

**Joint Testimony of
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**Before the Committee on Labor and Workforce Development
Council of the District of Columbia**

Public Oversight Hearing Regarding the Department of Employment Services

March 4, 2020

The Legal Aid Society of the District of Columbiaⁱ and the Claimant Advocacy Program (CAP)ⁱⁱ submit the following joint testimony regarding the Department of Employment Services (DOES) Office of Unemployment Compensation.

Legal Aid and CAP are alarmed by DOES's increasingly aggressive efforts to recoup old, sometimes unreliable unemployment compensation overpayment amounts. We call upon DOES to cease collection of old overpayment cases until DOES substantially improves its operations in line with fair and ethical overpayment collection practices. Specifically:

- (1) DOES must ensure the accuracy of its overpayment data and pursue overpayments in a timely manner.
- (2) DOES must account for the extraordinarily high number of fraud penalties it assesses – and collects upon – each year.
- (3) DOES should prohibit agency employees from threatening fraud penalties or criminal prosecution (directly or indirectly) if such prosecution is unlikely to occur.
- (4) DOES should adopt hardship factors to shield elderly, disabled, or other judgment-proof claimants from worsening impoverishment through DOES's collection efforts.
- (5) DOES must do more to notify claimants of their rights when they are assessed an overpayment.

We urge the Committee to monitor these crucial programs that disproportionately impact the most vulnerable unemployment claimants in the District.

Background: DOES's overpayment practices

The Office of Unemployment Compensation's Benefit Payment Control unit identifies cases in which DOES overpays unemployment compensation to current or former benefit recipients

(“claimants”). The unit works with the Office of General Counsel to recover overpaid benefits through repayment agreements, tax offsets, civil actions, and other measures.

In FY19, for reasons currently unknown, the Benefit Payment Control unit substantially increased the number of overpayment cases it initiated. In past years, DOES established an average of 6,800 overpayment cases a year.ⁱⁱⁱ However, in FY19, DOES increased these numbers by 50% and issued 9,780 notices of overpayment.^{iv}

DOES has not yet explained this substantial uptick in overpayment cases. However, based on the claimants Legal Aid and CAP have counseled during this period, many cases allege overpayments from very old benefit years. For example, the Claimant Advocacy Program assisted a claimant in an alleged overpayment from 2011 where DOES did not issue a Notice of Overpayment until January 2020 – nine years later. This claimant’s former employer had since gone out of business, and the claimant was unable to recover records related the benefit year to defend the accuracy of his claim filings or refute the overpayment amount. The District of Columbia Office of Administrative Hearings eventually dismissed the overpayment debt because the DOES representative admitted that the agency did not verify the data submitted by a third-party payroll vendor or otherwise take steps to ensure its accuracy.^v

Many other claimants never receive DOES’s Notice of Overpayment because the last address on file with DOES is years old and now inaccurate. Some of these claimants only learn of their overpayment case after the DC government takes action to intercept their tax return to pay back the overpayment.

Of these overpayment cases, DOES accuses *one-third* of overpaid claimants of committing fraud. A finding of fraud allows DOES to levy an additional penalty of 15% of the overpayment balance that the claimant must pay to the agency.^{vi} Even though District of Columbia case law is clear that civil fraud must be proved by “clear and convincing evidence” of *intentional* wrongdoing,^{vii} DOES refuses to distinguish between claimants who accidentally (though incorrectly) file unemployment claim cards with inaccurate information – for example, due to low literacy, language barriers, or misunderstanding how to report their wages – and truly fraudulent bad actors.^{viii} Instead, it is Legal Aid and CAP’s understanding that DOES uses a standard rule where claimants who submit at least three (3) incorrect claim cards in a row are identified for alleged fraud. In FY19, DOES assessed \$321,884 in fraud penalty charges and recouped \$184,413 from claimants.^{ix}

Very few claimants appeal their alleged fraud penalties: despite DOES issuing 2,184 overpayments with fraud penalties in FY18, zero claimants appealed. In FY17, DOES issued 2,417 fraud penalties and only four (4) claimants appealed. Similarly, District law allows a claimant to request a waiver of repayment,^x and DOES has published a standard form that claimants can use to ask DOES to waive their overpayment debt,^{xi} very few claimants submit waiver requests, and DOES rarely grants them.^{xii}

Since 2018, DOES has increased its overpayment collection efforts by filing civil actions in the Superior Court of the District of Columbia. DOES has filed hundreds of cases in the past two years,^{xiii} including ten cases that are scheduled for initial hearings this Friday, March 12, 2020.^{xiv} Of the pleadings Legal Aid has reviewed, the vast majority contain vague language that does not specify exactly how the claimants were overpaid and when.^{xv}

Unfortunately, the courts rarely have the opportunity to review the merits of these claims because many of these matters conclude in dismissals or settlement agreements. In these agreements, claimants agree to pay back the allegedly overpaid funds – sometimes for amounts higher than the original lawsuit alleged. For example, in one case, DOES filed a civil action in May 2019 alleging the claimant had been overpaid by \$5,556.00.^{xvi} Just three weeks later, DOES and the claimant settled the case with the claimant agreeing to pay \$8,316.00 – a full \$2,760.00 more than the District sued him for.^{xvii}

In Legal Aid’s experience representing claimants seeking to negotiate repayment agreements while civil actions are pending, DOES has refused to consider individualized hardship factors. DOES refuses to dismiss cases even where claimants are elderly, disabled, or impoverished. DOES also refuses to dismiss cases where claimants are “judgment proof,” i.e., the claimant’s income, such as Social Security disability benefits, is protected from garnishment.

Legal Aid and CAP have spoken to many claimants who felt intimidated by DOES employees’ tactics when asking claimants to sign restitution agreements waiving their right to appeal. Claimants have reported to us that DOES employees inspired their fear of further, even more serious action in their cases if they do not agree to a repayment agreement, such as assessment of the 15% fraud penalty (if DOES has not already assessed one) or potential criminal fraud investigations. Even very low-income claimants with little to no assets have told us they entered into repayment plans despite needing repayment funds to pay for their basic monthly living expenses.

In this context, most claimants agree to sign repayment agreements.

Table 1: Summary of Select Overpayment-related Data from DOES Performance Answers

Fiscal Year	Total Overpayment Cases (Fraud and Non-Fraud)	Of Total, Number of Cases with Fraud Penalty	Percentage of Total Cases with Fraud Cases	Fraud Cases Appealed to DC Office of Administrative Hearings	Waiver Requests Received by DOES	Waiver Requests Granted by DOES
FY 19	9,780	No data	No data	No data	27	2
FY 18	6,522	2,184	33%	0	19	3
FY 17	7,205	2,417	34%	4	No data	No data

Needed Improvements

Given the substantial concerns in DOES’s overpayment practices, we urge DOES to cease collection of any unemployment overpayment over three years old until the agency has adopted substantial improvements to its collection practices in line with fair and ethical collection practices.

(1) DOES must ensure the accuracy of its overpayment data and pursue overpayments in a timely manner

First and foremost, DOES must take steps to improve the accuracy of its overpayment data. For example, when overpayment cases are based on wage reports from employers or third-party payroll vendors, DOES must ensure that this information meets the legal standards for assessing overpayments. If a third-party payroll vendor reports to DOES when a claimant was *paid* for work, but DOES's claim forms require claimants to report when they *performed* the work (whether or not they were paid that same week), then DOES must take additional steps to calculate whether the claimant was overpaid.

Very old data is often unreliable and inherently difficult to verify. It is also unfair to claimants who are often unable to produce their paystubs from many years ago in order to ensure they were indeed overpaid by the amount DOES alleges. Until DOES improves its data – and is capable to issuing notices of overpayment in a timely manner shortly after the alleged overpayment – DOES should issue a moratorium on overpayment collection of any cases older than three years.

(2) DOES must account for the extraordinarily high number of fraud penalties it assesses – and collects upon – each year

Before assessing a 15% fraud penalty, DOES must gather individualized evidence of a claimant's *intent* to provide false information for the purpose of obtaining more in unemployment compensation. DOES should not rely on repeated misstatements in claim cards unless it has proof that such misstatements were intentional and not a result of inadvertence or mistake. DOES's current practice is not sufficient to meet its obligation under District law. If DOES does not have evidence of intentional fraud, DOES must cease collection of the 15% fraud penalty.

Further, without policies to protect claimants who might fail to report wages due to barriers in communication and comprehension such as those with limited education, low or lack of literacy, or limited or no English proficiency, DOES is assessing a 15% fraud penalty on workers who were overpaid due to these limitations. Some other jurisdictions provide protections that the Council ought to consider. Maine's unemployment code, for instance, offers clear, reasonable safeguards for vulnerable workers that should be a model for future District policy:

In determining whether a claimant is at fault [or has committed fraud], the [Director] shall consider all pertinent circumstances, including the claimant's age and intelligence, as well as any physical, mental, educational, or linguistic limitations (including lack of facility of the English language).^{xviii}

Such a policy would allow DOES to pursue the workers who knowingly and intentionally commit fraud without harming those who were overpaid without any intent to receive more benefits than they were due (which constitutes the majority of claimants). The Benefit Payment Control unit should adopt more sophisticated fraud detection practices in order to identify bad actors who lie (on purpose) in order to receive more in benefits.

- (3) DOES should prohibit agency employees from threatening fraud penalties or criminal prosecution (directly or indirectly) if such prosecution is unlikely to occur

Our understanding is that in most unemployment overpayment cases—in the absence of truly egregious circumstances or a pervasive fraudulent scheme—referrals for criminal prosecution are unlikely. Additionally, if DOES has not already assessed the 15% fraud penalty while investigating an initial overpayment, it is unlikely to pursue fraud penalty unless substantial new evidence emerges.

As such, DOES should prohibit agency employees from directly or indirectly threatening future fraud penalties of criminal prosecution to secure an advantage in order to obtain concessions or agreements to repay District funds. This proposed policy is in line with federal guidelines for states accusing a benefit recipient of fraud in the Supplemental Nutrition Assistance Program (Food Stamps).^{xix} DOES should be prohibited from using a threat of fraud penalty or criminal liability as a debt collection tool.

- (4) DOES should adopt hardship factors to shield elderly, disabled, or other judgment proof claimants from worsening impoverishment through agency collection efforts

In line with the remedial purpose of the statute, DOES should adopt hardship factors to ensure that even voluntary repayment agreements do not worsen the impoverishment of the District's most vulnerable claimants. Similarly, DOES should adopt common sense guidelines for pursuing or dismissing civil actions, including assessing whether a claimant is elderly (i.e., out of the workforce and unlikely to have future tax offsets), disabled (i.e., limited earning capacity), or judgment proof (i.e., efforts to collect the judgment would be futile).

- (5) DOES must do more to notify claimants of their rights when they are assessed an overpayment.

As advocates for claimants, Legal Aid and CAP educate our clients about their right to file an administrative appeal and to request a waiver when DOES issues a Notice of Overpayment. However, we only speak to a small percentage of claimants each year.

DOES must proactively notify claimants of the risk that they will be assessed an overpayment or fraud penalty in the future when they apply for unemployment compensation. DOES must also notify claimants of their rights to review and appeal those notices if they do arrive (for example, by including a claimant's appeal rights on the DOES website page on unemployment fraud). While not all claimants will file an appeal, the extremely low appeal numbers currently strongly suggest that few claimants are aware of their right to review the veracity of DOES's claims or to present evidence in their defense.

Conclusion

Legal Aid and the Claimant Advocacy Program thank the Committee for the opportunity to submit this joint testimony. We urge the Committee to closely monitor DOES's unemployment

compensation overpayment collection practices, and we look forward to working with the Committee and DOES to address these concerns.

ⁱ The Legal Aid Society of the District of Columbia was formed in 1932 to “provide legal aid and counsel to indigent persons in civil law matters and to encourage measures by which the law may better protect and serve their needs.” Legal Aid is the oldest and largest general civil legal services program in the District of Columbia. Over the last 88 years, Legal Aid staff and volunteers have been making justice real – in individual and systemic ways – for tens of thousands of persons living in poverty in the District. The largest part of our work is comprised of individual representation in housing, domestic violence/family, public benefits, and consumer law. We also work on immigration law matters and help individuals with the collateral consequences of their involvement with the criminal justice system. From the experiences of our clients, we identify opportunities for court and law reform, public policy advocacy, and systemic litigation. More information about Legal Aid can be obtained from our website, www.LegalAidDC.org, and our blog, www.MakingJusticeReal.org.

ⁱⁱ The Claimant Advocacy Program (CAP) is a free legal counseling service available to individuals who file unemployment compensation appeals in the District of Columbia. CAP provides legal advice and/or representation to 50-60 claimants each month. CAP is a program of the Metropolitan Washington Council AFL-CIO, which works with over 200 affiliated union locals and religious, student, and political allies to improve the lives of workers and families throughout the greater metro Washington area. For more information, visit <http://www.dclabor.org/unemployment-help.html> or <http://www.dclabor.org/>.

ⁱⁱⁱ In FY18, DOES issued 6,522 overpayment cases. DOES Responses to FY18-19 Performance Oversight Questions, page 67. Available at: <https://dccouncil.us/wp-content/uploads/2019/02/DOES-2019-PO-responses-02-18-19.pdf> (hereinafter “DOES Responses FY18-19”). DOES Responses to FY17-18 Performance Oversight Questions, page 65. Available at: <https://dccouncil.us/wp-content/uploads/2018/10/DOES-FY17-18-Perf-Oversight-responses-03-06-18.pdf> (hereinafter “DOES Responses FY17-18”).

^{iv} DOES Responses to FY19-20 Performance Oversight Questions, page 74. Available at: https://dccouncil.us/wp-content/uploads/2020/02/DOES-PO-Questions-2020_Final-Response.pdf (hereinafter “DOES Responses FY19-20”).

^v Interested Committee members can contact Tonya Love at tlove@dclabor.org for a redacted copy of the decision in this matter.

^{vi} See D.C. Code § 51-119(e)(3).

^{vii} In order to prove fraud, the District is required to have specific evidence that the individual “knowingly made a false statement for the purpose of obtaining benefits” (emphasis added). See *Jacobs v. District Unemployment Compensation Board*, 382 A.2d 282, 289 (D.C. 1978).

^{viii} Legal Aid representatives have raised these concerns with senior official at DOES on several occasions, to no avail, including an in-person meeting in December 2018. Legal Aid’s best understanding of DOES’s position is that the claimant’s signature on their weekly claim card (for example, stating that they had no income during the week they filed for unemployment claim) is

sufficient proof of intentional fraud. Legal Aid disagrees that this is “clear and convincing evidence” of intentional, fraudulent conduct.

^{ix} See DOES Responses FY19-20 at 76.

^x See D.C. Code 51-119(d)(1) (stating that overpaid funds “may [be] ... waived in the discretion of the Director...”).

^{xi} See Request for Waiver of Overpayment, available at: <https://does.dc.gov/page/request-waiver-overpayment>.

^{xii} DOES granted 2 out of 27 waiver requests in FY19. See DOES Responses FY19-20 at 76. DOES granted 3 out of 19 waiver requests in FY18. See DOES Responses FY18-19 at 76.

^{xiii} Case documents for these cases are publicly available on www.dccourts.gov using E-Access.

^{xiv} Legal Aid and CAP do not represent these claimants. As stated in note 10, these court documents are publicly available. The cases with initial hearings scheduled for March 12th are: 2020 SC3 000725, 2020 SC3 000726, 2020 SC3 000727, 2020 SC3 000728, 2020 SC3 000729, 2020 SC3 000730, 2020 SC3 000731, 2020 SC3 000732, 2020 SC3 000733, 2020 SC3 000734, and 2020 SC3 000736.

^{xv} The standard complaint language merely states that “[claimant] failed to disclose [s]he was employed or [s]he underreported her earnings.” DOES then lists the overpayment balance but does not include the dates when the claimant was allegedly overpaid.

^{xvi} See Case Number 2019 SC3 003153. This case record is available at www.dccourts.gov. Neither Legal Aid nor CAP represents this claimant.

^{xvii} According to court filings, this claimant agreed to make payments of \$50.00 per month, which would take him fourteen (14) years to repay in full. Less than a year later, DOES filed a motion to enter judgment against the claimant who allegedly failed to make a required monthly payment.

^{xviii} Unemployment Insurance Reporter, Regulation, Maine, 2(B) (Definitions); see also New Hampshire, Emp. 502.03 (Overpayment without Fault).

^{xix} In Food Stamp intentional program violation cases, threats of criminal prosecution without an intent to refer for such prosecution are expressly prohibited because, as the federal Food and Nutrition Service acknowledges, “suggesting to the client that his/her case may be referred to prosecution if he/she does not sign an [administrative hearing] waiver is confusing or misleading and again makes it difficult for the individual to make an informed decision.” Memo on Fraud Policy: 7 CFR 273.16, USDA Food and Nutrition Services (issued 02/04/04), available at <https://www.fns.usda.gov/snap/fraud-policy>; 7 CFR §273.16(a).