition, a number of states have developed hybrid approaches, such as using percentage-of-income guidelines with lower percentages for setting awards for obligors at low-income levels, while using income-shares guidelines for higher-income families.<sup>122</sup>

However, a few participants remained troubled by these proposals, and did not think they would be appropriate in the absence of other policy changes. Especially in states that provide minimal assistance to custodial parents and children, some participants thought that a recommendation that would reduce the child support obligations of noncustodial parents would be inequitable, except perhaps as part of a comprehensive plan, such as child support assurance or incentives, that would ensure other increased support for poor children.<sup>123</sup> And several participants thought that, unless the child support payments were going to children, the obligations these recommendations would impose on low-income noncusto-

*States should expressly evaluate and improve the impact of their child support guidelines on both low-income parents.*

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*States should take affirmative steps to reduce the number of orders set by default, and to avoid or minimize the use of imputed income.*

dial parents would be too harsh, and not in the best interests of the children.

***d. Determining Income Fairly for Low-Income Parents***

Common Ground participants recognized that for low-income noncustodial parents the award levels set by child support guidelines may be less important than the way the amount of income is determined. For example, a guideline may provide that an obligor with income of \$500 per month (\$6,000 per year) should pay a minimum order of \$50. However, if a decisionmaker imputes income of \$10,000 per year, the amount of child support this obligor is ordered to pay will be much higher than the minimum. Common Ground participants also recognized that accurately determining income for low-income parents may be difficult. Their earnings may not show up on regular wage records and, for a variety of reasons, low-income noncustodial parents may fail to appear at hearings when award levels are set. Because they often do not have stable living arrangements, some may not receive notice of hearings; others may receive notice, but not understand its significance, or may be reluctant to interact with the formal legal system. In the absence of information or in the face of information showing minimal earnings, decisionmakers may utilize a figure representing either what is thought to be the actual (if unreported) income, or the income that the decision-maker feels the noncustodial parent can or should be making.

Common Ground participants had differing perspectives on the imputation of income. Proponents of imputation spoke of cases they had handled in which they knew that the noncustodial parent was working but could not prove his earnings. Some noted that it is especially difficult to determine income accurately for some individuals (e.g., the self-employed, immigrants with no formal work documentation). They also talked about cases in which noncustodial parents quit their jobs for lower-paying positions in order to minimize child support payments. Although child support agencies have access

to new-hire reporting and other enforcement tools, some participants with experience with state child support offices said that the agencies are not as proficient at tracking down noncustodial parents' earnings as they are supposed to be. If income could not be imputed, or could only be imputed at very low levels, noncustodial parents with the ability to hide their income, including some middle- and upper-income parents, would be able to minimize their child support obligations.

Opponents of imputation were equally concerned that unrealistic levels of income are being imputed and used as the basis for support awards. They emphasized that the nature of the low-wage market, in which individuals have long spells of unemployment and job shifting, and the discrimination that many low-income men of color face, make it unrealistic and potentially unfair to assume that everyone can get a full-time, minimum wage job. And some participants argued that individuals should be able to change employment or seek training, even if this reduces the income they have available for child support.

The use of imputed income in default cases raised additional concerns for some participants. These participants noted that some states have much higher default rates than others, and that in such cases, states may simply rely on a universal standard of imputed income that could overestimate or underestimate actual income. Participants agreed that states should make an increased effort to ensure that parents receive actual and more understandable notice of hearings, and the assistance they need to participate, to reduce the number of orders set by default. Participants also urged that states make a greater effort to obtain actual income information in all cases, including defaults, to avoid or minimize the use of imputed income.

Participants recognized that even with greater efforts by states, some noncustodial parents would fail to appear at hearings and neither the child support agency nor the custodial parent would have information about their income or earnings history. Some

participants thought that the parents for whom a minimum or even a zero order would be most appropriate might be the least likely to appear. They recommended that if there is no evidence of a work history in a default case, a minimum order (or even a zero order) should be set; others felt that this would reward parents who failed to appear. There was no consensus on this issue.

Participants also discussed situations in which the noncustodial parent is present when the order is being set, but has an income that is lower than a previous income, has an erratic income, or is unemployed. Practitioners in responsible fatherhood programs advise fathers to come forward and work with the child support system, rather than avoid it, so they can obtain an order that reflects their ability to pay.<sup>124</sup> They noted that if the information fathers provide about their actual earnings and circumstances is ignored, because it fails to meet some abstract standard, the resulting award feels more like a punishment for failure than an appropriate and equitable order. Several participants suggested using a noncustodial parent's work history over a recent period of time as a basis for determining income in instances of erratic, under-, or unemployment. They thought this could serve as a disincentive to altering work patterns in anticipation of a hearing and an incentive for the noncustodial parent to obtain employment that is reflective of his earning potential. To ensure that it have this effect, participants suggested that there would need to be regular, periodic reviews of these orders and, ideally, programs to assist parents to find employment and deal with the review process.

Although participants did not reach agreement on all issues related to the imputation of income, participants did agree that child support agencies should make greater efforts to obtain information about an individual's actual income and work history and use that information in setting awards. Participants thought this would increase the fairness of awards, reduce the buildup of arrears, and increase the likelihood that support would be paid.

***e. Payment in Cash or in Kind***

Common Ground participants recognized that given the choice, some custodial parents would choose not to establish and enforce a support award through the formal child support system against a low-income noncustodial parent who is providing support to the best of his ability, whether in cash or in kind (e.g., in the form of material items, caregiving, etc.)<sup>125</sup> or who is cohabiting with the custodial parent. The first Common Ground report on paternity establishment recommended that the requirements that custodial parents receiving public assistance assign their support rights to the state and cooperate in support enforcement be eliminated, so that custodial parents, not the state, would decide whether to seek support through the formal child support system.<sup>126</sup> However, when monetary support is ordered, most participants did not consider in-kind support to be an appropriate form of payment of child support.

Several participants noted that it is difficult to monitor payment of in-kind support.<sup>127</sup> Others noted that the kinds of items that make up most informal transfers — diapers, clothes or shoes, gifts given during visits<sup>128</sup> — are of economic and symbolic value, but are no substitute for cash payments that can be used to pay rent and other bills, and that cash support is critical, particularly in the context of time-limited public assistance. Moreover, since in-kind support is not recognized among wealthier families, some participants suggested it should not be recognized among poorer families in the interests of maintaining a uniform system. In addition, several participants pointed to the need for the custodial parent to be recognized as the head of her household, who can best judge what items are needed on a day-to-day basis. In addition, participants noted that if the custodial parent is receiving government assistance, material items given in support are re-calculated based on their cash value, and receiving them is usually counted against the family's eligibility and level of benefits. Consequently, the majority of participants — while they acknowledged that some parents

*Custodial parents should be able to choose whether to seek a formal child support award, but when monetary support is ordered, payment should be in cash.*

## II. SETTING CHILD SUPPORT AWARDS FOR LOW-INCOME FAMILIES

*States should not order low-income parents to pay for private health insurance that they cannot afford, which diverts resources needed for child support without actually securing health care coverage.*

might wish to negotiate these issues on their own outside of the formal child support system — did not recommend permitting in-kind support payments in lieu of cash payments.

***f. Securing Health Insurance at Reasonable Cost***

Common Ground participants pointed out that for many low-income parents, private health insurance is out of reach. They were concerned that ordering low-income parents to pay for private health insurance that they cannot afford is generally futile and even counterproductive, diverting resources needed for child support without actually securing health care coverage. However, participants thought there are a number of ways child support agencies could help children obtain affordable, accessible and comprehensive health care coverage — public or private.

The Common Ground participants endorsed a number of principles developed by the HHS-DOL Medical Child Support Working Group.<sup>129</sup> Participants agreed that private health care coverage should be ordered only when it is affordable at reasonable cost, and that reasonable cost generally should be redefined as a percentage of the income of the parent purchasing it. (The Medical Child Support Working Group recommended 5% of gross income, the standard used in the State Children’s Health Insurance Program, S-CHIP.) Participants also thought that below a certain income level, private coverage should not be ordered; instead, parents should focus their limited resources on monetary child support, and children should be able to obtain coverage through Medicaid or S-CHIP. (The Medical Child Support Working Group suggested, as a best practice, that states not require parents whose net income is below 133% of poverty to provide private coverage.)

Participants also agreed that child support agencies should consider whether the available private health care coverage will offer accessible and comprehensive services. Private health care coverage should not be ordered if the coverage only offers

services outside of the geographic location in which the child resides or if the services offered are inadequate to meet the basic health needs of the child. Participants noted that coverage available through a custodial parent may offer greater access to services, especially when the noncustodial parent and child do not reside in the same geographic area. Custodial and noncustodial parents may prefer to have coverage ordered through the custodial parent, with the noncustodial parent contributing to the cost.

Finally — and perhaps most importantly for low-income parents who may both lack access to affordable private health insurance — participants wanted child support agencies to play an affirmative role in helping to enroll low-income children who cannot obtain comprehensive, accessible, and affordable private health coverage through either their custodial or noncustodial parent in Medicaid, S-CHIP, or other available state-sponsored health programs.

***g. Minimizing Debts to the State in the Initial Award***

Common Ground participants shared a number of concerns about adding retroactive support obligations to the state to the initial child support order. As they discussed at the first Common Ground meeting, participants were concerned that the prospect of large debts could discourage low-income parents from establishing paternity or otherwise coming into the child support system.<sup>130</sup> Participants also were concerned that requiring low-income parents to use their limited resources to pay down debts to the state means less current support for custodial parents and children. Participants recognized that for the poorest obligors, it may not make much of a difference whether debts are \$500, \$5,000, or \$50,000, since virtually any amount is out of reach. However, for the children of obligors with low to moderate earnings, not requiring the obligor to pay an additional 20–25% of the child support order to the state for retroactive support would mean more income available to the children. In addition, the existence of a large debt to the state could subject noncustodial

parents to tough enforcement measures, even if they were doing a reasonable job of keeping up with current payments.

Many participants thought that states should not impose retroactive child support obligations for the reimbursement of state public assistance costs. Six states already have a policy of not pursuing retroactive support.<sup>131</sup> Alternatively, states should not impose retroactive obligations to reimburse the government for public assistance benefits on individuals with incomes below 200% of poverty. Although no states appear to have adopted this specific standard, several states give the decision-maker discretion not to order retroactive support if it would cause an undue economic hardship to the obligor or if there is evidence the obligor had no income.<sup>132</sup> In addition, participants emphasized that if states set retroactive support awards, they must comply with the legal requirement that awards be set under the guidelines, based on income rather than the amount of public assistance paid to the family.

Common Ground participants also discussed policies concerning the award of retroactive child support to custodial parents. Participants agreed that laws that give more favorable treatment to state claims for retroactive support to reimburse public assistance costs than to custodial parents' claims for such support have harsh effects on both low-income fathers and mothers. They place a greater responsibility on the fathers of children who received public assistance than the fathers of children who did not, although the former group of fathers is much more likely to be poor themselves. They also make it more difficult for mothers to seek retroactive support on their own behalf, and to collect current support, because of the state's additional claims on fathers' limited resources. While agreeing that it is unfair to give states greater claims to retroactive support than custodial parents and children, participants struggled to define the circumstances under which retroactive support should be awarded to custodial parents.

Participants were especially concerned about custodial parents who are prevented from obtaining a

support order because the noncustodial parent actively and successfully evades service of process and adjudication of an award. Unless custodial parents could seek retroactive support, their children would be permanently deprived of support for the period of evasion. Some participants noted that delays by overburdened state child support agencies in filing cases and securing orders also cause children to lose their claims to support for long periods of time. In these cases, too, retroactive support may be warranted. However, other participants thought that allowing custodial parents to seek retroactive support for an extended period because of agency delay penalizes noncustodial parents for the agency's delay without generating much additional support from low-income noncustodial parents. In the time available, participants did not resolve when it would be appropriate to award retroactive support to custodial parents, for how long, or possible limitations on the right to seek retroactive support, including statutes of limitation and equitable defenses.

***b. Reimbursement of Medicaid Birthing Costs***

Common Ground participants agreed that requiring low-income fathers to reimburse states for the Medicaid costs incurred for the birth of their children, as some states and counties do, is especially detrimental to young parents. As discussed in the first Common Ground report, if paternity establishment results in the immediate imposition of thousands of dollars of debt to the state for repayment of Medicaid birthing costs, low-income fathers and mothers may be discouraged from establishing paternity. Participants also noted that the addition of Medicaid debts to the child support award, like the addition of retroactive support debts to the state, can make it more difficult for low-income fathers to meet their current support obligations. Some fathers resent that they, but not the mothers, are required to reimburse Medicaid costs. Participants emphasized that these policies put additional stress on the fragile relationships of young parents at a critical time in their — and their child's — life. They also thought

*States should not give more favorable treatment to their claims to retroactive support than to custodial parents' claims.*

II. SETTING CHILD SUPPORT AWARDS FOR LOW-INCOME FAMILIES

that providing access to health care for indigent pregnant women and newborn children serves a vital public interest — but that it is wrong for the government to require equally poor fathers to reimburse

the government for these expenditures for the benefit of all. Participants agreed that low-income fathers should not be required to reimburse Medicaid birthing costs.<sup>133</sup>

*States should not require low-income fathers to reimburse the Medicaid birthing costs of low-income mothers and newborn children.*

### III. REVIEWING AND ADJUSTING CHILD SUPPORT AWARDS

Even if an award is appropriate when it is set, it is likely to need adjustments over the course of a child's life, as the income of the parents and the needs of the child change. This is especially true in the difficult and uncertain lives of low-income parents. Low-wage jobs are often unstable. Poor parents — mothers and fathers — face higher rates of disability and incarceration than the general population, which can affect their ability to work. The structure of many means-tested benefits programs means that a small increase in earnings for custodial parents can produce an even greater loss of public benefits and increase in expenses; for example, as they lose eligibility for child care subsidies and other forms of assistance.

In addition, for the reasons discussed in Chapter II, there are special challenges to setting appropriate initial awards for low-income families. Tensions around how initial awards are set — in general and in specific cases — are magnified when awards are extremely difficult to change. Low-income mothers and fathers need meaningful access to a review and adjustment process that will help ensure that child support awards reflect the changing circumstances of their lives.

#### I. Review and Adjustment: The Legal and Policy Context

Congress has recognized the importance of periodically reviewing and adjusting child support awards. Research indicates that the earnings of non-custodial parents generally increase over the first 18 years of a child's life, and that even fathers who are poor when their children are born can make substantial contributions to their children's support over time, though the payments may not be regular.<sup>134</sup> The income of custodial mothers also changes, as do children's needs.

There are two ways to seek a change in a support award. In cases being enforced by the state child support agency, the state must have a procedure for the periodic review and adjustment of awards, at least every three years, upon the request of either parent

or the state in a public assistance case.<sup>135</sup> In addition, in all cases, states must have a procedure for modifying an award upon the request of a parent who can demonstrate a "substantial change of circumstances."<sup>136</sup> Both approaches are discussed more fully below.

#### a. Periodic Review and Adjustment by State Child Support Agencies

Federal law requires that states have procedures for the review and adjustment of child support orders enforced by the state child support agency every three years upon the request of *either* parent or, in a public assistance case, of the state, taking into account the best interests of the child involved.<sup>137</sup> To obtain this periodic review and adjustment, the requester does not have to show a "substantial change in circumstances."<sup>138</sup> However, the state is not required to conduct any periodic reviews except upon request.

In a system in which the periodic review and adjustment process is driven by requests, parents must have notice of their rights. Under federal law, states must notify both parents at least every three years of their right to request the state to review and, if appropriate, adjust the order.<sup>139</sup> However, a 1999 OIG survey of state practices on review and adjustment found that 18 states did not comply with the federal requirement that parents be given notice every three years, and nine had no plans to do so.<sup>140</sup> Although, as the OIG survey noted, "[t]he point of exit from public aid is an optimal time to encourage custodial parents to request a review of child support orders," it found that with rare exceptions, states did not use proactive measures to promote review requests from parents close to exiting public assistance.<sup>141</sup> Even with notice of their rights, to make a fully informed decision about whether to request or challenge a review and adjustment parents may need additional information, such as financial information about the other parent; however, federal law does not require parents to exchange or the state to provide such information.

*Child support awards are likely to need adjustments over the course of a child's life, especially in the difficult and uncertain lives of low-income parents.*

## III. REVIEWING AND ADJUSTING CHILD SUPPORT AWARDS

*Federal law gives both custodial and noncustodial parents the right to a periodic review and adjustment of child support awards every three years.*

Under federal law, states have three options for carrying out the periodic review and adjustment. First, they can review the order under the guidelines and, if appropriate, adjust the order. Second, they can apply a cost-of-living adjustment (COLA) to the order; third, they can use automated methods, including comparisons with wage or state income tax data, to identify orders due for review and calculate the adjustment. However, if a state chooses the second or third method to conduct the review and adjustment, it must allow either parent to contest the adjustment within 30 days by requesting a review and adjustment under the guidelines. (For example, if the state applies a COLA, a noncustodial parent may request a guidelines review because his income failed to keep pace with inflation; a custodial parent may request a guidelines review because she believes the noncustodial parent's income increased much more than inflation.)

The “review” and “adjustment” represent distinct stages of the process. Federal law states that the state shall “review and, if appropriate, adjust the order.”<sup>142</sup> This has been interpreted by OCSE as allowing states to decline to adjust the order, even if the review produces a new amount, using a “reasonable quantitative standard based upon either a fixed dollar amount or percentage, or both.”<sup>143</sup>

Nearly all states (48) require that a proposed adjustment exceed a certain threshold before they will make an adjustment to an order, even after a review. The 1999 OIG survey found that state percentage thresholds for adjustment range from 10% to 30%, and dollar thresholds range from \$10 to \$100 per month.<sup>144</sup> In several states, both the percentage and the dollar standard must be met before an adjustment will be made. For example, Washington State requires that the difference between the newly computed and the old order must be at least \$100 and 25%.<sup>145</sup> Under this standard, if the existing order is \$200 per month, and the review calculates an order of \$250, the order is not adjusted because this 25% increase is only \$50 higher. Similarly, an adjustment of \$100 per month is not made to an existing order

of \$500, since it only represents a 20% change. As discussed below, states use quantitative standards in another way: to decide when a variance is large enough to constitute a “substantial change of circumstances” and justify a modification outside the periodic review and adjustment cycle. However, many states appear to apply the same high quantitative standards they use in that context to determine whether to make an adjustment following a periodic review.<sup>146</sup> This would appear to contradict the explicit federal statutory requirement that “any adjustment under clause (i) [the periodic review] shall be made without a requirement for proof or showing of a change of circumstances.”<sup>147</sup> And 40 states apply the thresholds even if the order has not been reviewed in the last three years.<sup>148</sup>

Federal law gives both custodial and noncustodial parents the right to a periodic review and adjustment. In response to the OIG survey, all states reported that they conduct a periodic review upon the request of either parent. However, the more in-depth study the OIG conducted in ten states reveals that actual practice differs from official policy in some offices. Even when state policy calls for reviews in response to noncustodial parent requests, some workers or local offices indicated that they do not conduct such reviews.<sup>149</sup>

Some states did acknowledge that, as a matter of policy, they deal with adjustment of orders differently depending on whether the adjustment indicated by the review is upward or downward, was requested by the custodial or noncustodial parent, or is in a public assistance or non-public-assistance case. Seventeen states reported that they proceed with the adjustment process differently if the review indicates that a downward adjustment would be appropriate.<sup>150</sup> For example, in 12 of these 17 states, noncustodial parents must file on their own for such an adjustment.<sup>151</sup> In two of these states, custodial parents not receiving public assistance also must file on their own for an adjustment, even if the periodic review indicates that an upward adjustment is appropriate.<sup>152</sup> In at least one of the 17 states, the state agency will not file for

a downward adjustment for a noncustodial parent, but will hire a private attorney to represent such a noncustodial parent.<sup>153</sup> (Whether the state agency would represent a custodial parent wishing to oppose the adjustment in such a case or appoint an attorney for her, or whether she would be left on her own is unclear.) Two of the 17 states reported that they do not adjust orders downward; one state has a “clean hands” statute which provides that only noncustodial parents who do not owe arrears may have their orders reviewed or adjusted.<sup>154</sup>

Finally, state child support agencies are not subject to performance measures, incentives, or penalties related to how well or poorly they perform the review and adjustment function, in contrast to other required child support enforcement activities — paternity establishment, order establishment, collection of current support, and collection of arrears.<sup>155</sup> State administrators and caseworkers therefore have few incentives to devote significant resources to reviewing and adjusting awards.

***b. Periodic Review and Adjustment of Medical Support***

Under federal regulations, the need to provide for a child’s health care expenses also establishes the right to petition for adjustment of an award.<sup>156</sup> However, the 1999 OIG survey of state practices on review and adjustment indicates that states do not consistently pursue medical support, even if a periodic review indicates that a medical support order is warranted.<sup>157</sup> All states reported that it is their policy to check for and add medical support to orders they review.<sup>158</sup> However, in seven of the ten states visited by the OIG, child support staff said that they do not always pursue medical support if the order does not otherwise require adjustment.<sup>159</sup> In some states, caseworkers reported that judges consider cases involving only medical support a low priority; in other states, caseworkers believed that it is not state policy to pursue medical-support-only adjustments, or they are uncertain when they should do so.<sup>160</sup>

The OIG also expressed concern that the increasing reliance on COLAs to adjust orders may result in a decline in medical support orders. The OIG found in 1999 that states that were using or planning to use the COLA method to review and adjust orders were not planning to include medical support in the review process.<sup>161</sup>

***c. Modification for “Substantial Change of Circumstances”***

In addition to the periodic review and adjustment, parents have the right to seek a modification of a child support award outside of the periodic cycle when they can demonstrate a “substantial change in circumstances.”<sup>162</sup> In many states, this review is conducted by the courts rather than the child support agency. The definition of “substantial change of circumstances” varies from state to state, but generally, courts require that the party seeking a modification demonstrate that there has been a change of circumstances that is material, substantial and permanent, and not just trifling or temporary.<sup>163</sup> Under the common law test, many courts also require that the change have been unforeseeable at the time the original order was entered, and that the party requesting the modification show both a change in the child’s needs and the noncustodial parent’s ability to pay.<sup>164</sup> Thus, applying the common law standard, some courts have held that showing only a substantial increase in the obligor’s income, or an increase in the cost of living, is not grounds for a modification of an award.<sup>165</sup>

The adoption of child support guidelines has added to the common law standard other grounds for seeking a modification of a child support order, making it easier to obtain a modification because of a substantial change in circumstances. Most states now hold that there has been a change of circumstances warranting modification if there is a significant variance — as defined by the state — between the existing award and the award that would result from an application of the guidelines.<sup>166</sup> The variance may be the result of a change in one of the factors used to

*Parents have the right to seek a modification of an order outside of the periodic review cycle if they can show a “substantial change in circumstances.”*

## III. REVIEWING AND ADJUSTING CHILD SUPPORT AWARDS

*Incarceration is a significant factor in the development of child support arrearages.*

determine awards under the guidelines — income, for example — or a change in the guidelines themselves.

Nearly every state has set a quantitative standard for determining when the variance between the existing award and amount under the guidelines is sufficient to request a modification.<sup>167</sup> The percentage standards vary from 10% to 30%; some standards specify an absolute dollar figure as an alternative to, or in addition to, the percentage. For example, Texas requires a change of 30% and \$50 a month; Illinois sets a standard of 20% or \$10, whichever is less.<sup>168</sup> Demonstrating the required amount of variance gets a petitioner over the “substantial change in circumstances” threshold; it does not ensure that the order will be changed. As with any calculation under the guidelines, the award amount is presumptive, and parties may argue that there are grounds for deviating from the guidelines. Courts also may consider the reasons for the change in circumstances in deciding whether to grant a modification.

Whether using the traditional “substantial change in circumstances” standard or determining if there is a substantial variance from the guidelines amount, in deciding whether to grant a modification courts also are likely to consider whether the change in circumstances was voluntary or involuntary, and, if voluntary, whether the change was made in good faith.<sup>169</sup> For example, most courts recognize the onset of a disability that greatly reduces the ability to work as an involuntary and substantial change warranting a modification. Most courts would treat quitting a job in order to avoid paying child support as both voluntary and in bad faith, and deny a modification.<sup>170</sup> However, many cases fall somewhere in the middle, and states — and individual judges — use different approaches.

When the loss of a job is attributed to the behavior of the parent — such as fighting on the job, stealing from an employer, tardiness or drinking — but the behavior was not engaged in for the purpose of avoiding child support obligations, decisions vary. A number of courts have refused to grant a modifica-

tion when the loss of a job is due to a parent’s misconduct, even though they recognize the parent’s inability to earn at the level assumed in the order and even the futility of continuing the order at the current level, reasoning that a modification would shift the consequences of the wrongdoing to the child and other parent.<sup>171</sup> Other courts have modified orders in such circumstances, emphasizing the lack of intent to avoid child support obligations, and the reality of the obligor’s inability to pay.<sup>172</sup> However, even when unemployment or underemployment is not found to be willful, and a modification is granted, courts may impute income at a level higher than the parent’s actual earnings.<sup>173</sup> (Imputation of income also is an issue in the setting of initial awards; see Chapter II, *supra*.)

#### **d. Modifying Awards for Incarcerated Noncustodial Parents**

When obligors are incarcerated, their ability to work and pay child support clearly changes substantially. However, different approaches to the issues of voluntariness and good faith have produced different decisions on whether incarceration can be a substantial change in circumstances justifying modification of a child support order. Most courts have held that because incarceration is involuntary, it can be the basis for a modification of a child support award, at least if it is unrelated to the failure to pay support, and if there are no other income or assets from which the obligation can be satisfied.<sup>174</sup> Other courts have held that because incarceration is the result of a voluntary criminal act, it should not be the basis for a modification.<sup>175</sup>

Incarceration is a significant factor in the development of arrearages, according to research by state child support agencies into the characteristics of their “hard-to-collect” cases and the composition of their arrearages. Colorado has estimated that nearly 20% of all the arrears in the child support program are associated with cases where the obligor is or has been incarcerated, although some of these arrears may have accumulated before or after the period of

incarceration.<sup>176</sup> Washington State has found that 30% of its debtors in hard-to-collect cases have been incarcerated.<sup>177</sup>

## 2. Reaching Common Ground on Improvements to the Review and Adjustment Process

Common Ground participants who work with both low-income mothers and fathers expressed concern that the policies for reviewing and adjusting support awards are unresponsive to the circumstances of the lives of low-income families. Orders that fail to reflect increases in the earnings of noncustodial parents deprive low-income custodial parents and children of badly needed support. Orders that fail to reflect decreases in the earnings of low-income noncustodial parents who lose jobs, become disabled or become incarcerated can lead to mounting arrears and serious sanctions, including jail, for noncustodial parents, without increasing the support that children are likely to receive.

However, Common Ground participants recognized that there are a number of potentially competing interests to consider in developing recommendations to increase access to the review and adjustment process. It is important that awards be appropriate in light of current income and needs, but some stability also is important, so that parents can budget for the payment or receipt of a known amount of child support. In some circumstances, the ability to petition freely for a modification could be abused by parties manipulating their income to get a lower award, or simply harassing the other parent. The resources of state child support agencies are also limited; requiring agencies to review and adjust awards too frequently competes with other important service needs. Within this context, participants explored ways to overcome the barriers that low-income mothers and fathers face to obtaining a review and adjustment of their orders.

### a. Helping Parents Decide Whether to Seek a Review and Adjustment

Under federal law, child support agencies are required to review or adjust orders only upon the request of a parent or the state in a public assistance case. However, many low-income parents do not know of their rights to seek a review and adjustment, Common Ground participants reported. Participants who work with low-income mothers reported that many mothers do not know about possibilities for getting a review and adjustment of their order. Some leave welfare with minimum orders set years before, and may be eligible for an increase in support that could help them provide for their child. But, lacking information about their rights, they do not request a review and adjustment. Participants who work with low-income fathers reported that many do not know that they may request review and adjustment of an order on a periodic basis, or even know that they must do so, if their circumstances change, to avoid accumulating large arrearages.

In some locations, parents may not receive even the minimal written notice required by federal law every three years, or the written notice may be undermined by agency workers, for example by telling fathers that the agency will not review orders at the request of noncustodial parents, even though federal law requires them to do so. Even if parents receive notice of their rights, they may not have the information to make an informed decision about whether to request a review and adjustment.

Participants agreed that states should explain what the review and adjustment process is, how to utilize the process, and how parents can get the specific information they need — for example, about changes in the financial circumstances of the other parent — to decide whether it is worth pursuing. And agencies should ensure that all their workers know that, by law, child support agencies must conduct a periodic review at the request of either parent.

Participants thought that state child support agencies should play a more proactive role, informing

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*Low-income parents especially need access to a review and adjustment process more frequently than every three years.*

parents whose circumstances appear to have changed about their options for seeking a review and adjustment, with parental control over the ultimate decision about whether to proceed. For example, when the child support agency identifies a parent leaving TANF, or when the agency's automated system shows a significant change in a parent's earnings, incarceration of a parent, or receipt of unemployment or disability payments, the participants thought the agency should notify parents about their options for requesting a review and adjustment through the periodic process or by seeking a modification because of a substantial change in circumstances.

***b. Increasing Access to a Timely Review and Adjustment***

Participants agreed that because of multiple instabilities in the lives of low-income parents, and the lack of other resources to help a parent cope when a child support award is too low or too high, parents must have access to a review and adjustment process more frequently than every three years. Some states have a shorter periodic review period, and some state child support agencies will undertake a review and adjustment outside the periodic review cycle in some circumstances. But some agencies, participants reported, provide no assistance to parents seeking a review of an order outside the 3-year periodic review cycle.

Participants discussed different approaches to increasing access to a timely review and adjustment. Some participants recommended that periodic reviews of child support orders for low-income families should be available every six or 12 months. Others thought that it would be difficult to establish different intervals between periodic reviews based on parental income, and that allowing periodic reviews so frequently in all cases would put a burden on the other parent to respond as well as on child support agencies. These participants pointed out that low-income parents also could get increased access to reviews when they need them by improving access to a

modification for a "substantial change of circumstances" (see *infra*).

***c. Improving the Periodic Review and Adjustment Process***

Common Ground participants discussed how the various methods states can use for the review and adjustment process — review under the guidelines, automatic COLA, or automated review and adjustment — work for low-income parents, and how they can be improved. The full guidelines review is the most thorough — and the most resource-intensive. Participants recognized that states might be more willing to conduct reviews more frequently if the process were simpler, and discussed alternative methods for conducting the reviews.

Some participants thought states should adopt the option for an automatic COLA, with parents having the right to seek a full review under the guidelines. These participants noted that this approach takes the burden off custodial parents to request the adjustment, is simple to make, and ensures that the order automatically will reflect increases in cost of living, if not other changes in the parent's income and expenses such as child care. However, some participants were concerned that if an order is established at an inappropriate amount, the automatic COLA adjustment compounds this problem and leads to the build up of larger arrearages. Moreover, many low-income fathers do not have the pattern of stable earnings that increase along with inflation which the COLA method assumes. Participants agreed that if states use a COLA, both parents should be notified of their right to appeal the adjustment and request a full review under the guidelines.

Participants thought child support agencies should utilize their automated systems in the review and adjustment process in a variety of ways. In particular, participants thought the systems could identify cases in which there appeared to be a significant change in a parent's circumstances and provide a preliminary estimate of the possible change in the order that could help parents decide whether to re-

quest a review. However, participants did not recommend that states adopt the option for doing the review and adjustment entirely through their automated systems. Participants recognized the limits of automated systems to gather all the relevant information, especially about the circumstances of low-income parents who may work off the books or not have filed tax returns.

Common Ground participants discussed another automatic approach that some jurisdictions have utilized in the past: expressing the child support order as a percentage of the noncustodial parent's gross income. For example, if a guideline calls for an award to be 20% of gross income, and the noncustodial parent earns \$2,000 per month, under a "percentage-expressed" order his obligation would be 20% of his income instead of \$400/month. If his income rises to \$2,500, his obligation automatically rises to \$500 per month; if it falls to \$1,500, his obligation automatically falls to \$300. Research in Wisconsin, which utilized percentage-expressed orders until recently,<sup>178</sup> found that using such orders in conjunction with income withholding increased payments over time.<sup>179</sup>

Although the idea of having orders expressed as percentages that would adjust automatically for changes in income appealed to several Common Ground participants, others pointed to practical problems. It would only work in the minority of states using simple guidelines based on percentage-of-obligor income, not in states using income-shares guidelines or other models, and would work only for orders being enforced by wage withholding. Participants also recognized that percentage-expressed orders present practical problems for child support agencies and employers. Employers find them difficult to respond to for purposes of wage withholding, and percentage-expressed orders make it more difficult to determine whether an obligor is in compliance and to determine the amount of an arrearage. Indeed, federal requirements concerning the use of automated systems and uniform rules in interstate cases preclude the use of percentage-expressed orders in cases being enforced by state child support

agencies.<sup>180</sup> Thus, most participants concluded that percentage-expressed orders were not a viable way of achieving automatically adjusted orders.

***d. Making Adjustments When Adjustments Are Due***

Common Ground participants expressed frustration that even when a periodic review is conducted, and the child support agency calculates a different award, the vast majority of states will not adjust the order unless the difference exceeds the threshold set by the state. This creates serious hardships for low-income mothers and fathers who must continue to live with orders that are acknowledged to be too low or too high for their circumstances. Participants emphasized that poor mothers and children need all the child support to which they are entitled. For a mother struggling to house, feed, clothe, and provide care for her children on \$800 a month, an extra \$49 a month makes a big difference. But some states consider such adjustments (and even larger adjustments) too small to bother with. On the other side, many poor fathers are already expected to pay a higher percentage of their income in child support than middle or upper-income obligors. Requiring a poor father to continue to pay an order that is \$49 per month (or more) too high leaves him facing even greater deprivation or greater arrearages and the consequences that go with them.

Eventually, the discrepancy between what the award should be and what it is may exceed the threshold. But, participants noted, a later prospective adjustment will not compensate either parent for past hardships. In addition, the refusal to make incremental adjustments means that when adjustments finally are made, they are larger, making compliance potentially more difficult and producing greater tension between parents.

Denying parents adjustments that have been determined to be appropriate also undermines their confidence in the child support system. To say that parents have a right to a review of their orders every three years, conduct the review, calculate a new

*States should not refuse to adjust orders after a periodic review because the state considers the adjustment too small.*

## III. REVIEWING AND ADJUSTING CHILD SUPPORT AWARDS

*States should make the process for securing a review and adjustment outside of the periodic review cycle more accessible.*

award — and then refuse to implement the adjustment — makes little sense to parents or the Common Ground participants. Participants agreed that states should not be permitted to use a quantitative threshold to decide whether to make an adjustment following a periodic review.

***e. Adjusting Medical Support When Appropriate***

Common Ground participants thought it was important for child support agencies to address the issue of medical support when child support awards are periodically reviewed, as well as when they are initially set, to help children secure and maintain health care coverage. During the review process, agencies can identify changes in parents' employment status or income that may affect their ability to obtain affordable, accessible, comprehensive health care coverage for their children. (See Chapter II, *supra*, for discussion of ways to improve the establishment of medical support awards.) If appropriate private coverage is not available to either parent, child support agencies should help children obtain public coverage. For example, a custodial mother who has left welfare for work since her child support order was established or last reviewed may have lost Medicaid coverage. She may not know that her children are eligible for coverage through S-CHIP, which in most states covers children in families with income up to 200% of poverty.<sup>181</sup> At the time of the review, the child support agency, through a coordinated effort with the state S-CHIP and Medicaid agencies, could help enroll the children in the appropriate program.

***f. Improving Access to Modifications for a Substantial Change in Circumstances***

In addition to the periodic review process, federal law requires that states, on the request of either parent, modify an order if there has been a "substantial change in circumstances." In practice, however, Common Ground participants said that this option is

often difficult for low-income parents to pursue for two reasons: they are unaware of this right or how to exercise it, and some states define "substantial change in circumstances" very narrowly.

Some participants thought that noncustodial parents faced greater barriers than custodial parents in obtaining a modification of an order. Participants have worked with fathers who go to the state child support agency for help with an order because they lost a job, only to be told that the agency will not assist parents seeking a downward modification of an order. Some agencies provide information about how parents can proceed on their own, but sometimes no advice or information is given.

Common Ground participants who work with low-income mothers, as well as those who work with low-income fathers, agreed that it was unfair and counterproductive for child support agencies to deny assistance to parents who seek a downward modification because of a substantial change in circumstances. However, participants struggled with how child support agencies should respond, outside the periodic review cycle, to conflicting requests and information from parents. Participants recognized that some low-income noncustodial parents need help to pursue appropriate downward modifications. They also recognized that there are some noncustodial parents who can and do manipulate their apparent income to reduce their child support obligations.

Participants agreed that all states should make the modification process more accessible to low-income parents, as some states already have done. If child support agencies are not prepared to undertake a review and adjustment themselves outside of the periodic review cycle, they should inform parents that they have the right to seek a modification elsewhere if there has been a substantial change in circumstances. State courts and child support agencies should cooperate in developing simplified procedures and forms and good explanatory materials to help parents seek a modification on their own. Courts or agencies also should make staff available to answer parents' questions about the process.

Participants also thought that states should review their criteria for establishing a “substantial change in circumstances” to make them more responsive to low-income parents’ needs and the realities of their lives. Participants recognized the need for states to use a quantitative threshold to determine whether reconsideration of an order outside of the periodic review process is warranted. With no quantitative threshold, a parent with resources could file motion after motion to modify an order based on trivial changes in income or other circumstances, burdening the other parent and the court. (This risk does not exist in connection with the periodic review and adjustment process; accordingly, as discussed above, Common Ground participants agreed that no quantitative threshold should be used to determine whether to make an adjustment following a periodic review.) Several participants thought the quantitative standards used by some states are too high, but in the time available, participants did not resolve what the standard should be. Participants did agree that certain circumstances, such as leaving TANF or being incarcerated (see below), automatically should be considered grounds for review.

***g. Modifying Awards for Incarcerated Parents***

Common Ground participants identified the continuation of child support obligations while parents are incarcerated and unable to pay as a major factor in the buildup of arrears, and an additional barrier to helping parents put their lives back together when they are released. Most of this discussion, as with most of the work state child support agencies are doing with incarcerated parents, focused on the child support issues faced by incarcerated noncustodial fathers. However, participants noted that incarcerated custodial mothers whose children are placed in the foster care system may be required to pay child support to the state to reimburse foster care costs, and that these debts may hinder their ability to reunite with their children when they are released.

Common Ground participants thought that state policies or judicial decisions that prevent the modifi-

cation of orders while parents are incarcerated may build up arrearages on paper, but may decrease, rather than increase, the amount of support that ultimately is paid. Participants explored various options for improving child support policies for incarcerated parents and their children.

Participants discussed whether the policies should be the same for parents incarcerated for non-payment of support and those incarcerated for other reasons. Some participants believed that suspending or dramatically reducing the child support obligation of a parent who is incarcerated for willfully failing to pay support effectively rewards such behavior. Other participants noted that whatever the reason for the incarceration, incarcerated parents have little or no ability to pay support. Several participants also observed that some parents jailed for nonpayment of support may not be willful deadbeats, but may have had limited ability to pay support at the time they were incarcerated. Other participants acknowledged problems with the way criminal sanctions for non-support are imposed, but believed that because criminal sanctions require a finding of willfulness, it would be anomalous to suspend the child support obligation of someone incarcerated for nonsupport. Participants were not able to reach agreement on this issue.

Most participants thought that the most effective way to ensure that orders are adjusted promptly would be the presumptive suspension of an order during a period of incarceration. (A similar approach is to lower orders presumptively to the minimum amount.) Incarcerated obligors would not have to petition for a modification. However, custodial parents would be given notice of the proposed suspension or reduction and an opportunity to challenge it. Participants also noted that in addition to suspending support obligations, further accumulation of interest on previously accrued arrears should be presumptively suspended, to prevent child support debt from growing during a period of incarceration.

North Carolina appears to provide an example of the suspension approach. Its law states that a child

*States should make their criteria for establishing a “substantial change in circumstances” more responsive to the realities of low-income parents’ lives.*

## III. REVIEWING AND ADJUSTING CHILD SUPPORT AWARDS

*States should adopt policies to help incarcerated parents modify their support awards.*

support payment or relevant portion thereof is not past due, and no arrearage occurs, during any period when the obligor is incarcerated, is not on work release, and has no resources from which to make the payment.<sup>182</sup> A number of other states have statutes or policies dealing with the child support obligations of incarcerated inmates, but none automatically suspends support during incarceration or automatically initiates the modification process.<sup>183</sup>

Participants recognized that policy makers may be reluctant to adopt this approach, and explored other options, such as helping incarcerated parents apply for a modification of their support orders. Colorado, Massachusetts, and several other states are experimenting with this approach, including outreach to prisoners, educating prison staff, developing *pro se* materials and streamlined procedures, and providing connections to community services for released offenders.<sup>184</sup> Participants thought these developments are positive. However, some expressed concern that it will be difficult for states to implement these pro-

grams on a universal basis: to do the continuing outreach needed to inform all affected inmates about modification procedures, and to ensure that state child support agencies and courts — which are having such difficulty dealing with modification of orders in other situations — could respond to their requests.<sup>185</sup> Evaluations of these programs should provide information to advance policies in this area.

Participants also discussed ways to meet the needs of children who are deprived of support during the incarceration of a parent. Participants concluded that it is not politically feasible to allow the children of prisoners to receive support from funds for crime victims, but hoped that, as more attention was paid to the needs of incarcerated parents, resources also would be devoted to helping find support for their children. This could be done through special programs for prisoners and their families, or through a broader system of child support assurance.

## IV. MANAGING ARREARS

Many low-income noncustodial parents owe thousands of dollars of child support debt. Much of the debt owed by low-income noncustodial parents is owed to the state as reimbursement for public assistance or Medicaid costs; some is owed to custodial parents and children. Some arrearages have built up over time through the failure to make current support payments that may or may not have had a reasonable relationship to the ability to pay; other debts are the result of adding retroactive support or Medicaid debt to an initial child support obligation. Improved policies for preventing and managing arrearages could help noncustodial parents make regular and timely contributions to their children's support, benefiting low-income mothers and fathers.

### I. Arrears: The Legal and Policy Context

The federal Office of Child Support Enforcement reports that \$84 billion in arrears are owed in cases in the federal-state child support system.<sup>186</sup> However, as states look more closely at the debt on their books, they are discovering that the causes are more complex than deadbeat parents refusing to pay the child support they owe to their children. The policy choices a state makes concerning the use of default orders, the setting of award levels, the imputation of income, the addition of retroactive support or Medicaid reimbursement, the charging of fees or interest, the modification of awards, all contribute to the size and character of the state's child support arrears and the debt burdens on low-income noncustodial parents.<sup>187</sup>

A recent analysis of California's child support debt found that 70% of the debt is owed to the State of California; 30% is owed to families.<sup>188</sup> Seventy percent of California's arrears are attributable to default orders, which California relies on to an unusual extent: 70% of all child support orders in California and 75% of orders in Los Angeles are entered by default.<sup>189</sup> And, in default cases, California sets awards based generally on the size of the public assistance grant; while not high in absolute terms, such orders may exceed the ability of many low-income parents

to pay and increase the size of the debt on the books.<sup>190</sup> The study found that about 800,000 individuals owed arrears, and about half had reported earnings in California in 1999.<sup>191</sup> For those with reported earnings, annual earnings averaged \$18,000, but half of those with reported earnings (about 200,000 debtors) showed earnings below \$10,000.<sup>192</sup> Lower-income obligors had a greater debt burden; on average, those with earnings less than \$10,000 had child support debts averaging four times their annual earnings, while the debt burden on those with earnings greater than \$10,000 was only half their annual earnings.<sup>193</sup>

In Colorado, defaults were less of a factor; 11% of Colorado cases with arrears have default orders.<sup>194</sup> But Colorado's practice of routinely adding retroactive support when opening a case was largely responsible for making the amount of prior-year support due per case nearly twice the national average.<sup>195</sup>

The state of Washington analyzed its "hard-to-collect" cases, defined as open cases with debts over \$500 and no collection in the past six months.<sup>196</sup> Most of the debt in these hard-to-collect cases, 72%, is owed to the state.<sup>197</sup> The study revealed "the pervasiveness of serious, recurring barriers to collection."<sup>198</sup> Almost half of the noncustodial parents had multiple child support cases.<sup>199</sup> Over 30% received public assistance or Supplemental Security Income for at least part of the 29-month project period, and had long histories of intermittent employment, physical or mental illness, chemical abuse, and other problems.<sup>200</sup> At least 12% were incarcerated during the study period, and at least 30% had corrections records.<sup>201</sup>

Federal law prohibits the retroactive modification of arrears.<sup>202</sup> This provision, often referred to as the "Bradley Amendment" because it was sponsored by then-Senator Bill Bradley, was adopted because in some states judges were reducing the amounts of past-due support owed to custodial parents, depriving children of needed support and making it impossible to enforce past-due support as a final judgment, especially in interstate cases.<sup>203</sup> However, states have

*The policy choices that states make contribute to the size and character of the arrears that low-income noncustodial parents accumulate.*

## IV. MANAGING ARREARS

*Promptly establishing and enforcing support orders can prevent the build-up of arrears.*

flexibility under the Bradley Amendment to deal with arrears. OCSE has advised states that the Bradley Amendment does not prevent a party to whom arrears are owed — either a state or a custodial parent — from agreeing to a compromise of the judgment, in the same way that other judgments may be compromised under state law.<sup>204</sup> And OCSE has supported a number of state initiatives that involve compromising arrearages that have been permanently assigned to the state to enable noncustodial parents to focus on the payment of current support.

## 2. Reaching Common Ground on Managing Arrears

### a. Preventing the Accumulation of Arrears

When arrears build up to uncollectible levels, low-income mothers and fathers both lose. Common Ground participants explored a number of ways to prevent the accumulation of arrears by promoting the regular payment of support. Improved policies concerning the setting and modifying of support awards, as discussed in previous chapters of this report, represent important “arrearage prevention” strategies.<sup>205</sup>

Participants also emphasized the importance of prompt establishment and enforcement of support orders as a way to prevent the development of arrearages. Participants who work with low-income fathers have clients who found themselves unexpectedly months behind in payments because they assumed, incorrectly, that a withholding order had been put in place promptly after their visit to the child support office. Some low-income fathers are not sure how or where to make child support payments, a problem that is compounded in some states by a rocky transition from a localized payment system to a centralized collection and disbursement system. One participant suggested that if the state child support agency is responsible for a delay in establishing an order or getting wage withholding in place, the state should provide the family with support during the period of delay, rather than penalize either

the custodial or noncustodial parent. All agreed that prompt establishment of orders and initiation of wage withholding must be a high priority for state agencies.

Whether a state adds interest to a child support debt can make a substantial difference in how quickly arrearages grow, and policies vary among the states.<sup>206</sup> For low-income noncustodial parents, some participants contended, adding interest simply increases the size of an already uncollectible debt. Other participants who work with custodial parents responded that, as a general matter, there are good reasons for charging interest when support payments are late. When support is owed to the custodial parent, the addition of interest helps compensate for the delay in payment. And, since most other creditors routinely charge interest, if there were no penalty for failing to make child support payments on time, obligors might decide to make their child support payments last, instead of first. However, the potential incentive effects of charging interest often are lost because some child support agencies are unable to indicate to obligors what the interest payment is and how it accrues. Obligor may not realize that interest is being charged until they are close to paying off the underlying debt, only to discover that interest is still owed. Participants agreed that when interest is charged, the amount attributable to interest should be included separately in billing and accounting statements.

Most participants recommended that to the extent that overdue child support is owed to the state, interest should not accrue. As an alternative to this preventive strategy, waivers or suspension of interest on support owed to the state should be part of the state’s arrearage compromise policy (see *infra*). Participants did not agree on whether low-income noncustodial parents should be exempt from interest charges on arrears owed to custodial parents and children. However, participants did agree that state child support agencies should provide parents with clear, regular billing statements that show what portion of their obligation is due to interest accrual.









































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