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November 12, 2020

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

Dear Director:

The National Council of Child Support Directors (NCCSD) has reviewed 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. We submit the following comments, which express the opinion of the majority of the NCCSD Executive Committee acting on the behalf of the entire NCCSD and not necessarily the views of the respective states or their child support directors.

With the changes suggested below, NCCSD strongly supports the state flexibility in the proposed rulemaking. In fact, NCCSD advocated for the same flexibility in 2015 when OCSE originally proposed the current prohibition on treating incarceration as voluntary unemployment:

> [T]he view of the states is that incarceration should not be treated as voluntary unemployment. However, for states that continue to believe that reducing obligations is rewarding bad behavior, it is not appropriate for the proposed rule to attempt to override that policy decision. In addition, the proposal would ultimately lead to a reduced child support obligation even if the reason for incarceration is willful failure to pay child support or some other heinous crime against the child. NCCSD suggests that this provision should not be included in the final rule.

Many states have already faced resistance from state legislatures, courts, and other partners for pursuing changes in state law or practice to implement a blanket prohibition on treating incarceration as "voluntary unemployment" even when the incarceration is for nonpayment of support or a crime against

the child or other parent or caretaker of the child. Thus, although NCCSD appreciates and supports the changes currently being proposed by OCSE, it also regrets that the optional exceptions being proposed in the current rulemaking were not included in the 2016 modernization rule.

In the preamble to the current rulemaking, OCSE offers the following explanation for its change in direction:

> 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).

NCCSD does not believe this description of state comments is accurate or persuasive. If NCCSD's comment had been adopted in the 2016 modernization rule, states would not have been required to adopt an exception to the prohibition against treating incarceration as voluntary unemployment for the listed offenses. Rather, states would have had discretion whether to treat incarceration for nonsupport or a crime against the child or other parent or caretaker of the child as voluntary unemployment. Seeking an exception to a prohibition is much different than seeking a requirement.

Essentially, NCCSD was suggesting in 2015 the exact approach being proposed by OCSE in the current rulemaking. It is not appropriate for OCSE to explain the current rulemaking by misrepresenting what states were suggesting in 2015.

Nonpayment needs to occur before incarceration. NCCSD suggests (c)(3)(i) be rephrased. As drafted, the nonpayment must result from a criminal case or contempt action, rather than being the cause of it. We believe OCSE intended to reference the standard enforcement sequence that begins with nonpayment of child support, which prompts a criminal case or civil contempt action leading to the incarceration of the parent. Since the word "incarceration" requires an underlying criminal case or civil contempt action, NCCSD 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 and confusing language.

State of mind regarding nonpayment. NCCSD suggests the word "intentional" be deleted for clarity. Since the word "incarceration", as well as existing regulation, require either intentional nonpayment (criminal case) or willful nonpayment (civil contempt), it is not necessary or accurate for this rule to provide for "intentional" nonpayment.

The group of victims for which the exception may apply is too narrow. NCCSD suggests expanding the language, as drafted, at (c)(3)(ii) which is limited to "child support recipients." This phrase is too narrow because it excludes a parent or other caretaker of a dependent child against whom a crime is committed prior to establishment of a child support obligation. NCCSD suggests expanding the language to any dependent children or the other parent or caretaker of any dependent children.

Application of exception for nonsupport to the parent's other cases. States vary in their approach to enforcing obligations when an obligor has multiple families. 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 several practical litigation considerations unrelated to the family or families the parent has failed to support. Whether the exception is appropriate depends on each state's approach.

NCCSD 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. 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. NCCSD believes states should have the option to determine whether it is appropriate to apply such exceptions to one or all 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).

Summary of comments regarding § 302.56. NCCSD'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~~ <u>other parent or caretaker of the individual's dependent child</u> was a victim. ~~The State may apply the exception under this paragraph (c)(3)(ii) to the individual's other child support cases.~~

Impact of exceptions on review and adjustment process. NCCSD asks that OCSE include an amendment to 45 § 303.8(b)(7)(ii) which removes the requirement to send notice when a parent is considered voluntarily unemployed. In contrast to the stated purpose of the NPRM to provide states more flexibility, for states who make the election authorized in the proposed rule, leaving (b)(7)(ii) in place imposes an undue burden on those states to initiate a review or notify an incarcerated parent and a recipient parent of a right to a review that will nearly always result in no change because the parent is considered voluntary unemployed and would be a poor use of precious program resources

States should no longer be required to send notice of the right to request a review to incarcerated parents who will be considered voluntarily unemployed if a state makes the election in the NPRM. Under NCCSD's suggestion, however, if a state chooses to send all parents the notice, it is still free to do so. NCCSD suggests 45 § 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 noncustodial parent is incarcerated because of nonpayment of support and the state has elected to treat the incarceration as voluntary unemployment under subparagraph (c)(3) of § 302.56 of this chapter.

OCSE addresses this section in the preamble to the NPRM, so NCCSD believes it is appropriate to add this amendment in the final rule even if § 303.8 was not originally proposed to be amended.

NCCSD encourages OCSE to consider these comments and finalize the rule as soon as possible, with an implementation schedule of sufficient duration for states to obtain any needed changes in state law or court rules.

Thank you for the opportunity to review and provide comments on this proposed regulation change.

Sincerely,

James C. Fleming
NCCSD President