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CORRECTED

VIA EMAIL

Attn: Rodney K. Huenemann
E-mail: rhuenemann@azdes.gov

Arizona Department of Economic Security
1789 West Jefferson Street, Mail Drop 1292
Phoenix, Arizona 85007

Re: Comments to Proposed Final Food Stamp Administrative Rules, Articles 3, 4 and 5

Dear Mr. Huenemann:

Community Legal Services ("CLS") and the William E. Morris Institute for Justice ("Institute"), submit these comments to the Arizona Department of Economic Security's ("DES") proposed Supplemental Nutrition Assistance Program ("SNAP" or food stamps) administrative rules. On October 19, 2018, DES published proposed administrative rules for three Articles: Article 3, Claims Against Households; Article 4, Appeals and Fair Hearings; and Article 5, Intentional Program Violations. DES administers SNAP and the proposed final SNAP administrative rules will replace emergency rules concerning the same three articles DES published two months earlier. CLS and the Institute work on access to food stamps for the vulnerable populations eligible for and served by the food stamp program.

Initially, we note that the proposed rules in several major respects deviate from DES' initial draft rules that we commented on in 2017. Those deviations negatively impact persons eligible for food stamps. Additionally, in paragraph 8 of the preamble section, DES states these rules "codify" current Department policy and practice, which is surprising because as recently as September 26, 2018, DES met with us to work on fair

and reasonable overpayment and compromise policies and practices and it was our understanding that the policies were still under review. Finally, in paragraph 11(b), DES claims the proposed rules are "no more stringent than the federal law or regulation." As explained below, in many respects DES' proposed rules are more strict than the federal requirements and may have the effect of preventing eligible persons from participating in the food stamp program.

Any review of the proposed rules must start with the understanding that eligible persons have a legal entitlement to participation in the SNAP program. 7 U.S.C. § 2014(a) ("Assistance under this program shall be furnished to all eligible households who make application for such participation."). Moreover, the state cannot as a condition of eligibility "impose additional application or application processing requirements. . . [and] must base food stamp eligibility solely on the criteria contained in the Act and this part." 7 C.F.R. § 273.2(a)(1). As described below, in many respects we believe that the rules do not comply with the federal food stamp law or are punitive to the participants in the food stamp program. These proposed rules need a lot of work and we have tried within the limited time available to us to identify and discuss all our concerns with the proposed rules. If we have missed anything in our comments, this omission does not waive our rights to address our concerns with the proposed rules with other entities and in other forums.

We will address each article separately.

Article 3: Claims Against Households

R6-14-301: Purpose and Definitions

DES' definitions for "agency error" in subsection (B)(1) and "inadvertent household error" in subsection (B)(4) are incomplete. Both definitions fail to link errors to action or inaction required by federal regulation. The definition of "claim" in subsection (B)(2) also must be linked to the agency or claimant taking an action or failing to take an action required by federal regulation. As drafted, the definition of "claim" occurs whenever food stamps were "overpaid." That is not the definition of when an overpayment occurs.

DES' definition of "Intentional Program Violation" in subsection (B)(5) should be modified to add the following words in italics: "an individual committing *and intending to commit*" an IPV pursuant to the federal regulation.

R6-14-302: Claim Calculation; Date of Discovery; Overpayment Period

DES' initial draft rules went back 12 months for the collection of overpayments in agency error cases. In subsection (B), the proposed rule increases the collection period to 36 months for both agency error and inadvertent household error. From information DES provided to us a few years ago, most overpayments in Arizona are caused by agency error. In those situations, the error was out of the control of the person. The longer collection period for agency error cases should be changed back to the initial draft proposal. The longer back DES goes for collection, the less likely the claimant will have the documents needed to challenge the overpayment. Several states, including Washington, limit the collection of agency errors to 12 months. Such a limitation on collection policy or practice is reasonable because the error is the fault of the agency and the agency does not keep any of the recovered overpayment. We recommend that for agency errors DES only go back 12 months. We also recommend the 12-month time period is appropriate for inadvertent household errors as well. While collections may go back three years, in cases with no intent to obtain benefits the person was not eligible for, administrative time and effort would be better served ensuring the operation of the food stamp program complied with federal law.

Also, the federal regulation 7 C.F.R. § 273.18(d)(1) requires the agency to "establish a claim before the last day of the quarter following the quarter in which the overpayment or trafficking incident was discovered." DES failed to include this requirement in the proposed rules. It must be included.

R6-14-303: Determining a Claim Amount

DES has failed to articulate the steps to calculate a food stamp overpayment as required by 7 C.F.R § 273.18(c)(1)(ii). DES should have a comprehensive rule on how to calculate an overpayment. At a minimum DES should add the following:

New (A)(2): The Department shall only count income that was reasonably certain under 7 C.F.R. § 273.10(c)(1) at the time that the initial calculation of benefits was made.

New (A)(3): The Department uses simplified reporting in most cases and unless the household's income exceeds 130 % of the federal poverty guidelines, a report of change is not required until the six month point in the certification

> period and does not constitute an overpayment. 7 C.F.R. § 273.12(a)(6).

In addition, the federal regulation requires the agency to offset or reduce the overpayment by any under-issuance and expunged benefits. 7 C.F.R. § 272.12 (c)(1)(ii)(D). That requirement should be included in the rule.

DES wants to act on every purported "error" that may have occurred. Under 7 C.F.R. § 273.12(a)(5)(v) for simplified reporting cases, the household only needs to report when their gross income exceeds 130% of the federal poverty level. For other changes reported outside the periodic report, DES is not required to act unless the gross monthly income exceeds the income for the household size. 7 C.F.R. § 273.12(a)(5)(vi). The regulation is very detailed that the agency should not act on reports that may decrease the household's benefits, except in specific unusual circumstances, but should act on those that increase their benefits. *Id.* DES proposed rule only contemplates that changes will result in less benefits being owed and not more benefits. These subsections need more work. While we understand DES has some discretion under the federal regulations, the current proposed wording appears to use the discretion to try to consider every change as a possible overpayment. That is not appropriate.

Finally, DES uses the term "correct benefit amount" but the term is not defined. If this term is going to be used, DES should define it.

R6-14-307: Collection Methods

In subsection (A), for current food stamp recipients, DES proposes to use the federal regulation collection amounts in 7 C.F.R. § 273.18 (g)(1) except the "allotment reduction in 7 C.F.R. § 273.18 (g)(1)(vi)" which concerns two separate households. This is very confusing. We request that DES clarify this rule. What is DES proposing? Are some words missing?

Also, DES should be specific as to whom the various collection methods apply. There are two definitions of household in the proposed rules. *See* R6-14-301(B)(3) and R6-14-308 (A).

In subsection (B), DES proposes that the payment period should be determined by the amount owed. When the claim is $600 or less, the payment period is 12 months. When the claim is $1,200 or less, the payment period is 24 months. When the amount owed is over $1,200, the payment period is 36 months. This payment scheme is arbitrary and has no relation to the federal regulation. The period to determine collectability in the

federal regulation is 36 months, 7 C.F.R. § 273.18(e)(7)(i), and that is the time period that should be used for all repayment plans. While DES may state that the proposed repayment schedule is a starting point for a repayment plan, DES should not start from an arbitrary and unreasonable policy and practice.

Finally, in subsection (C), DES intends to collect overpayments from unemployment insurance ("UI") benefits. DES previously stated it would not collect from UI benefits and in its initial draft rules, DES stated it would not collect from UI benefits. As recently as a few months ago in a meeting, DES staff reiterated that DES would not collect overpayments from UI benefits. Collection from UI benefits is not required, *see* 7 C.F.R. § 273.18 (g)(6)(i) and(ii), and we request that DES not collect from UI payments. Recipients of UI benefits are persons and families who have had a life altering event, the loss of a job through no fault of their own and are in financial crisis. Add to this situation the fact that Arizona has the second lowest UI weekly amount in the country, and the further loss of benefits will lead many households into being homeless. DES should not intentionally add to the financial stress these vulnerable families are facing.

R6-14-308: Claim Compromise

Subsection (C) concerns who is eligible for a full compromise without looking at income and expenses. We will refer to this as the automatic compromise. DES' proposed rule is too restrictive and conflicts with agreements it made with us. First, the households eligible for a full automatic compromise are limited in subsection (C)(1) to households that only have adults and those adults can only receive Supplemental Security Income ("SSI"). In subsection (C)(2) the households are limited to those with only elderly and disable adults and the only sources of income are SSI and other income received from the Social Security Administration. These are arbitrary and unreasonable restrictions. As an example, the household may be a disabled mother and a minor child who either is on disability or only receives Temporary Assistance to Needy Families ("TANF"). This household should qualify for the full automatic compromise but would be deemed ineligible under subsections (C)(1) and (C)(2). Households with minor children should not be excluded from the full automatic compromise.

In addition, we request that the following group be added to the full automatic compromise category as a new subsection (C)(3):

> *New* (C)(3): The household has a total net countable income (gross earned income minus 20% of earned income plus gross unearned income) that does

> not exceed 130% of the federal poverty level for the household size.

DES had agreed to include this group as a full automatic compromise category in our meetings that occurred in recent months.

Under subsection (D)(1), at the end of the sentence the following words should be added: "who is defined in subsection (A)(1) above." DES should use clear wording concerning whose income is or is not counted for the compromise calculation. As drafted, the subsection fails to do this.

Under subsection (D)(2), the expenses that can be counted against income to determine whether a compromise will be granted are not adequate. In subsection (D)(2)(d), DES intends to limit "actual" transportation expenses to those persons employed, looking for work or in a training program. This is too restrictive. In many rural areas, there is no public transportation and a vehicle is essential to completing daily tasks and responsibilities. In urban areas, public transportation can take hours to go relatively short distances. Transportation costs to go to school, doctor's appointments, and the grocery store are basic expenses that should be considered allowable expenses. Similarly, in subsection (D)(6) DES wants to restrict the expenses of a vehicle payment, insurance and gas to only those persons living in their vehicle. As noted above, in Arizona vehicles are critical to daily life. This restriction illustrates the failure of DES to protect vulnerable persons and families in the food stamp program. The only households who can get a compromise are those where the agency made an error or the household did not understand the reporting requirements. Quite frankly, if someone is homeless, DES should stay *any* collection efforts until the person obtains stable housing. Finally, DES has failed to include many other basic needs as allowable expenses. There are no expenses listed for clothing, diapers, personal items such as toothpaste and sanitary products and household items such as detergent and light bulbs.

We proposed that DES allow the following monthly expenses to calculate discretionary income as a revised subsection (D)(2):

a. Rental payment
b. Renter's insurance
c. Mortgage payment, real estate taxes and homeowner's insurance
d. Utility costs: Water, gas, electric, sewer, garbage
e. Phone and internet
f. Household and Personal care products ($10 per person)
g. Clothing ($10 per person)

h. Car payment
i. Car insurance
j. Other Transportation expenses (gasoline, bus passes, etc.)
k. Health insurance premium
l. Medical, dental, and prescription monthly out-of-pocket expenses
m. Child support payments (ordered by the court)
n. Alimony payments (ordered by the court)
o. Food
p. Non-NA participants: allow the Thrifty food plan amount for the current Compromise Budgetary Unit size.
q. NA Participants: allow the Thrifty food plan amount for the current Compromise Budgetary Unit size minus the NA allotment
r. Adult care
s. Child care
t. Nursing care
u. Educational expenses not covered by student Financial Aid including tuition, fees, and monthly student loan repayments.
v. Child and/or Adult Diapers (up to $60 per person upon verification of need)

In addition, DES should affirm that the following allowable expenses do not require verification: clothing, household and personal care products and food.

In subsection (E), DES proposes a very stringent process for persons to submit the financial statement and the required verification within 20 *working* days of the date the form was mailed. While there is a good cause exemption to meeting this time frame, it is limited to "circumstances beyond the household's reasonable control [that] make it *unduly* difficult or *impossible* for the household" to meet the time requirement. (emphasis added). First, DES has an obligation to assist persons to comply with verification requirements and to get needed documents. *See generally* 7 C.F.R.§ 273.2(f). We know of no food stamp regulation that defines good cause as limited to "undue" difficulty or "impossibility." Thus, this is an example where DES wants to impose a more stringent requirement than the federal regulation. Under DES' proposal very few situations will meet this standard. In contrast, in proposed Article 4 Appeals and Fair Hearings, good cause for reopening a hearing is when the reasons were "beyond the reasonable control" of the party. *See* R6-14-412 (E). DES must change the good cause definition in subsection (E).

In subsections (E) (1) and (2), the overview calculation of income is not challenged but we do object to the cut off to allow a compromise to those households

who have income equal to or less than 130% of the federal poverty level. As noted above, for families with a gross income that is equal to or less than 130% of the federal poverty level, those households should receive a full automatic compromise.

For those households with gross income above 130% of the federal poverty level, we propose a new revised subsection (E). A household with income over 130% of the federal poverty level may have very high medical expenses, very high utility bills and other extraordinary non-discretionary income. The inquiry should always be what can the household reasonably repay within three years. *See* 7 C.F.R. § 273.18(e (7)(i).

New (E): Calculate the discretionary income of the household as defined in in subsection (A)(1) above using the following calculation.

1.	Enter amount of gross earned income in last 30 days	$
2.	Subtract standard deduction of 20%	$
3.	Subtotal (1 -2 = 3)	$
4.	Add amount of gross unearned income in last 30 days	$
5.	NET COUNTABLE INCOME (3+ 4= 5	$
6.	Compare the result in (e) to 130% of Federal Poverty Level (FPL) for the appropriate CBU [1]size. If the result in (e) is less than or equal to 130% FPL, the CBU is eligible for a full reduction of the NA overpayment. If the result in (e) is more than 130% FPL, continue with the calculation.	Full NA OP Reduction? ___ Yes ___ No
7.	Enter total CBU expenses from Request for Compromise (form 1018B)	$
8.	Subtract total CBU expenses from net countable income (5 – 7 = 8)	$
9.	Enter monthly food expense: For CBU with NA, enter Thrifty Food Plan minus NA benefits For CBU without current NA, enter Thrifty Food Plan	$
10.	Subtract (9) from (8)	$
	DISCRETIONARY NET INCOME (10)	$

The above was the agreement DES staff reached with us in September 2018.

[1] CBU is the acronym for compromise budgetary unit and was the term we were using in our discussions with DES. We kept the acronym in the calculations.

We do not object to the compromise calculation in subsections (H)-(J), except to the limitation on the households who may request and get a compromise. In subsection (K)(1) we object to the minimum payment being at least $10.00 per month, unless DES is going to not collect any overpayments that are $300 or less.[2]

Finally, the proposed rule has no time period for the agency to send the notice of its decision on the compromise request to the household. Under subsection (E), the agency has 20 working days to determine the gross income amount. In subsections (K) and (L), there is reference to a notice to the household, but no time frame in which to send the notice. The rule should clearly require DES to send the notice within the time frame that DES has to calculate income and expenses, which is 20 working days from receipt.

R6-14-309: Reinstatement of a Compromise Claim

We do not object to subsections (1) and (2), except that the proposed rule fails to address what happens when the default or delinquency is the result of changed circumstances and renegotiation of the repayment plan is needed because of a hardship. 7 C.F.R. § 273.18(e)(5)(iii) provides for the renegotiation of the payment agreement and DES current policies contain renegotiation provisions as well. We are surprised that since DES currently renegotiates repayment plans it failed to include the practice in the proposed rules.

We object if DES is no longer going to renegotiate payments plans when circumstances change. We request the following be added as a new section:

> *New Section: Delinquency and Renegotiation of a Repayment Plan*
>
> A. If the household is in default or delinquency of the repayment plan, the department shall send a notice to the household advising them of the delinquency. The notice shall inform the household how to apply for a renegotiated

[2] During our meetings, DES stated that it was going to ask the federal government to allow DES to waive any potential overpayment of $300 or less, rather than the current limit of $125. We had proposed that DES raise this limit to $500.

payment plan, and the documentation they will need to submit.

B. If the household's circumstances have changed, and it can no longer make the agreed upon payments, they may apply for a renegotiated payment plan based on the hardship.

C. The household has the right to appeal the agency's failure to renegotiate a new repayment plan upon request and the renegotiated repayment plan terms.

R6-14-310: Terminating and Writing Off a Claim

The federal regulation, 7 C.F.R. § 273.18(e)(8), lists circumstances when the agency must terminate or write off a claim. In the proposed rule, DES failed to include all the listed circumstances in the federal regulation subsections (e)(8)(i) and (ii). In subsection (A), the only circumstance DES lists is when no adult household member responsible for the overpayment can be found. DES must include all of the circumstances in the federal regulation and not only one.

Article 4: Appeals and Fair Hearings

R6-14-401: Entitlement to a Fair Hearing; Appealable Action

The federal regulation for food stamp fair hearing is 7 C.F.R. § 273.15. DES must follow the regulation. In 7 C.F.R. § 273.15(a), the regulation requires that DES provide a fair hearing by any agency action or inaction "which affects the participation of the household in the program." We request that DES add this wording to this proposed rule.

R6-14-403: Request for Hearing; Form; Time Limits; Presumptions

We do not object to subsection (A) but request that the wording in 7 C.F.R. § 273.15(h) concerning what constitutes a request for a hearing be included in the rule as a new subsection (A).

New (A): Request for hearing: A request for a hearing is defined as a clear expression, oral or written … to the effect that it wishes to appeal a decision

> or that an opportunity to present its case to a higher authority is desired.

We also suggest that the rule affirmatively require DES staff to assist a person to file an appeal as required in 7 C.F.R. § 273.15 (i). In the proposed rule, DES only requires the agency to "help an applicant or recipient complete the form."

We do not object to subsection (C) but note that subsection (B) requires more information than is allowed in 7 C.F.R. § 273.15(h). All that is needed for an appeal is the desire to file one. *Id*. We recommend that subsection (B) be deleted. The appeal form DES develops can ask for this information but explain that it is not required to be filled out and that DES will assist the person to fill out the form.

In subsection (E), the reasons DES proposes to consider for when an untimely submission of an appeal will be considered timely are too limited. There should be a general catch-all good cause exception. We propose the following change to subsection (E): "A document is timely filed … was due to GOOD CAUSE OR any of the following reasons."

In addition, 7 C.F.R. § 273.15(j)(1)(i) provides that the agency can dismiss the hearing request as untimely "provided that the State agency considers untimely requests for hearings as requests for restoration of lost benefits in accordance with § 273.17." Those words must be added to the end of subsection (F).

The following sentence should be added to subsection (J): "The notice of hearing shall include information on the availability of agency conferences and how to request a conference if the person wants one."

R6-14-405: Hearings; Location; Notice; Time

In subsection (A) the rule should affirmatively state that: "The notice of hearing shall inform the appellant that he or she may request to appear in person and the steps to take to make this request." DES' appellate division has been very reluctant to have in person hearings although claimants have a right to one. *See* discussion below in parties' rights, R6-14-410, concerning the parties' rights to appear in person.

The federal regulation 7 C.F.R. § 273.15(l) lists the information that must be in a notice of a hearing. While DES lists the first 3 items in the proposed rule, it fails to list the fourth: "Explain that the household or representative may examine the case file prior to the hearing." 7 C.F.R. § 273.15(l)(4). This is no limitation in this right. It is a right to

review the whole case file and not part of the file. DES must add this right as a new subsection (D)(4).

In subsection (D)(4)(c), we suggest changing the word "present" to "bring" as that is what is used in the federal regulation and is easier to understand.

In subsection (D)(5), regarding information about free legal services, the words used should be "free legal services" with correct contact information and not "free *community* legal services." "Community Legal Services" is the free legal services program that operates in only certain parts of the state.

R6-14-407: Hearing Officer; Duties and Qualifications

In subsection (B)(6), the administrative law judge ("ALJ") should be required to render the hearing decision and issue a written decision "reversing, affirming, modifying or remanding the agency's decision." The ALJ must be required to actually make a decision that is dispositive of the case. *See* 7 C.F.R. § 273.15(m)(2)(vi) (render a hearing decision . . .which will resolve the dispute.").

We also request that the rule include the ALJ's duty to "Issue subpoenas for witnesses or documents."

R6-14-409: Subpoenas

DES' proposed process for subpoenas will make it very difficult for a claimant to obtain a subpoena. It requires the party to try to obtain attendance or production of documents by voluntary compliance. But this requirement is fraught with problems. First, there are many situations where the person or custodian of records to be subpoenaed does not state they will not attend the hearing or not produce the documents and instead fails to respond at all or gives a vague response. Even if the person states they will attend the hearing or bring the documents to the hearing, the party may be concerned they will not. Second, the proposed rule also requires significant information from the party. Third, the proposed process and proposed time frames for the setting of the hearing and the request for a subpoena make this all very hard to accomplish. The notice of hearing is mailed at least 20 days before the scheduled hearing (proposed rule 405(C)) and the request to ask that a subpoena be issued must be made "at least five *work* days before the hearing date (subsection (D)) (emphasis added. Here is an example of how this may play out: The notice of hearing is mailed 25 days before the hearing. the person receives the notice on the 18th day before the hearing. The person has to request issuance of the subpoena by the 8th *calendar* day prior to the hearing. This leaves the

person only 10 days to decide what persons and evidence she wants subpoenaed; to make some preliminary contacts; to familiarize herself with the administrative rule; and to submit the written request. We suggest that this process needs to be fair to the requesting party. The party should not have to go through the step of trying to obtain voluntary compliance and the written request should be streamlined. Finally, the party should have a right to appeal the denial of a request for a subpoena.

The reference in subsection B to R6-14-410*(2)* probably should be to 410*(4).*

R6-14-410: Parties' Rights

DES fails to correctly state the agency's rights. The proposed rule allows DES to appeal the administrative law judge's decision but 7 C.F.R. § 273.15(q)(2) states "[a] decision by the hearing authority shall be binding on the state agency." Hearing authority is defined as the "person designated to render the final administrative decision in a hearing." 7 C.F.R. § 273.15 (n). In addition, under 7 C.F.R. § 273.15(q)(3) and (4) only reference appeals filed by the household. The provision on DES' right to appeal must be deleted.

We would also add the right to appear in person at the hearing and the right to bring family and friends to the hearing to the list of a party's rights. The federal regulation 7 C.F.R. § 273.15 (o) specially provides for "attendance" at the hearing of the household, as well as friends and relatives of the household, "if the household so chooses" unless there are some space limitations.

R6-14-412: Failure to Appeal; Default; Reopening

The proposed rule has two good case sections; subsection (B) for good cause to not be able to attend the hearing and subsection (E) for reopening a hearing. The two definitions of good cause are not the same. In subsection (B), the word "unduly" should be deleted. That word currently modifies difficult and burdensome. If it is difficult or burdensome for a party to attend a hearing that should be a sufficient reason to continue the hearing. DES appears to forget that the food stamp program is an entitlement program and that DES should not be imposing barriers to persons exercising their rights to a fair hearing. Moreover, the "good cause" provision in subsection (E) only requires reasons "beyond the reasonable control of the party. That definition should be used in subsection (B).

In subsection (C) the proposed rule allows a person to submit a request to reopen the hearing by mail or in person. These requests also should be allowed to be made by telephone or e-mail.

Finally, there is no provision that allows the hearing officer to set the matter for a hearing when the hearing office cannot make a finding of whether good cause to reopen exists based on the information provided. We propose a new subsection (D):

> *New* (D). If the hearing officer cannot make a finding of good cause for the failure to appear based on the information provided, the hearing officer shall set the matter for a hearing to determine if good cause exists.

We note that a similar provision is in proposed rule R6-14-504, subsection (D), for failure to appear at an Administrative Disqualification Hearing.

R6-14-413: Hearing Proceedings

Although 7 C.F.R. § 273.15(p)(4) requires the state agency to honor a party's right to "advance" arguments without under interference, subsection (G) only allows the party to make an oral opening and closing argument with the consent of the hearing officer. Parties must be allowed to "advance" their arguments. The rule should be revised to state the parties have the right to make an oral opening and closing argument.

In addition, there must be a records retention policy stated affirmatively in the rule. We propose the following new subsection (M):

> *New* (H): The Office of Appeals shall not destroy or purge any hearing records for four years from the date of the last administrative proceeding.

R6-14-415: Effect of the Decision

There needs to be a time period in which DES must implement the reversed decision.

R6-14-416: Further Administrative Appeal

Here, as well, the proposed rule allows DES to file an appeal. Pursuant to 7 C.F.R. § 273.15(q)(2), the administrative decision is binding on the agency. The rule must be revised. In subsection (A) instead of the words a "party" the wording must be "The appellant can appeal . . . ."

R6-14-417: Appeals Board

In subsection (B), the Appeals Board must be required to make its decision on the "complete" record, "including the record of the hearing." The proposed wording only refers to the "record" but the Appeals Board is not required to have the hearing transcribed before making its decision and, thus, the words "complete" and "including the record of the hearing" must be added to subsection (B).

Article 5: Intentional Program Violation

We propose adding the following new subsections to the Intentional Program Violation sections:

New subsection (C) in R6-14-501

> The Department shall inform the household in writing of the disqualification penalties for Intentional Program Violation each time it applies for Nutrition Assistance. The penalties shall be in clear, prominent, and boldface lettering on the application form as required by 7 C.F.R. § 273.16 (d).

New subsection (A) in R6-14-502

> The Department may only require reporting and the clarification of unclear information as provided for in 7 C.F.R. §273.12.

New subsection (B) in R6-14-502

> A person is not required to cooperate with a fraud investigation for continued eligibility.

New subsection (C) in R6-14-502

> In determining whether an IPV occurred, the Department must investigate whether:
>
> 1. The person knew about the Department program rule in question and intended to act dishonestly.
> 2. The person has a mental or cognitive disability that prevents him or her from forming an intent to violate program rules or act dishonestly.
> 3. The person did not understand the Department rule because of literacy problems, limited English proficiency or a disability.
> 4. The person reported information but the Department failed to act on the information or the Department recorded the information incorrectly. 7 C.F.R. §273.2(b)(1)(v).
> 5. The Department told the person their actions were legal or failed to explain the reporting requirements. See 7 C.F.R.§ 273.2(e)(1).
> 6. The Department failed to provide reasonable accommodations to a person with a disability that led to an unintentional violation of a program rule.

R6-14-502: Administrative Disqualification Hearings; Hearing Waiver

The proposed rule for the notice of waiver of disqualification hearing in subsection (C)(1) includes the statement that the department has determined that the person "committed one or more acts. . . ." The federal criteria for determining an IPV is whether the person "committed, and intended to commit" an IPV. 7 C.F.R. § 273.16(v)(6). DES should use the correct criteria in the rules. The words "and intended to commit" should be added to subsection (C)(1).

In subsection (C)(2) the proposed rule states the person, upon request, will be provided a copy of the "portions of the case file that are relevant to the hearing." The person has the right to look at their whole case file and DES' continued efforts to make it difficult for the person to see their complete file is unlawful. *See* comments in section R6-14-405 above.

In subsection (C)(11)(c), the statement the person may sign should have the following words in italics added: "I do not admit . . . and I do not waive my right to . . . where the Department must prove by *clear and convincing evidence* that I committed and *intended to commit. . . .* " The correct criteria should be disclosed to the person receiving the notice. 7 C.F.R. § 273.16(v)(6).

In subsection (C) we suggest that a new subsection (14) be added:

> *New* (14): If the signed waiver of the Administrative Disqualification Hearing is not returned by the due date, the administrative disqualification hearing will be scheduled and the person will be notified of the hearing date and time.

R6-14-503: Administrative Disqualification Hearings

The notice of the disqualification hearing must contain the rights listed in 7 C.F.R. § 273.15(p) which under subsection (1) includes the right to look at the person's complete case file. DES must include this right in its notice. Subsection (D)(3) is not adequate.

In subsection (D), the hearing notice should also include: (1) the person has the right to not attend the hearing or attend the hearing and remain silent; (2) the person's right to remain silent and that anything said or signed by the person can be used against them: (3) if the person does not attend the hearing, the ALJ will make findings based on the record produced by DES, and (4) that the standard of proof to find a violation is clear and convincing evidence that the person "committed and intended to commit an IPV." 7 C.F.R. § 273.16(v)(6). It is important that persons understand the heightened proof that DES must satisfy in these cases.

Subsection (G) provides that in addition to informing the person at the beginning of the disqualification hearing that she can remain silent, the proposed rule also requires the ALJ to state, "the consequences of exercising that right, including the court's ability to draw an adverse inference from silence." The right to remain silent is absolute and the hearing officer cannot make any inference about the person asserting their constitutional

and statutory right to remain silent. The federal regulation protects the right to remain silent. *See* 7 C.F.R. § 273.16(e)(2)(iii) and (f)(1)(ii)(B).[3]

In subsection (J), we suggest the following words in italics be added: "The hearing officer shall find whether the evidence shows by clear and convincing evidence that the person committed *and intended to commit* an IPV. . . ." As noted in several places the italicized words are criteria.

There is no proposed rule for when the ALJ finds the did not commit an IPV and a notice is sent. We suggest a new subsection:

> *New* (K): If the hearing officer finds that the person did not commit and intend to commit an IPV, the hearing officer shall provide a written notice which informs the person of the decision pursuant to 7 C.F.R. §273.16(e (9)(i).

In addition, we suggest the following subsections be added for when an ALJ finds the person committed and intended to commit an IPV.

> *New* (L): If the hearing officer finds the person did commit and intended to commit an IPV, the hearing officer shall provide a written notice that informs the person of the decision pursuant to 7 C.F.R. §273.16(e)(9)(ii) and explains the right to appeal to state court and the appeal process.

R6-14-504: Failure to Appear: Default: Reopening

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[3] Arizona courts have recognized that the protection against self-incrimination includes the freedom from adverse consequences flowing from defendant's exercise of his fifth amendment rights. *State v. Bravo*, 158 Ariz. 364, 378, 762 P.2d 1318, 1332 (1988); *State v. Carrillo*, 156 Ariz. 125, 750 P.2d 883 (1988). Normally, any reference by a judge or a prosecutor about a defendant's protected silence will constitute fundamental error. *State v. Anderson*, 110 Ariz. 238, 517P.2d 508 (1973). *Miranda* warnings carry an implicit assurance that a defendant's choice to remain silent will carry no penalties. *Carrillo*, 156 Ariz. at 134, 750 P.2d at 892 (citing *Doyle v. Ohio*, 426 U.S. 610, 618–19, 96 S.Ct. 2240, 2245, 49 L.Ed.2d 91, 96 (1976)).

The word "unduly" should be deleted from subsection (B) for the reasons provided in R6-14-412 above.

Subsection (G) should include the following words at the beginning of the subsection:

> The department shall provide a separate written notice to the remaining household members, it any, of the disqualification period, including any explanation of any deferment of disqualification; the allotment they will receive during the disqualification period or that they must they must reapply because the certification period has expired. *See* 7 C.F.R. §273.16(e)(9)(ii) and (f)(3).

R6-14-505: Disqualification Sanctions; Notice

The proposed rules do not have a designated section where the contents of the notice are listed in a straightforward manner. We suggest that reorganization.

In subsection (G), we suggest adding that the eligibility of the remaining household members will be determined under 7 C.F.R. §273.11(c).

Conclusion

CLS and the Institute request that DES modify the proposed food stamp rules as discussed above. Thank you for the opportunity to submit our comments to the proposed rules. Please contact me at (602) 252-3432 or eskatz@qwestoffice.net if you have any questions or need any clarification concerning our requests.

Sincerely,

/s/

Ellen Sue Katz