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District Department of the Environment
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Via email: Karim.Marshall@dc.gov

Dear Mr. Marshall:

The undersigned organizations (the Legal Aid Society of the District of Columbia, Bread for the City and the DC Fiscal Policy Institute) are writing to provide you with our comments on the District of Columbia Department of the Environment's (Department or DDOE) proposed regulations governing the Low Income Home Energy Assistance Program (LIHEAP). Thank you for providing us with this opportunity to provide informal comments prior to publication of the rule.

Introduction and overall comments

These proposed regulations represent a good start in the process of providing transparency and guidance to the public regarding the conduct of the District's LIHEAP program. That said, they remain deficient in one key respect: In critical areas, the proposed regulations offer only an administrative framework for operating the program, without any meaningful guidance regarding program eligibility standards or policies for determining the benefits an eligible household can expect to receive. Instead, the proposed regulations suggest that the Department would "provide" or "specify" this information each fiscal year. *See* Sections 3601.4 and 3601.5. The proposed rules fail to explain the manner in which this information would be provided or specified, whether there would be an opportunity for public comment, or even whether or how this information would be made available to the public.

We urge the Department to revise these regulations to set a baseline policy and guidelines for many of the matters identified in Sections 3601.4 and 3601.5, including income thresholds and eligibility limits, priorities to certain at-risk groups, factors for determining a crisis benefit if offered, factors and values considered in an eligibility determination, and the method for calculating benefits. This will give the public an opportunity to comment on the Department's baseline approach and ensure that the resulting guidance will be available to the public through a published set of regulations.

We believe that our recommendation not only would provide much needed transparency, but indeed is legally required. Under the D.C. Administrative Procedure Act (DCAPA), policies for implementing the program (and not merely the administrative framework) must be established through notice and comment rulemaking and made available to the public. *See Webb v. D.C. Dep't of Human Services,* 618 A.2d 148 (D.C. 1992) (D.C. agency improperly established policies for awarding benefits under a federally funded program without promulgating the policies in accordance with the DCAPA). Although the proposed regulations would require that DDOE provide and specify LIHEAP benefit determination policies annually, we assume DDOE does not want to go through notice and comment rulemaking for all of these policies on an annual basis, nor is there any reason to re-hash these items year after year.

As discussed in greater detail below, the proposed regulations contain other missed opportunities for DDOE to clearly describe the current rules and processes of the LIHEAP program, and to reflect the policy decisions that would govern the future of the program. In section after section, through the use of discretionary language, DDOE provides a list of options that the agency can utilize but does not specify which option is currently in place or will be put in place as the program policy baseline. This kind of clarity and specificity is what we are seeking from the regulations so that potentially eligible households can understand what services they can receive from LIHEAP and protect their rights to receive these services.

To provide greater transparency and accountability for LIHEAP, DDOE must make key policy decisions, state the outcome of these decisions and explain the basis for these decisions in the regulations. For example, under Section 3604.3, would an individual who was denied a regular benefit under Section 3604.2 have priority for an additional crisis assistance benefit or would the benefits be awarded in a first come, first served fashion?

We appreciate that many of these issues are complex, and we would be happy to collaborate with DDOE to help work through competing policy priorities.

Specific section by section comments

Section 3601

3601.4(b), (c), (d). It is not clear why the standards discussed in these sections – income limits as a percentage of the Federal Poverty Guidelines, priority given to certain groups, and criteria for crisis benefit eligibility – would have to be re-determined each year. These are not features that should depend on the amount of funds allocated to the Department in a given year. The Department should make permanent choices about these issues and include the parameters of those choices in the regulations. In addition, the baseline formula (with inputs) and benefits

matrix table in subsection (a) could be established through rulemaking, with only funding-driven adjustments made on a fiscal year basis.

3601.5(a), (h), (i), (j), (k). Again, there is no reason that the factors going into benefit calculation should change from year to year. Nor is there any reason that monitoring and compliance activities should have to be reestablished each year.

3601.5(e). It is unclear what kind of coordination DDOE is contemplating in this section.

3601.7. To the extent we understand this section – and the wording is not clear to us – it seems to suggest that the Department will be engaging in an essentially constant rulemaking process, on both a regular and emergency basis, to publish a set of ever-changing rules for administration of the program. For the reasons explained above, we do not believe this is necessary or constructive.

3601.8. This regulation is not consistent with the DCAPA. Under the DCAPA, except in emergency circumstances, notice and a comment period must come at least 30 days *before* the rule becomes effective. *See* D.C. Code § 2-505 ("The Mayor and each independent agency shall, *prior to* the adoption of any rule or the amendment or repeal thereof, publish in the District of Columbia Register . . . notice of the intended action . . . *not less than 30 days prior to the effective date* of the proposed adoption") (emphasis added).

Moreover, even for emergency rulemaking – described in the law as "necessary for the immediate preservation of the public peace, health, safety, welfare, or morals," *id.* – the rule shall remain in effect for only 120 days, so as to permit the ordinary notice-and-comment process to take place. There simply is no basis under the APA for the type of notice procedure described in this section.

Section 3602

3602.4. By referencing "all or part of an amount billed," this section suggests that a participant will never receive more than the amount of a currently outstanding bill, even if he or she is entitled to more under the benefits matrix. This is not consistent with our experience, which is that LIHEAP benefits may result in a credit on the energy bill to be applied against future months. That procedure also makes sense given that LIHEAP funds are often disbursed at or near the start of heating season, with the goal of providing financial assistance during the coming winter months.

We support the current practice of giving credits when the LIHEAP benefit amount exceeds the current outstanding balance of an energy bill. Therefore, we suggest adding the following to the

end of this section: "If the benefit amount is larger than is necessary to satisfy the outstanding bill, the remainder will be paid to the home energy supplier to be used as a credit against future bills."

3602.6. Because this is another program feature that should not change from year to year, we suggest that the Department establish the "procedure for obtaining" this benefit – which we assume will involve submitting some kind of proof of payment for energy supplies – and include that procedure here.

3602.8. Although we understand that the *amount* of the crisis benefit may vary from year to year, the eligibility standards and process for applying should not. This section should include that information.

To address the concern that funding may not be sufficient to provide any crisis benefit in a given year, we suggest adding the following subsection: "If sufficient funds are not available for a given fiscal year, the Department may elect not to offer crisis benefits. This decision shall be communicated and made public together with the regular benefit matrix for that fiscal year."

3602.9. Similarly, while we understand that funding changes may make it impossible to promise in-kind benefits every year, this section should specify, in the event that such benefits are available, what items the Department will provide: Solely fans? Blankets? Portable heaters or air-conditioning units? This section should also specify how a family qualifies for an in-kind benefit, and whether the item must be returned to the Department at the end of the heating/cooling season.

Section 3603

3603.3. Again, there is no reason that the factors used to calculate gross monthly income should change from year to year. This section should simply specify what those factors are and how gross income will be calculated. *See, e.g.*, 29 D.C.M.R. §§ 7503.9 - 7503.15 (describing countable and excluded income sources for purposes of the Emergency Rental Assistance Program).

3603.4. This section is extremely confusing. First, it is not clear whether the factors listed under (a) will trigger automatic eligibility; *or* will trigger eligibility only if those factors are included in the State Plan; *or* must be included in the State Plan each year, thus triggering eligibility; or some other meaning. Second, it is unclear whether the income limits in (b) are an additional criterion to the factors listed in (a), or are an alternative way to satisfy eligibility requirements.

We suggest that this regulation simply state that a household receiving any of the types of income in (a) is eligible for benefits. Each of these benefits is reserved for persons of very low income. Moreover, it would certainly simplify the eligibility determination for these applicants if they need only provide proof of receiving one of these types of benefit.[1]

3603.5. This section is also confusing as compared against the previous subsection, 3603.4(b). This section appears to declare that anyone is eligible whose income is less than *110 percent* of the FPG; but the preceding section references income below *150 percent* instead. We suggest that the Department clarify its intent regarding income limits?

3603.6. Rather than providing that crisis eligibility "may" include the following factors, this section should clearly lay out the eligibility requirements for crisis benefits, which we assume means the combination of the factors listed in (a) and (b). Use of the word "may" leaves participants and providers with no guidance as to whether a household will in fact be eligible (funds permitting) for crisis assistance, and it creates a troubling potential for denial of benefits for unknown or arbitrary reasons.

3603.7. This section should define the meaning of "timely." For an example, please see 29 D.C.M.R. § 7501.11 (Emergency Assistance Application Process) ("The provider shall complete the eligibility and assistance determination in as short a time as possible but not later than ten (10) calendar days after the date of a completed application.").

Section 3604

3604.2. This section would allow DDOE to limit benefits for an otherwise eligible household to only a crisis benefit if DDOE has determined that funding will be insufficient to support paying regular benefits and has given notice to the public. As written, these proposed regulations raise concerns about how they will be implemented. For example, if person A and person B apply for benefits on the same day at the same time, how will DDOE decide who gets the benefits? Under this provision, as long as some undefined form of notification is provided, DDOE has complete flexibility to make arbitrary allocation decisions.

In order to address this concern, the proposed regulations should require that advance notice to the public be provided, with an effective date identified, so that potential beneficiaries can plan around funding availability. The proposed regulations should also provide specifics on when and how such notice will be provided after the Department has made the decision not to fund regular benefits in a given year. Additionally, an individual notice should be generated for these

[1] Please see the final section of these comments for specific recommendations related to SNAP (Food Stamps) beneficiaries and the interaction between SNAP and LIHEAP under the LIHEAP "Heat and Eat" program.

situations so that if person A is approved and person B is denied, person B will have an explanation as to why he or she received only a crisis benefit.

3604.3. It is unclear whether an individual who receives an extra crisis benefit would have had to receive a regular benefit as well or whether the additional crisis benefit would only go to an individual who was denied a regular benefit under Section 3604.2. This is a policy decision that should be clarified and justified in the final regulations.

As with Section 3604.2 above, the final regulations should require the agency to provide advance notice, plus individual notice so that the individual knows that they have received an additional crisis benefit, and specify how notice will be provided.

Section 3605

3605.1. This section provides a laundry list of actions that DDOE *may* take if funding is insufficient to meet all of the program's current law obligations. This section is problematic for several reasons. First, there is no indication of which actions are a higher priority for the agency. So for example, would the agency suspend taking applications or restricting eligibility before terminating an outreach effort? Second, some of these actions would require substantive program changes that could not be done without notice and comment rulemaking; for example, restricting eligibility or reducing benefit levels. Third, what would be the basis for choosing one action over another and how would the public be notified of that basis?

This section should be rewritten. First, DDOE should provide an ordering of the actions so that it is clear which action would come before another. Again, this ordering and choice of actions are policy decisions that the agency is likely making at this time and should be reflected and explained in the final regulations. Second, DDOE should separate out from this list of actions those that would substantively change program requirements, and require that such a change be publicized through notice and comment rulemaking. Finally, in whatever type of advance notice is provided under Section 3605.2 (see below), DDOE should also provide the rationale for whatever decision is undertaken pursuant to this subsection.

3605.2. We appreciate that this subsection specifies that notice be provided in advance of the decision to take an agency action. As with the notice sections above, this subsection should be revised to specify how notice will be provided and require that individual notice be provided to affected households.

Section 3606

3606.1 & .2. Just like the previous sections, this section involves a policy decision that DDOE has already likely made but is not noted here. Under subsection (1), does the LIHEAP program currently prioritize "a projected category of household applicant with higher home energy costs or needs in relation to household income?" What does it mean to set a benefit level for such a projected category of applicant? Under subsection (2), does a larger household with lower income receive the highest benefit; and how are (a) through (d) weighed to determine eligibility and benefit levels?

In the final regulations, DDOE must define all ambiguous phrases, such as "projected category of household applicant," and state and explain the agency's current policies governing the priorities and calculations referenced in these two sections.

3606.3. We suggest changing this provision to a mandatory one and using the same notice language of 3604 and 3605 with our suggested amendments.

Section 3607

We are pleased to see that the regulations contain provisions governing the content of vendor agreements.

Section 3608

3608.1. This section should substitute "will" or "shall" in place of "may."

3608.3. It is our understanding that no household may receive more than one crisis benefit per year. If that is the case, then this section also should use "shall" in place of "may." If there are certain circumstances in which a household can receive multiple crisis payments in a given year, then this section should describe those circumstances and how the decision will be made to pay an additional crisis benefit.

Section 3609

3609.3. This section appears duplicative of 3603.7, and suffers from the same lack of clarity as to the meaning of "timely."

3609.4. Again, the introductory language here should use "shall" in place of "may". In addition, this section appears to conflate the initial application with the notice of approval or denial, and includes items that are logically included in one document but not the other. For example, the amount of the award (f) and identification of the recipient (h) belong only in the approval notice,

not the application. Conversely, the statement and signature required by (k) belongs in the application, not the approval or denial notice.

- (b): The Department should add language to (b) addressing provisions for applicants without Social Security numbers.

- (i): This information is required in a determination notice, and should not be optional.

- (k): Subsections (3) and (4) appear duplicative. Is there an intended difference between these provisions?

Section 3610

3610.1. The "may" in this provision should be changed to "shall." It is unclear why this provision is phrased as discretionary rather than mandatory. What other action would DDOE take in this situation?

3610.2. The "may" in this provision should be changed to "shall." The discretionary language in this subsection raises serious concerns under federal and District law, as well as constitutional principles. As public assistance, LIHEAP's notice and hearing rights are also governed by the D.C. Public Assistance Act. *See* D.C. Code § 4-201.01(6) (defining "public assistance" as "payment in or by money, medical care, remedial care, goods or services to, or for the benefit of, needy persons."). The DCPAA provides for the right of "[a]n applicant for, or recipient of, public assistance aggrieved by the action or inaction of the Mayor" to a hearing to challenge that action or inaction. D.C. Code § 4-210.01. Furthermore, the provision requires notice of the right to request such a hearing. *See id.* at § 4-210.04(a). Adequate notice, based on constitutional principles, is defined as one that: 1) explains the basis for an agency's action, and 2) details the individual's right, if any, to challenge that decision. *See, e.g., District of Columbia v. Jones*, 442 A.2d 512, 521 (D.C. 1982) ("We consider an 'essentially fair' hearing to be one characterized by the fundamental elements of procedural due process. First in the enumeration of such elements, we count . . . [the] right to receive prior notice of the proposed termination . . ., of the basis for the termination, and of the extent of his rights to contest the action."); D.C. Code § 4-205.55(a)(2) (defining an "adequate" notice as one that "includes a statement of what action the Mayor intends to take, the reasons for the intended action, the specific law and regulations supporting the action, an explanation of the individual's right to request a hearing, and the circumstances under which assistance will be continued if a hearing is requested."); D.C. Code § 4-210.04(a) (requiring written notice of the right to request a hearing and the manner for doing so at the time of application and whenever the agency is taking an action that might adversely affect the applicant or beneficiary or his or her benefits).

Also, Section 3610.2(e) refers to an "option to discuss with a Department representative." We were not aware of the existence of such a process. If one exists (or if the regulations are proposing to add a new process), the process should be adequately defined in the final regulations.

Section 3611

This section raises many concerns. We suggest striking many of the proposed provisions in this section because they are inconsistent with District law (including the DCPAA and the regulations governing the Office of Administrative Hearings (OAH)) and/or beyond the scope of what DDOE can regulate. For example, in proposed provision 3611.6, DDOE instructs OAH how to resolve an appeal.

We propose striking sections **3611.4 through 3611.13** because they are inconsistent with existing law and/or beyond the scope of what DDOE can regulate.

We provide the following comments on the subsections that we believe can be kept but must be amended to be consistent with District law.

- **3611.1**. It is unclear what type of exhaustion requirement the agency is attempting to impose in this provision. The right to bring a cause of action in District or federal court is governed by statute and not by regulation.

  Therefore, DDOE should either strike the phrase "shall exhaust administrative remedies" or add "shall exhaust administrative remedies *except where otherwise provided by District or federal law*."

- **3611.2**. The federal LIHEAP statute provides for the right to file a fair hearing request when DDOE does not act upon a benefits application with reasonable promptness. *See* 42 U.S.C. § 8624(b)(13) (requiring that the State Plan also must "provide an opportunity for a fair administrative hearing to individuals whose claims for assistance under the plan . . . are denied or are not acted upon with reasonable promptness."

  Therefore, DDOE should add a new subsection listing another appealable action as, "*(d) failure to act on an application with reasonable promptness*."

- **3611.3.** The requirement that an individual file a written appeal is inconsistent with OAH regulations and the DCPAA. OAH regulations ensure that an aggrieved person can request a hearing in writing, in person, or by telephone. 1 DCMR§ 2971.1. Moreover, the

OAH regulations require the Department to provide a designated phone number that aggrieved individuals can call to request a hearing by phone. *See id.* The Public Assistance Act requires only that an "applicant or recipient" "request a hearing by giving a clear expression, oral or written, that he or she wants an opportunity to present his or her case to a higher authority." D.C. Code § 4-210.05.

Therefore, the section should be amended to read, "shall file a written *or oral* appeal," *consistent with the requirements of section 2971.1 of the regulations governing the Office of Administrative Hearings and D.C. Code § 4-210.05*.

Subsection (b) of this provision should be deleted. D.C. Code § 4-210.09 (Public Assistance Act) specifies a deadline of 90 days to file a fair hearing request. Having different deadlines for different actions makes the program too confusing for beneficiaries and does not appear to serve any important agency objective identified in these proposed regulations.

Add new section dealing with the LIHEAP Heat and Eat program.

We suggest that DDOE add a provision to these regulations the rules governing DDOE's implementation of the District's LIHEAP Heat and Eat program. As you know, through the Heat and Eat program, SNAP (Food Stamps) beneficiaries are provided with a minimum $20 LIHEAP benefit which enables them to qualify for a Standard Utility Allowance deduction from their income for purposes of determining their SNAP benefit amounts.

This is a great program, and we appreciate the Department's support for continuing the program through an increase in the minimum benefit from $1 to $20, pursuant to federal law. However, it is unclear how this program is implemented. For example, one of the goals of the Heat and Eat program is to connect SNAP beneficiaries with a LIHEAP benefit. It would be helpful to know how the $20 benefit is awarded to a SNAP beneficiary (as a payment to a utility company, in cash), and whether they are ever screened for eligibility for a full LIHEAP benefit through administration of the Heat and Eat program. If such a screening does not happen automatically, does any type of outreach happen so that a SNAP beneficiary knows to make an appointment to apply for regular or crisis benefits? This information would be very helpful to SNAP beneficiaries who might be in need of, but missing out on, full LIHEAP benefits.

Conclusion

Again, we thank you for the opportunity to submit these comments. We look forward to working with you on these regulations in order to achieve our mutual goals of increasing transparency in

the LIHEAP program. Please feel free to contact Jennifer Mezey (jmezey@legalaiddc.org) or Julie Becker (jbecker@legalaiddc.org) with any questions or to discuss these comments further.

Sincerely,

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