



## **Setting Current Support Based on Ability to Pay**

**Issue:** There is currently significant variance among states in how they ensure current child support orders are established at an appropriate amount. “Right-sized” obligations promote reliable, sustained collections of child support. When current child support is set, or allowed to remain, at an inappropriate level, there is an increase in non-compliance and ever-increasing arrears. In addition, the effort spent on uncollectible cases dilutes the resources that are available for cases where child support efforts are more likely to be successful.

**NCSEA Position:** As a general rule, child support guidelines and orders should reflect actual income of parents and be changed proactively to ensure current support orders reflect current circumstances of the parents and to encourage regular child support payments. Presumed or default orders should occur only in limited circumstances. The ideas and proposed legislation and regulations are identified as policy issues that would benefit the child support program and the families it serves. The policy proposals assume that additional federal resources would be available to implement them – either by broadening how the federal incentive match can be utilized or with additional federal resources.

**Action Needed:**

### **Legislative**

1. Require the federal Office of Child Support to establish circumstances under which state child support agencies must conduct a review more often than once every thirty-six months, such as unemployment/promotion, military call-up/release from duty, and availability/loss of insurance coverage.
2. Require states to conduct a review upon request, and seek appropriate modification, following incarceration expected to last longer than ninety days and upon release from incarceration if the parent has been released for at least ninety days.
3. Amend federal law to prohibit states from setting obligations for inmates and former inmates based solely on pre-incarceration earnings, except incarceration stemming from offenses against the supported child or family.

### **Regulatory**

1. Provide federal guidance discouraging the use of presumed or default income calculations prior to making best efforts to obtain earnings history or income information.
2. Require a low-income provision in state guidelines to accommodate non-custodial parents who are at or below the Federal Poverty Level and are not willfully unemployed or underemployed.
3. Provide federal guidance regarding the selective pursuit of retroactive support.
4. Mandate data matching with other state and federal agencies, such as unemployment, Medicaid, TANF, SNAP and quarterly wage, to proactively initiate the review or modification process.
5. Encourage modification-specific outreach so parties know when and how to utilize the process.
6. Encourage child support agencies to proactively review or modify current child support orders without waiting for a request from a parent, including non-assistance cases.

**Background:** Past due payments of child support, referred to as child support arrears, have reached unprecedented levels in recent years, according to a study conducted by the Urban Institute for the U.S. Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation. In Federal Fiscal Year (FFY) 2007, the total nationwide child support arrearages were \$106,463,340,323. In FFY 2011 that figure rose to \$111,343,376,518. By comparison, total distributed collections for FFY 2011 were \$27,296,685,029. The best approach to dealing with the arrearage issue is to prevent the arrears from accruing in the first place. Prevention is most likely accomplished by ensuring all current support obligations are based on an individual's ability to pay, as established by applying the state child support guidelines to current case circumstances and providing an accelerated path to modification in the event case circumstances change.

1. Many states consider incarceration a voluntary decision and deny a downward modification on that basis. Unlike a non-custodial parent who voluntarily quits a job, an incarcerated obligor usually has very little or no ability to earn income. Refusing a reduction in support during incarceration is counter-productive because of the challenges faced by an inmate following release. NCSEA also feels that any reduction based on incarceration should be reviewed on a similar basis upon release of the non-custodial parent.
2. One of the most difficult resource management issues faced by child support is whether to increase the resources committed to early reviews with the hope that comparable amount of time and resources will be saved in the long run from not trying to collect unrealistic amounts of support. Federal guidance and standards would be beneficial and promote consistent services from state to state.
3. Not surprisingly, imputed income orders have detrimental impacts on the non-custodial parent's ability to pay. Default judgments for current support are commonly entered based on a presumed ability to earn, imputed wages, or minimum wage. Often, these are set at a higher amount than the obligor would be required to pay had current income been shared. However, there is also a

risk the amount is based too low, which in turn is unfair to the obligee. NCSEA feels a total bar on default judgments goes too far, in that the obligor might see it as an opportunity to delay the process. However, states should encourage obligors to appear at a hearing so defaults can be avoided.

4. A significant portion of the nationwide arrears are owed by parents with little or no reported income. To prevent the accrual of inappropriate amounts of child support, state guidelines should accommodate non-custodial parents who are at or below the Federal Poverty Level, unless the non-custodial parent is willfully underemployed or unemployed and therefore subject to court order to obtain employment above the Federal Poverty Level.
5. Many states guidelines permit or mandate the imposition of a retroactive child support judgment at the time a current child support obligation is established. However, assessing retroactive support for periods prior to the date of an order often contributes to arrears. When access to income for these prior periods is unavailable, states may impute retroactive support based on ability to earn, imputed wages or minimum wage. Just as these are ineffective approaches to establishing a current order, they may be equally impractical when establishing a retroactive support amount. On occasion, a delay in establishing an order is the result of the actions of a parent who should not be rewarded for failing to cooperate and act diligently. Flexibility on whether to grant retroactive support, and then how the amount should be calculated, is necessary to avoid a “one size fits all” approach to the issue.
6. It is believed that the federal Office of Child Support has access to databases from the Social Security Administration or other agencies which could be “mined” to help states identify on an automated basis additional orders for which review is warranted based on a change (up or down) in the non-custodial parent’s income.
7. The federal Office of Child Support is in a position to urge states and award grants to promote outreach to parents, including non-custodial parents who may otherwise be skeptical of the child support program, regarding the ability to obtain a review of their child support obligation.
8. As an independent third party, and not an advocate for either parent, a child support agency has an independent interest in avoiding the accrual of uncollectible support which it may later be required to attempt to collect. When a child support agency possesses reliable income information which suggests that a change in the child support obligation would be appropriate, there is a benefit to initiating a review and modification process rather than waiting for a parent to act on that information by requesting a review.