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Stuck Between A Rock And a Hard Place

Parents Who Do Hard Time

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The Inmate Paradox: when parents are punished for doing bad things, they are usually no longer able to pay child support. Ergo ...

- a) Give parents who owe child support immunity from prosecution;
- b) Pretend that incarcerated parents are still able to earn wages; or
- c) Recognize that child support obligations need to be based on true ability to pay, despite the reason for incarceration.



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Under the December 2016 modernization [rule](#):

- States are prohibited from declining to review obligations on the basis that incarceration for a crime constitutes “voluntary unemployment”; and
- States must do SOMETHING to address the obligation of a parent who is incarcerated for more than 180 days
- See generally

https://www.acf.hhs.gov/sites/default/files/programs/css/fem_final_rule_incarceration.pdf



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Option 1 [45 CFR 303.8(b)(2)]:

The State may elect in its State plan to initiate review of an order, after learning that a noncustodial parent will be incarcerated for more than 180 calendar days, and without the need for a specific request and, upon notice to both parents, review and, if appropriate, adjust the order, in accordance with paragraph (b)(1)(i) of this section.



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Option 2 [45 CFR 303.8(b)(7)(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.



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Option 3 [45 CFR 303.8(b)(7)(ii)]:

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.



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- Decisions, decisions, decisions
- How to solve the paradox
- How to convince external partners of the need to change
- What is the optimal approach from a IV-D perspective, and how close to that can each state get after factoring the position of external partners?



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Starting Point – Texas

- In 2015, Texas passed a law stating that the minimum wage presumption does not apply if the obligor is subject to an order of confinement exceeding 90 days. In absence of other resources, child support will be set at \$0
- Incarceration is already a basis for requesting a review and modification by Child Support
- No minimum period of incarceration is required in order to obtain a review



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Starting Point – Utah

- For new orders, obligations were set based on \$0 income and led to a \$30 minimum order. Modifications to existing obligations were not permitted under existing case law.
- Review and modification of obligations upon incarceration was not permitted due to the existing case law.
- Length of incarceration was not relevant – no reviews and modifications were permitted



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Starting Point – Virginia

- Virginia case law treated incarceration as voluntary unemployment, and thus looked at the parent's pre-incarceration ability to earn.
- The same case law did not allow for review and modification of a parent's obligation as a result of incarceration.
- Length of incarceration was irrelevant – no change in obligation



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Starting Point – North Dakota

- Upon incarceration, income was imputed at minimum wage 40 hours per week, phased down to \$0 income by 20% per full year of incarceration.
- Incarceration was sufficient basis to obtain a review earlier than the 36-month review cycle.
- Incarceration needed to be at least for 1 year in order to obtain an early review and modification.



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Polling Question #1 – at the time of the December 2016 OCSE rulemaking, which of the following best reflects the approach of your jurisdiction?

- a) Ignore incarceration – use pre-incarceration earnings
- b) Drop to zero income and a minimum obligation
- c) Impute at minimum wage
- d) Other



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- Pros and Cons – Having the Necessary Policy Discussion
- Case in point – North Dakota [2017 Senate Bill 2277](#)
 - Debate in ND House of Representatives
 - [http://video.legis.nd.gov/pb2/powerbrowser Desktop.aspx?wowzaplaystart=1011000&ContentEntityId=1880&MediaStart=2017-03-14T17%3a11%3a55-06%3a00&browser=0](http://video.legis.nd.gov/pb2/powerbrowser_Desktop.aspx?wowzaplaystart=1011000&ContentEntityId=1880&MediaStart=2017-03-14T17%3a11%3a55-06%3a00&browser=0)



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Pros and Cons – Option 1, reviewing and modifying the obligation of an incarcerated parent without waiting for a request from a parent



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Pros and Cons – Option 2, notifying an incarcerated parent of the opportunity to request a review and modification



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Pros and Cons – Option 3, modification of the obligation of incarcerated parent by operation of law



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Polling Question #2 – Which Option Would You Prefer?

1. Option #1 – Review without waiting for a request from a parent
2. Option #2 – Notify parent of opportunity to request a review
3. Option #3 – Modify obligations by operation of law



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Polling Question #3 – Which Option Do You Think Will Be Adopted In Your Jurisdiction?

1. Option #1 – Review without waiting for a request from a parent
2. Option #2 – Notify parent of opportunity to request a review
3. Option #3 – Modify obligations by operation of law



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Adding a degree of difficulty to the process: what if the reason for incarceration is willful nonpayment of child support or a crime against the child or custodial parent?



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Under the amended OCSE rules, what latitude does a jurisdiction have regarding the amount of child support that an incarcerated parent should owe?



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45 CFR 302.56(c)(1)(iii): Child support guidelines must provide that the order is based on the NCP's earnings, income, and other evidence of ability to pay that ... If imputation of income is authorized, takes into consideration the specific circumstances of the noncustodial parent (and at the State's discretion, the custodial parent) to the extent known, including such factors as the noncustodial parent's assets, residence, employment and earnings history, job skills, educational attainment, literacy, age, health, criminal record and other employment barriers, and record of seeking work, as well as the local job market, the availability of employers willing to hire the noncustodial parent, prevailing earnings level in the local community, and other relevant background factors in the case.



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Child Support must use appropriate processes in establishing and modifying obligations, including:

- Gathering information regarding the earnings and income of the noncustodial parent and, when earnings and income information is unavailable or insufficient in a case gathering available information about the specific circumstances of the noncustodial parent, including such factors as those listed under § 302.56(c)(1)(iii) of this chapter;
- Basing the support obligation or recommended support obligation amount on the earnings and income of the noncustodial parent whenever available. If evidence of earnings and income is unavailable or insufficient to use as the measure of the noncustodial parent's ability to pay, then the support obligation or recommended support obligation amount should be based on available information about the specific circumstances of the noncustodial parent, including such factors as those listed in § 302.56(c)(1)(iii) of this chapter.



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Beyond the minimum requirements of federal regulation

- Consider length of sentence rather than length of incarceration?
 - North Dakota – expires “upon incarceration of the obligor under a sentence of one hundred eighty days or longer, excluding credit for time served before sentencing.”
- What do you do after release from jail?



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The reverse law of gravity: any child support obligation that goes down will eventually need to go back up (barring emancipation of the child)

- Revert back to pre-incarceration earnings?
- Wait for a period of time for obligor to find a residence and a job?
- Modify order based on post-incarceration ability to pay
- Impute at minimum wage



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- Texas: we will review the obligation after release and modify the obligation using the parent's current, post-incarceration ability to pay.
- Utah: we intend to automatically adjust the support amount 6 months post-incarceration based on current ability to pay, keeping in mind the state still retains a federal minimum wage imputation.
- Virginia: three months before release, we intend to serve the parent with notice of a hearing date three months after release to calculate a new obligation based on current ability to pay.



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What is the Potential Impact?

Current Support Collections in ND after 1-1-2018

| | |
|-----------|--------|
| January | 74.20% |
| February | 74.21% |
| March | 74.38% |
| April | 74.57% |
| May | 74.85% |
| June | 74.99% |
| July | 75.13% |
| August | 75.33% |
| September | 0.00% |



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Questions?

Thank You For Attending!

