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(BY EMAIL to richard.rhodesjr@otda.ny.gov)

Richard P. Rhodes, Jr.
Division of Legal Affairs
New York State Office of Temporary and Disability Assistance
40 North Pearl Street, Floor 16C
Albany, New York 12243-0001

RE: Regulatory Amendments to 18 NYCRR Part 398 (Supplemental Security Income (SSI) Additional State Payments)

Dear Mr. Rhodes:

Please find the accompanying comments submitted in response to the proposed amendments to 18 NYCRR Part 398, which regulates the New York State Supplement Program ("SSP"), published in the New York State Register on July 1, 2020.

The National Center for Law and Economic Justice ("NCLEJ") is a national organization that uses litigation, policy advocacy, and support for community-based organizations to promote economic justice for low-income individuals. We conduct our advocacy in states across the country and have extensive experience with the full range of public benefits programs, including Supplemental Security Income ("SSI") benefits. Our benefits advocacy focuses on ensuring and maintaining access to critical supportive benefits for vulnerable and low-income people, with a strong focus on ensuring applicants and recipients receive Due Process and have fair access to critical financial assistance.

NCLEJ does not object to a number of the technical corrections and clarifications the New York State Office of Temporary and Disability Assistance ("OTDA") has proposed. However, NCLEJ strongly opposes proposed changes that will: restrict payment of SSP benefits to former SSP recipients; restrict who receives a notice of eligibility determination; reduce the time for recipients to notify OTDA of changes; and remove the presumption of joint application for SSP based upon application for SSI. Taken together, these changes will burden people who already have difficulty accessing these benefits and complying with application processes due to their extremely limited resources and, in many cases, functional limitations when trying to access SSP income.

Broadly characterized, the regulatory changes to which NCLEJ objects are steps OTDA seems to take in an effort to make SSP more difficult to access and more like public assistance. This approach is flawed for at least two significant reasons. First, SSP is not public assistance, nor should it be treated as equivalent. Public assistance programs are not designed for a predominately vulnerable population. Public assistance rules are strict and onerous mechanisms to enforce compliance. In contrast, SSP is a supplemental payment to raise the very modest income of persons who are indigent and permanently unable to work due to either age or disability. Imposing arbitrary compliance metrics on SSP recipients serves no purpose other than to limit access.

Additionally, SSP benefits are issued to individuals based on their eligibility for federal SSI benefits. (*See* Soc. Serv. Law § 209;18 N.Y.C.R.R. § 398-1.1 ("States also have the option to provide additional payment to supplement the basic Federal SSI payment.")) SSP eligibility depends on action taken by the Social Security Administration ("SSA"). There is no mechanism in statute or regulation for SSP to be an independent benefits program—no eligibility determination, no written or online application, no codification of due process protections or rights, no regulatory guidance document characterizing SSP as a standalone program. To the extent that OTDA seeks to set different standards for SSP from what exists and has been used in SSI, it will cause unnecessary duplication of effort and create confusion for recipients. SSP eligibility is wholly linked to SSI and should reflect SSI eligibility and rules for purposes of administrative efficiency and ease of use by a core clientele who already face multiple barriers. Many of these proposed regulatory changes are not consistent with the manner in which SSI operates or how the SSP benefits were administered when the State of New York paid SSA to issue the same benefits on behalf of the state. The changes will not benefit to the people SSP exists to serve. If enacted, these changes will unfairly deprive some SSI recipients of SSP benefits to which they are entitled.

I. Limitation of benefits issued for retroactive time periods to active recipients – Proposed 398-1.1; 398-2.1(a), (g), (u), (aa), (aq); 398-3.2; 398-4.2(a)(2); 398-4.3; 398-4.4 (a); 398-4.6(a); 398-11.1; 398-11.3, etc.

Newly proposed language impacting multiple sections of the SSP regulations would impose a regulatory prohibition on the issuance of SSP benefits for prior periods of eligibility unless the recipient is currently eligible for SSP. Under this proposed language, a recipient who is not currently able to receive SSP will be precluded from receiving payment despite the SSA's determination of eligibility for that period of time and issuance of SSI benefits for the same.

This change seeks to administratively overrule three Supreme Court decisions that have already directed OTDA to issue SSP benefits to individuals who were eligible for SSI during a retroactive time period but were not in current receipt of SSI or SSP benefits. (*See Torres v. Roberts*, 63 Misc.3d 1229 (Alb. Co Sup.Ct. 2019); *Goyer v Roberts*, 65 Misc.3d 1203 (Alb. Co Sup.Ct. 2019); *Sherwood v Roberts*, (unreported decision 4/23/19) Albany Co Index No. 904631-18). This effort by OTDA, as an administrative agency, is improper and exceeds the scope of the agency's authority. Because eligibility for SSP is articulated in Social Services Law § 209, the decision to alter or limit eligibility is reserved to the legislature.

The proposed change would require that disabled and elderly New Yorkers be in *active* receipt of SSP benefits in order to obtain SSP benefits for retroactive periods of time. This change will adversely affect a number of beneficiaries, including a particular subset of individuals or couples who would only be eligible for SSP benefits during their five-month waiting period for Title II benefits (commonly referred to as Social Security Disability Insurance or "SSDI"), or those whose SSI benefits were suspended for technical reasons before or shortly after they started.

Many disability claimants apply for both SSI and SSDI concurrently. If both SSI and SSDI claims are approved, depending on the date of onset, the individual may be subject to a five-month waiting period before receipt of the first payment of SSDI. (20 C.F.R. § 404.315.) During this five-month waiting period, many disability claimants are eligible to receive SSI benefits, which are not subject to a waiting period. Pursuant to 18 NYCRR § 398-4.1 (c) and (d), eligibility for SSP benefits also begins on the SSI onset date, and SSP benefits are payable as of the month that SSI payments begin.

Unless there is a delay with processing the SSDI, by the time these claimants are found eligible for any SSDI benefits, they are ineligible for on-going SSP, because they are no longer eligible for SSI. During the five-month waiting period, however, the claimants met the eligibility requirement for SSP, pursuant to Social Services Law § 209 (1)(a) and the current 18 NYCRR 398-4.2 (a) and (b), because the claimant was 1) eligible to receive SSI benefits; 2) had monthly countable income less than the State standard of need; and 3) lived in New York State with the intention of making his or her home in New York State. Thus, these claimants should be entitled to receive SSP benefits for the five-month period for which they only received SSI benefits.

Similarly, individuals found disabled by SSA long after they apply but who are not currently eligible because of technical reasons such as immigration issues are adversely affected by this rule. For example, federal law limits the time that refugees are eligible for SSI to seven years, starting with the date that they are granted refugee status.

The proposed regulatory change limiting SSP issuance to only those recipients with current and ongoing eligibility should not be enacted because to promulgate such limitation exceeds the scope of OTDA's authority, creates an impermissible distinction between recipients of federal SSI benefits in New York and will create unnecessary hardship for many older individuals and people with disabilities.

II. Limiting issuance of notices to "currently eligible" individuals – Proposed 398-2.1 (u)

OTDA seeks to revise their regulations to withhold fundamental constitutional Due Process protections from individuals who are not "currently eligible" for SSP benefits. By removing "applicants" for SSP from the scope of those who are entitled to receive notice and limiting the notices to those who are currently eligible, OTDA will deprive individuals who may be erroneously denied SSP or those who may not be aware additional information is required from the opportunity to correct their case and secure benefits for which they are eligible. It also forecloses notice to those SSP recipients with limited periods of retroactive eligibility (discussed in the preceding section).

The right to a legally adequate notice and the opportunity to dispute an adverse determination are fundamental rights for applicants and recipients of critical economic support benefits. (*See Goldberg v. Kelly*, 397 U.S. 254 (1970)). OTDA's effort to deny the most basic information—whether a case is opened or not and for what period of time—to some SSP households is contrary to the most fundamental notions of procedural due process. There is no rational basis to restrict provision of legally sufficient notice of benefits eligibility; this proposed regulation should not be enacted and the current regulatory language should remain**.**

III. Resolution of discrepancies between active SNAP cases and SSP recipients documenting their living arrangement – Proposed 398-2.1(ad) and 398-4.5

Newly proposed regulations would resolve discrepancies between living arrangement information in the SSP system and the SNAP benefits system by relying preferentially on the household composition in the SNAP case record for purposes of determining the state living arrangement for SSP. While SNAP cases are regularly recertified and updated documents provided to the local departments of social services, the better practice would be to seek verification directly from the SSP applicant/recipient when discrepant information is uncovered.

IV. Shortening the time to report changes, - Proposed 398-6.2

The proposed regulations put forth a regulatory change that will dramatically change the time an SSP applicant or recipient has to respond to requests for additional information. OTDA proposes to radically reduce the time that an SSP applicant or recipient has to respond to a request for information or documents from 30 days to ten days. Requests for information sent by OTDA by mail often take many days to arrive, particularly during the current public health crisis. Also, the regulation fails to provide for any grace period for mailing as permitted in the federal SSI regulations or in New York's general statutory service provisions. (*C.f.* 20 C.F.R. § 416.1401 and CPLR 2103(b)(2).)

Further, as drafted, the proposed regulation fails to describe how the ten days will be counted and documented, and how responses by mail will be accounted for. While recipients can communicate with OTDA through an 800 number, which often has long wait periods that are burdensome to low income persons with limited cell phone access, the proposed regulation is silent as to whether any record will be maintained of an applicant's or recipient's unsuccessful attempts to respond in a timely fashion. Nor does the regulation provide protection for recipients or applicants who timely report changes to SSA rather than OTDA, as they are allowed to do.

The regulation, as written, will create a procedural due process nightmare and prove unnecessarily burdensome for the clients—who are by definition indigent elderly or disabled persons. For anyone to respond by mail, they require envelopes, stamps, and access to a post office or mailbox, any one of which can be an impediment to an SSP applicant or recipient. Additionally, creating a different change reporting standard for SSP than is used for SSI will cause unnecessary confusion. It also raises the question of how applicants and recipients would be notified of the two relevant change reporting standards and what information would be reported to whom. Will the information be contained in the notices? It is particularly hard to consider since SSP is not addressed by the local departments of social services, so there is no

way for an applicant or recipient to ask in person for help when they are confused and need to quickly submit papers critical to maintaining their eligibility.

Rather than enacting the proposed regulation as drafted, the current 30-day change reporting period should be retained, which is the same time frame applicable in the SSI program. (20 C.F.R. § 416.714(b).) Additional, clarification of a five-day grace period for mailing would be a welcome change to incorporate in further regulations, consistent with the federal and New York State standards.

V. Repeal of concurrent application rule – Proposed 398-4.1

The proposed regulations eradicate the presumption that a person who applies for SSI is deemed to have concurrently applied for SSP and proposes to remove regulatory language that no separate application for SSP shall be required or accepted. Because SSP eligibility is tied inexorably to SSI eligibility in both state and federal statutes, this proposition has no rational basis. Any additional steps to create a separate SSP application process will be unduly burdensome to SSP applicants and recipients, and hinder benefits access. This proposed regulatory provision should not be enacted.

NCLEJ strongly oppose all aspects of the proposed revisions to 18 NYCRR Part 398 that will limit payment of SSP benefits to individuals and couples who otherwise meet SSI eligibility criteria and create burdensome barriers to accessing SSP benefits. The proposed changes will deprive eligible SSI recipients of a portion of their benefits. Thank you for your consideration and the opportunity to comment.

Respectfully submitted,

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