NATIONAL WOMEN'S LAW CENTER
EXPANDING THE POSSIBILITIES

July 5, 2011

Lisbeth Silbermann, Director
Program Development Division
Food and Nutrition Service
U.S. Department of Agriculture
3101 Park Center Drive, Room 810
Alexandria, VA 22302

RE: Proposed SNAP Eligibility, Certification, and Employment and Training Provisions Rule, 76 Fed. Reg. 25,414 (May 4, 2011)

Dear Ms. Silbermann,

The National Women's Law Center is a non-profit, non-partisan organization that has been a leader in research, analysis, and advocacy on child and dependent care assistance policies as a critical support for women and their families.

We are writing in response to the notice published in the Federal Register on May 4, 2011 (Vol. 76, No. 86) regarding the SNAP Eligibility, Certification, and Employment and Training Provisions proposed rule. This rule implements many of the provisions of the Food, Conservation, and Energy Act (FCEA) of 2008, Pub. L. 110-246, which affected the eligibility, benefits, certification and employment and training requirements for applicant or participant households in the Supplemental Nutrition Assistance Program (SNAP).

Among other provisions, the proposed rule amends the SNAP regulations to eliminate the cap on the deduction for dependent care expenses. The Center commends the Department of Agriculture for this proposed rule change, which has the potential to greatly expand access to benefits for low-income families. Lifting the cap on the dependent care deduction reflects Congressional understanding that direct and associated costs of dependent care are a major expense for working households and will support low-income families by reducing the strain on food budgets for families with significant out-of-pocket child or dependent care costs.

We strongly support the proposed rule. The comments that follow are intended to highlight aspects of the rule that could be clarified to reduce confusion for SNAP participants and administrators and ensure the broadest possible access to SNAP benefits.

Eliminate the dependent care cap and include associated costs of care as deductible expenses.

For many years prior to the enactment of the FCEA, the dependent care deduction was capped at $175 per month per dependent ($200 for infants), well below the out-of-pocket costs that many families pay for care. The elimination of the cap on dependent care expenses is a critical improvement that will allow families to deduct actual out-of-pocket child and dependent care costs, which often comprise significant portions of their household budgets. The high costs of child care rival families' spending on food, rent, and mortgage payments; in fact, the annual cost of child care exceeds the cost of state college tuition in 40 states. For low-income families, these costs are significant, with average costs of center-based care for an infant comprising nearly half of the income of a two-person family living in poverty.[1] Employment-related care expenses for adult dependents are also very high, as the average fee for full-day adult day care is $16,045 a year.[2] Moreover, few low-income families receive help with these costs; only one in six children eligible for child care assistance under federal law actually receives help.[3]

In addition to eliminating the cap on dependent care costs, the proposed rule explicitly includes transportation costs and activity fees associated with the care as allowable dependent care costs. We strongly support this proposal. Transportation can be a major expense for families who cannot find affordable care near home, especially those in rural areas where jobs are far from home and for those who must rely on public transportation. We also support the inclusion of "activity fees" in the allowable dependent care costs, as such fees can be burdensome for low-income families with tight budgets. We suggest, however, that the Department clarify in the final regulation (as it has in the preamble to the proposed rule) the types of expenses that may be counted as necessary activity fees, such as fees for art supplies or materials or field trips.

We also recommend clarifying that the "costs of care" given by an individual care provider or care facility are not limited to a standard and fixed monthly fee paid to a provider, but rather encompass additional required expenses such as application and registration fees. These one-time or annual fees required by child care providers can be significant for cash-strapped families. Given Congressional intent to take a "broad view of what constitutes a dependent care cost,"[4] we urge the Department to specify in the final regulation that such fees constitute actual costs of care.

Revise proposed definition of "incapacitated person of any age in need of dependent care" for the purposes of the dependent care deduction.

We agree that additional clarity regarding the eligible care expenses for dependents other than children is desirable. However, we do not agree that the regulatory definition of "elderly or disabled member [of a household]" at 7 C.F.R. § 271.2 that is used to determine eligibility and work requirements for SNAP benefits accurately describes adults requiring dependent care, or that "any adult requiring dependent care would be either disabled or elderly" under the SNAP regulatory definition. Further, we are concerned that the use of the term "incapacitated" as proposed could create confusion.

If the only potential caregiver in a household has a job or is invested in completing work preparation activities, the household must pay for another to care for any ill or disabled member. Such expenses, even if temporary or sporadic, can substantially strain a low-income household's budget. Congress (as well as the Department in these proposed regulations) intended to lighten this burden for SNAP participants by eliminating the cap on the dependent care deduction. Accordingly, we strongly encourage the Department to define the persons for whom care expenses may be deducted in a way that is broad, functional, and covers a variety of care arrangements.

However, as currently drafted and described in the preamble, the proposed definition of an "incapacitated person of any age in need of dependent care" does not meet this test. The Department has asked "whether adult dependent care expenses should be limited only to adults that meet the regulatory definition of 'elderly or disabled member'"; it should not. While the SNAP definition of "elderly" (i.e., age 60 or older) is appropriately broad, the definition of "disabled" is far more narrow, requiring receipt of specific federal disability or retirement benefits such as Social Security disability or SSI benefits. Because one purpose of both federal disability/retirement benefits and SNAP benefits is to provide economic support to aged or disabled individuals with limited ability to earn income, it is logical to incorporate the receipt of other federal benefits into the SNAP definition of disability in the context of eligibility determination. However, the receipt of such benefits is not relevant in determining whether an individual needs care while a SNAP participant is working or preparing to do so.

Rather, when defining a dependent for whom a SNAP participant pays care expenses, the relevant inquiry is whether the individual would benefit from the supervision and care of another person while the participant is working: does the individual need help with meals or feeding, dressing or self-care? Does the individual need care to prevent him or her from harming him or herself or others? For example, the federal tax credit for child and dependent care covers expenses for the care of a dependent who is "physically or mentally incapable of caring for himself or herself." 26 U.S.C. § 21(b)(1). Regulations at 26 C.F.R. § 1.21-1(b)(4) clarify that an "individual is physically or mentally incapable of self-care if, as a result of a physical or mental defect, the individual is incapable of caring for the individual's hygiene or nutritional needs, or requires full-time attention of another person for the individual's own safety or the safety of others." These criteria, however, generally do not figure into the eligibility criteria for federal disability or retirement benefits, which instead focus on a recipient's inability to work. *See, e.g.,* 42 U.S.C. §§ 423(d), 1382c(a)(3) (inability "to engage in any substantial gainful activity" is prerequisite to receipt of Social Security disability benefits or SSI benefits).

Not only is the receipt of federal disability or retirement benefits irrelevant to whether an individual needs care, but requiring the receipt of such benefits unquestionably excludes significant categories of individuals who need care while a SNAP participant works or looks for work. A range of medical conditions – such as a temporary recovery period from a serious illness, accident, or surgery, as well as some chronic impairments – may not meet the disability definitions applicable to the programs specified at section 271.2

but nonetheless preclude the afflicted person from being left alone. Even a household member who does qualify for federal disability or retirement benefits may need care well before the relevant federal agency completes the determination required to begin issuing such benefits; for example, in October 2009, the Social Security Administration's average processing time for disability claims was 446 days.[5] Moreover, by using the term "incapacitated" – which may to some appear even more restrictive than "disabled" – the proposed rule may cause confusion and inadvertently encourage an even narrower interpretation of the dependents for whom care expenses may be deducted.

Consistent with Congress's intent to tie the SNAP dependent care deduction to actual care expenses, any definition of what the proposed rule describes as an "incapacitated person of any age" should be broader than the SNAP regulatory definition of "elderly or disabled member" and cover all reasonable circumstances in which a household member's age, illness, or physical or mental condition (whether short-term or long-term) requires a SNAP applicant or participant to pay for care. If the Department chooses to define "incapacitated," the regulatory definitions of "incapacity" and "serious health condition" under the Family & Medical Leave Act, Pub. L. 103-3, may be instructive, as they recognize a range of conditions, both chronic and temporary, that can require medical treatment and/or supervision. *See* 29 C.F.R. §§ 825.113-115. However, we would advise the Department to eliminate the reference to "incapacity" and to instead adopt a more functional description of a "person of any age in need of dependent care." Any definition adopted for purposes of the SNAP dependent care deduction should be at least as broad as the definition of "physically or mentally incapable of self-care" applied in the context of the federal tax credit.

Explicitly allow the deduction for households with an individual looking for work.

The Act permits a dependent care deduction "when necessary for a household member to accept or continue employment," and the proposed regulation at section 273.9(d)(4) repeats the same language. The Department notes in the preamble to the proposed rules that they "propose to restore language to that section [273.9(d)(4)] that permits households to deduct dependent care costs if a household member needs care for a dependent in order to seek employment." Therefore, the proposed regulation should clearly and unambiguously state that someone looking for work may deduct dependent care costs. Parents need reliable child care in order to look for and obtain employment. Parents may also need to pay for child care to hold onto a slot while between jobs, to ensure that care is available as soon as new employment is secured. Given that there are many steps in the hiring process prior to accepting employment that preclude caring for dependents, including visiting job sites and attending interviews, the proposed language should explicitly state that the dependent care deduction is allowable for households with individuals looking for work.

Use reasonable verification policies.

Consistent with an increasing number of states' practices, the rules should establish a presumption that the dependent care costs the household reports are valid unless the state

agency finds them questionable in a particular case. In other words, to promote utilization of this important work support for families with out-of-pocket costs, dependent care costs should no longer be verifiable across-the-board as a state option under 7 C.F.R. § 273.2(f)(3), although they would remain verifiable if questionable under 7 C.F.R. § 273.2(f)(2). This step will help prevent unnecessary verification requirements for households simply because they are claiming a deduction in excess of the old cap.

Make clear that the deduction is available for those receiving child care subsidies.

The rule also should make clear that, even if a household receives child care assistance or other financial scholarships for dependent care, any co-payment required of the household is still deductible. These co-payments can often be significant – states require most families receiving child care assistance to contribute toward the cost of care, and the co-payment can range from 1 to 11 percent of household income depending on the state and the income of the family.[6]

In cases where states require verification, the Department should encourage states to provide deductions for these expenses using matches against the co-payment records of state subsidy programs.

Make clear that the deduction is allowable for payments made to non-household family members.

To address a persistent source of confusion, the rule should specify that care is deductible even if provided by a relative as long as that person is not receiving SNAP benefits as part of the same household as the child or dependent adult receiving care.

The Center greatly appreciates this opportunity to comment.

Sincerely,

Joan Entmacher
Vice President, Family Economic Security

Helen Blank
Director of Leadership and Public Policy

[1] Nat'l Assoc. of Child Care Resource & Referral Agencies, Parents and the High Cost of Child Care: 2010 Update 19 (2010), http://www.naccrra.org/docs/Cost_Report_073010-final.pdf.

[2] MetLife Mature Mkt. Inst., Nat'l Adult Day Servs. Ass'n (NADSA) & The Ohio State Univ. Coll. of Soc. Work, The MetLife National Study of Adult Day Services: Providing Support to Individuals and Their Family Caregivers 15 (2010), *available at* http://www.nadsa.org/assets/library/600_mmiadultdayservices.pdf (annual cost calculated by the National Women's Law Center from daily cost assuming care is used five days a week for 52 weeks per year).

[3] Office of the Assistant Sec'y for Planning & Evaluation, U.S. Dep't of Health & Human Serv., ASPE Issue Brief: Estimates of Child Care Eligibility and Receipt for Fiscal Year 2006 1 (2010), http://aspe.hhs.gov/hsp/10/cc-eligibility/ib.pdf.

[4] 154 Cong. Rec. S4750 (daily ed. May 22, 2008) (statement of Sen. Harkin), *available at* http://www.gpo.gov/fdsys/pkg/CREC-2008-05-22/pdf/CREC-2008-05-22-pt1-PgS4743-3.pdf.

[5] *Clearing the Disability Claims Backlogs: Hearing on the Social Security Administration's Progress and New Challenges Arising from the Recession Before the Subcomm. on Social Security of the H. Comm. on Ways & Means*, 111th Cong. (2009) (statement of Michael J. Astrue, Commissioner of Social Security), *available at* http://www.ssa.gov/legislation/testimony_111909.html.

[6] Office of Child Care, U.S. Dep't of Health & Human Serv., FFY 2009 CCDF Data Tables (Preliminary Estimates), http://www.acf.hhs.gov/programs/ccb/data/ccdf_data/09acf800_preliminary/table17.htm.