

Office of Child Support Enforcement
Attention: Director of Policy and Training
330 C Street SW
Washington, DC 20201

RE: ACF–2020–0002
RIN 0970–AC81

NCSEA submits the following comments in response to the proposed rulemaking *Optional Exceptions to the Prohibition Against Treating Incarceration as Voluntary Unemployment Under Child Support Guidelines*, Federal Register, Vol. 85, No. 181, pp. 58029-32. NCSEA appreciates OCSE's thoughtful consideration of all comments and looks forward to OCSE's replies to these comments in the final rule.

2016 Flexibility, Efficiency, and Modernization Rule. NCSEA strongly supports giving states flexibility to have exceptions to the "incarceration is not voluntary unemployment" mandate in the 2016 modernization rule. In fact, when OCSE originally proposed in late 2014 to prohibit states from treating incarceration as voluntary unemployment, NCSEA supported the general rule but further noted:

> [S]uch limitation [on considering incarceration as voluntary unemployment] should not apply where the parent is incarcerated for a crime against the supported child or custodial parent, including intentional failure to pay child support. Strong public policy dictates against affording relief to an obligor who commits a violent crime on the custodial parent or child, or the obligor who has the means to pay child support but refuses to do so. NCSEA urges OCSE to include these important exceptions in the final rule.

The preamble of the *Optional Exceptions to the Prohibition Against Treating Incarceration as Voluntary Unemployment Under Child Support Guidelines* describes comments as seeking required or mandatory exceptions to the prohibition:

> During the FEM rulemaking process, OCSE received several comments in support of *requiring* exceptions to the prohibition against treating incarceration as voluntary unemployment ….
>
> In the final rule, OCSE did not agree with the commenters' requests to *mandate* exceptions ….

Federal Register Vol. 85, p. 58030 (emphasis added).

This explanation does not address OCSE's decision not to adopt NCSEA's comment in this area. Seeking an exception to a prohibition is not the equivalent of supporting a requirement. Rather, in the absence of a prohibition against treating incarceration for nonpayment of support or a crime against the child or parent of a child as "voluntary unemployment," a state would have discretion whether to consider incarceration for those offenses as voluntary unemployment.

Application of exception for nonsupport to the parent's other cases. States vary in their child support guidelines' approach to multiple families and in their proration of collections. Frequently, a parent who fails to pay support for one family fails to pay support for all families. For parents who have failed to pay support to multiple families, there could be multiple potential criminal actions or contempt proceedings. The selection of the proper court or local jurisdiction for a criminal nonsupport action or a contempt of court hearing can be based on the noncustodial parent's residence, the interests of judicial economy, or other practical litigation considerations that are not connected to the family or families the parent has failed to support. Whether the exception is appropriate depends on each state's approach. Thus, NCSEA believes states should have the option of applying the exception proposed in (c)(3)(i) to one or all a parent's child support cases.

NCSEA also has concerns regarding the drafting of subparagraph (c)(3), which addresses the application of the exceptions to parents who owe support to multiple families. By specifically indicating that the exception in (c)(3)(ii) can be applied to all the parent's cases, OCSE creates a negative inference that the exception in (c)(3)(i) cannot be applied to all the parent's cases. If OCSE intends to prohibit states from applying the exception in (c)(3)(i) to the parent's other child support cases, the regulation should say so directly.

Just as states would have the option to exclude certain offenses from the general rule that incarceration cannot be treated as voluntary unemployment, NCSEA believes states should have the option to determine whether it is appropriate to apply such exceptions to one or all of a parent's child support cases. This could be accomplished

simply by removing the language at the end of (c)(3)(ii), since there would be no limit on the exceptions in the rest of paragraph (c)(3). Alternatively, if OCSE feels the proposed rule would be clearer if the application of the exception to the parent's other child support cases is expressed, then the same exception listed at the end of (c)(3)(ii) should be added to the end of (c)(3)(i).

Nonpayment needs to occur before incarceration. NCSEA suggests (c)(3)(i) be rephrased. As drafted, the nonpayment must result from the criminal case or contempt action. Literally, the proposed language requires an initial criminal case or contempt action, which causes a nonpayment, which then leads to a second legal action concluding in incarceration of the parent (presumably for failure to pay). We believe OCSE intended the sequence to start with nonpayment of child support, which prompts a criminal case or civil contempt action in accordance with § 303.6(c)(4) leading to the incarceration of the parent. Since the word "incarceration" assumes an underlying criminal case or civil contempt action, NCSEA suggests deletion of the phrase "resulting from a criminal case or civil contempt action, in accordance with guidelines established by the State under § 303.6(c)(4)" as unnecessary language. This would resolve the confusion created by the sentence structure.

State of mind regarding nonpayment. Although a criminal conviction usually requires proof of an intentional act by the parent, the question in a civil contempt action is whether the parent acted willfully. Since the word "incarceration" assumes either intentional nonpayment (criminal case) or willful nonpayment (civil contempt), it is not necessary for the rule to provide for "intentional" nonpayment and NCSEA suggests the word "intentional" be deleted for clarity.

The group of victims for which the exception may apply is too narrow. As drafted, (c)(3)(ii) is limited to "child support recipients." NCSEA believes this phrase is too narrow because it does not include a parent or other caretaker of a dependent child against whom a crime is committed by a potential payor parent prior to establishment of a child support obligation. The rule should be simple: if you do harm to any of your dependent children or the other parent of any of your dependent children, your incarceration can be considered voluntary unemployment.

Summary of comments regarding § 302.56. NCSEA's comments above could be implemented through the following additional changes to § 302.56 as originally proposed to be amended in the NPRM:

§ 302.56 Guidelines for setting child support orders.

* * * * *

(c) * * *

(3) Provide that incarceration may not be treated as voluntary unemployment in establishing or modifying support orders. The state may elect to exclude:

(i) Incarceration due to ~~intentional~~ nonpayment of child support ~~resulting from a criminal case or civil contempt action, in accordance with guidelines established by the State under § 303.6(c)(4)~~; and/or

(ii) Incarceration for any offense of which the individual's dependent child or the ~~child support recipient~~ parent or other caretaker of the individual's dependent child was a victim. ~~The State may apply the exception under this paragraph (c)(3)(ii) to the individual's other child support cases.~~

Technical comment. As proposed to be changed in the NPRM, paragraph (c)(3) no longer concludes with the word "and," which breaks the connection between paragraphs (1) through (4) in subsection (c).

Impact of exceptions on review and adjustment process. NCSEA disagrees with OCSE's decision in the NPRM not to propose conforming changes to 45 § 303.8(b)(7)(ii). In contrast to the stated purpose of the NPRM to provide states more flexibility, leaving (b)(7)(ii) in place imposes an undue burden on states to notify an incarcerated parent and a recipient parent of the right to request a review that will usually be a effort in futility. Such notices will alarm the recipient parent at the beginning of the review process and inflict further emotional damage on a family which has already suffered from intentional or willful nonpayment or a crime against the dependent child or the dependent child's parent. Further, the notice will frustrate the incarcerated parent at the conclusion of the review process in the vast majority of cases where there is no reduction in the obligation because of the state's election to consider the offense as voluntary unemployment.

Requiring a review notice (which the state would not be required to send except for the incarceration of the parent) in the off chance that the obligation was too high prior to incarceration is unwarranted and actually undermines the intent of the NPRM to respect the decision of a state "based on moral and societal values of justice and fairness" that a parent should not benefit from his or her bad acts against a dependent child or the dependent child's parent.

States should not be required to send review notices to incarcerated parents who will be considered voluntarily unemployed if a state makes the election in the NPRM. NCSEA suggests 45 CFR § 303.8(b)(7)(ii) should be changed as follows:

(ii) If the State has not elected paragraph (b)(2) of this section, within 15 business days of when the IV-D agency learns that a noncustodial parent will be incarcerated for more than 180 calendar days, to both parents informing them of the right to request the State to review and, if appropriate, adjust the order, consistent with this section. The notice must specify, at a minimum, the place and manner in which the request should be made. Neither the notice nor a review is required under this paragraph if the State has a comparable law or rule that modifies a child support obligation upon incarceration by operation of State law. Neither the notice nor a review is required under this paragraph if the state determines that the noncustodial parent is incarcerated because of nonpayment of child support or a crime against the dependent child or the dependent child's other parent or caretaker and the state has elected to treat the incarceration as voluntary unemployment under subparagraph (c)(3) of § 302.56 of this chapter.

OCSE itself addresses this section in the preamble to the NPRM, so NCSEA believes it is appropriate to add this amendment in the final rule even if § 303.8 was not originally proposed to be amended. Further, under NCSEA's suggestion, if a state chooses to send such a notice, it is still free to do so.

NCSEA encourages OCSE to consider these comments and finalize the rule as soon as possible. Thank you for the opportunity to comment, and for proposing this beneficial flexibility for states.

Submitted on behalf of NCSEA by:

Ann Marie Ruskin
Executive Director
NCSEA
7918 Jones Branch Drive Suite 300
McLean, VA 22102
annmarieruskin@ncsea.org
703-506-2885