



119 Washington Ave. ♦ Albany, NY 12210  
Phone 518.462.6831 ♦ Fax 518.462.6687  
[www.empirejustice.org](http://www.empirejustice.org)

September 23, 2019

Program Design Branch  
Program Development Division  
Food and Nutrition Service (FNS)  
3101 Park Center Drive  
Alexandria, VA 22302

RE: Docket No: FNS-2018-0037  
Docket RIN: RIN 0584-AE62  
Docket Name: Revision of Categorical Eligibility in the Supplemental Nutrition Assistance Program (SNAP)

Dear SNAP Program Design Branch:

I write on behalf of Empire Justice Center, a statewide, multi-issue, multi-strategy public interest law firm focused on changing the systems in which poor and low income New Yorkers live.

We appreciate the opportunity to comment in response to the proposed regulatory changes seeking to restrict categorical eligibility provisions in the Supplemental Nutrition Assistance Program (SNAP), published in the Federal Register on July 24, 2019.

Because SNAP is often the first line of defense against hunger in New York, Empire Justice Center strongly opposes any regulatory changes that will reduce or deny benefits to qualifying households or limit food benefits available to those who need this critical assistance. Consistent with the stated statutory intention in the creation and operation of SNAP,<sup>1</sup> Empire Justice Center supports food policy that provides robust and meaningful access to low-income individuals and families needing assistance to avert food insecurity and promote well-being.

Existing federal statutory provisions related to SNAP eligibility articulate that:

---

<sup>1</sup> 7 U.S.C. § 2011.

“[n]otwithstanding any other provisions of this chapter...households in which each member receives benefits under a State program funded under part A of Title IV of the Social Security Act (42 U.S.C. 601 *et. seq.*), supplemental security income benefits under Title XVI of the Social Security Act or aid to the aged, blind or disabled...shall be eligible to participate in the supplemental nutrition assistance program...households in which each member received benefits under a State or local general assistance program that complies with standard established by the Secretary for ensuring that the program is based on income criteria comparable to or more restrictive than those under subsection (c)(2), and not limited to one-time emergency payments that cannot be provided for more than one consecutive month, shall be eligible to participate in the supplemental nutrition assistance program.”<sup>2</sup>

The concept underlying this statutory provision is simple: a recipient of federal Temporary Assistance to Needy Families (“TANF”) benefits, aid to the aged, blind or disabled (“AABD”), or Supplemental Security Income (“SSI”) benefits, or a state-funded assistance program with income eligibility at least as stringent as the SNAP standard *shall* be eligible for federal SNAP benefits. The controlling statutory language is non-discretionary and clear. It confers broad eligibility for SNAP based on certain other categories of assistance received by the SNAP applicant, and is commonly referred to as broad based categorical eligibility (“BBCE”).

The currently proposed regulatory change would revise the language in 7 C.F.R. 273.2(j)(2)(i)(A)-(C), as well as 7 C.F.R. 273.8(e)(17), to restrict the types of programs that confer BBCE for SNAP on recipients of other programs by adding new requirements that the assistance be “on-going and substantial” and creating a new definition for on-going cash benefits.

#### **A. The Proposed Alterations to SNAP Categorical Eligibility Are Improper and Ill-Conceived.**

The currently proposed regulatory changes would vastly reduce the availability of SNAP in New York and create burdensome duplicity in the public assistance processing system. **Empire Justice Center strongly opposes all regulatory changes to BBCE that will reduce access to SNAP benefits and create burdensome, redundant application processes and operate contrary to authorizing SNAP statutes.**

The proposed regulatory changes to BBCE will exceed statutory authority and operate contrary to law for at least two reasons if enacted in the currently published draft form. First, the regulatory changes proposed are overbroad and in excess of the authorizing statutory language because the statute does not provide the United States Department of Agriculture (“USDA”) the power or discretion to limit the types of TANF benefits that confer categorical eligibility. As referenced above, the authorizing language at 7 U.S.C. § 2014(a) expressly states that SNAP eligibility *shall* be conferred upon TANF, SSI and AABD program recipients. “The word `shall’

---

<sup>2</sup> 7 U.S.C. § 2014(a).

is ordinarily ‘the language of command.’”<sup>3</sup> The statute uses directive, not discretionary language to describe the eligibility status conferred for SNAP purposes on TANF, SSI and AABD recipients. This is a noticeable difference from the subsequent sentence in the statutory provision related to categorical eligibility on the basis of receipt of state-funded general assistance, where the express statutory provisions identify parameters for eligibility in both income level and other statutory sections. There is no authority for USDA to determine that only some of the TANF beneficiaries are SNAP eligible; thus, the proposed regulation would limit SNAP in a manner not authorized by statutory language.

Second, the proposed regulatory changes are overbroad and in excess of the authorizing statutory language because the impact of the regulation runs counter to the goals of the SNAP program set forth in statute. “It is declared to be the policy of Congress, in order to promote the general welfare, to safeguard the health and well-being of the Nation’s population by raising levels of nutrition among low-income households....to alleviate such hunger and malnutrition, a supplemental nutrition assistance program is herein authorized which will permit low-income households to obtain a more nutritious diet through normal channels of trade by increasing food purchasing power for all eligible households who apply for participation.”<sup>4</sup> However, by its own statement, the proposed regulatory changes are designed to “create a clearer and more consistent nationwide policy regarding the cash and non-cash TANF benefits that confer categorical eligibility.”<sup>5</sup> *This is not the purpose of SNAP.*

Data indicate that the impact of these proposed regulatory changes would force 112,646 households off of SNAP in New York, including more than 41,000 low-income working poor households and nearly 49,000 households with elderly household members.<sup>6</sup> New York has expanded eligibility for working families with earned income up to 150% of the federal poverty level and up to 200% of the federal poverty level for households with dependent care costs and households with elderly or disabled household members.<sup>7</sup> These eligibility levels are entirely necessary in light of the extremely high housing cost burden in New York that strips low-income households of food purchasing power well beyond the point where SNAP’s general gross income eligibility criteria lies.<sup>8</sup> At an annual cost of \$15,394, quality child care is unaffordable for 90%

---

<sup>3</sup> *Alabama v. Bozeman*, 533 U.S. 146, 153 (2001) quoting *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947) (quoting *Escoe v. Zerbst*, 295 U.S. 490, 493 (1935)).

<sup>4</sup> 7 U.S.C. § 2011.

<sup>5</sup> Federal Register, Vol. 84, No. 142, FNS-2018-0037, 35572 (July 24, 2019).

<sup>6</sup> Estimated number derived from Fiscal Year 2016 SNAP Quality Control Sample data modeling prepared by Mathematica. Available online at <https://www.mathematica.org/dataviz/impact-of-bbce-proposal-on-snap-caseloads>.

<sup>7</sup> Expansion of Categorical Eligibility for Supplemental Nutrition Assistance Program (SNAP) Households with Earned Income , 16-ADM-06 (June 10, 2016), available online at <http://otda.ny.gov/policy/directives/2016/ADM/16-ADM-06.pdf> ; Expansion of Categorical Eligibility for Food Stamps for Households with Out-of-pocket Dependent Care Expenses, 09-ADM-06 (March 25, 2009), available online at <http://otda.ny.gov/policy/directives/2009/ADM/09-ADM-06.pdf>; Categorical Eligibility for Food Stamps, 07-ADM-09 (December 14, 2007), available online at <http://otda.ny.gov/policy/directives/2007/ADM/07-ADM-09.pdf>.

<sup>8</sup> A recent report of the New York State Comptroller’s Office found that 2.8 million of New York’s 7.3 million households, or approximately 38.4%, were in housing that exceeded the general standard for affordability. Additionally, nearly half of those households, or 1.4 million, were severely burdened by high housing costs. Housing Affordability in New York State, Office of the New York State Comptroller, June 2019, at 1, available online at <https://www.osc.state.ny.us/reports/housing/affordable-housing-2019.pdf>.

of New York families.<sup>9</sup> New York State ranks 6<sup>th</sup> out of all 50 states for the most expensive infant care.<sup>10</sup> Working families with child care costs and seniors on fixed incomes should not be forced to choose between paying for housing and a decent meal. This is contrary to the intent of SNAP. There is no basis for limiting the TANF-funded benefits that confer categorical eligibility. The purpose of SNAP is to ensure households have the ability to purchase needed food; BBCE supports SNAP's purpose and does not run afoul of the language in the authorizing statute.

Additionally, the proposed changes will create vast inefficiency and potentially disrupt state efforts to administer its own benefit programs. The commentary generated with the proposed regulatory language in the Federal Register expressly states that BBCE based on receipt of non-cash TANF benefits generates administrative efficiencies.<sup>11</sup> Yet, there is an express effort to de-couple administrative efficiencies and force the workers determining benefit eligibility into redundant verification and documentation. To receive SNAP, all households, including those eligible under BBCE, must apply, be interviewed, and document that their monthly income and expenses, such as high housing and child care costs, even when they are applying for another benefit, contrary to the assertion that that states are approving households for SNAP under BBCE without checking their incomes or assessing their need for food assistance.<sup>12</sup> In New York, where nearly 1.5 million SNAP recipients<sup>13</sup> rely on benefits issued by a legacy computer system with individually coded cases entered by tens of thousands of workers without centralized training or supervision, a significant increase in the workload to process SNAP applications and recertifications because of added administrative burden has the potential to hinder and even devastate the workflow at the county departments of social services with regard to both SNAP and other public assistance programs handled by the same workers.

## **B. The Civil Rights and Regulatory Impact Analyses Are Grossly Inadequate.**

Empire Justice Center further opposes the regulatory changes to BBCE as proposed in light of the inadequacy of both the regulatory impact analysis and civil rights impact analysis accompanying the proposed rulemaking. The regulatory impact analysis is inadequate for failing to address significant problems the proposed elimination of BBCE would create. Specifically, the impact analysis does not properly address impact on the federal school breakfast and lunch programs.

USDA concedes that “The proposed rule may also negatively impact food security and reduce the savings rates among those individuals who do not meet the income and resource eligibility requirements for SNAP or the substantial and ongoing requirements for expanded

---

<sup>9</sup> *Child care costs in the United States*, Economic Policy Institute. <https://www.epi.org/child-care-costs-in-the-united-states/#/NY> (accessed 9/18/19).

<sup>10</sup> *Child care costs in the United States*, Economic Policy Institute. <https://www.epi.org/child-care-costs-in-the-united-states/#/NY> (accessed 9/18/19).

<sup>11</sup> Federal Register, Vol. 84, No. 142, FNS-2018-0037, 35572 (July 24, 2019).

<sup>12</sup> *Id.* at 35577.

<sup>13</sup> This is a numerical estimate based on monthly caseload data from the New York State Office of Temporary and Disability Assistance in June 2019. Available online at <http://otda.ny.gov/resources/caseload/2019/2019-06-stats.pdf>, Table 16.

categorical eligibility.”<sup>14</sup> Yet the proposed rule failed to include the rule’s impact on the School Breakfast Program and National School Lunch Program in its Regulatory Impact Analysis.

Because students whose households participate in SNAP are directly certified to receive free school meals, direct certification helps to ensure that children who need free school meals are certified to receive them,<sup>15</sup> and it reduces administrative work for school districts in New York and across the country. USDA’s own Food and Nutrition Service anticipated that, if changed, the rule would jeopardize automatic access to free school meals for more than 500,000 students nationwide,<sup>16</sup> although this information was excluded from the regulatory impact analysis. In New York, we anticipate this could impact approximately 40,000 children.<sup>17</sup>

Furthermore, the proposed rule also could harm the ability of high-needs schools to offer free breakfast and lunch to all students based on community eligibility. Community eligibility uses the number of children directly certified for free school meals, primarily due to participation in SNAP, to determine if a school is eligible to implement the provision and to set the federal funding for school breakfast and lunch that a school will receive.<sup>18</sup> Community eligibility’s reliance on SNAP direct certification means that some high-needs schools may no longer be eligible or may not find it financially viable to adopt community eligibility. The Regulatory Impact Analysis of the proposed rule failed to determine the impact of the proposed rule on community eligibility in the breakfast and lunch programs.

Moreover, Empire Justice finds the civil rights impact analysis inadequate for failing to address how demographic disparities in assets and resources will create disproportionate impact among certain communities because of the proposed changes. The proposed restriction of BBCE among the states will disproportionately impact people of color. Data compiled by the National Center for Education Statistics finds that high poverty schools who would generally meet the community eligibility standard for free lunches and school breakfast disproportionately serve students of color: 45% of black and Hispanic identified students attend high poverty schools, while only 8% of white students do based on data from 2012-13, even though in lower income white and Asian students significantly outnumber black and Hispanic students in low poverty schools.<sup>19</sup> Older demographic data indicates that the percentage of black and Hispanic students in the New York City public school who receive free or reduced cost lunches is more than double that of white and Asian students.<sup>20</sup>

---

<sup>14</sup> Federal Register, Vol. 84, No. 142, FNS-2018-0037, 35575 (July 24, 2019).

<sup>15</sup> See generally 7 C.F.R. §§245 *et. seq.*

<sup>16</sup> See Chairman Scott to Secretary Perdue: Release Internal Estimates Showing Impact of Proposed SNAP Changes on Free School Meals, Press Release of Congressman Bobby Scott (July 29, 2019), available online at <https://bobbyscott.house.gov/media-center/press-releases/chairman-scott-to-secretary-perdue-release-internal-estimates-showing>.

<sup>17</sup> Estimated number derived from Fiscal Year 2016 SNAP Quality Control Sample data modeling prepared by Mathematica. Available online at <https://www.mathematica.org/dataviz/impact-of-bbce-proposal-on-snap-caseloads>.

<sup>18</sup> See 7 C.F.R. § 245.9(f).

<sup>19</sup> Snyder, Tom and Lauren Musu-Gillette, *Free or Reduced Price Lunch: A Proxy for Poverty?* (April 16, 2015), available online at <https://nces.ed.gov/blogs/nces/post/free-or-reduced-price-lunch-a-proxy-for-poverty>.

<sup>20</sup> Free and reduced priced lunch eligibility and racial/ethnic composition as a percentage of school district membership for school year 2003-04 available online at [https://nces.ed.gov/pubs2006/100\\_largest/tables/table\\_a9.asp](https://nces.ed.gov/pubs2006/100_largest/tables/table_a9.asp).

In light of the inadequate civil rights impact analysis to accompany the proposed rule-making, identifying how these proposed regulatory changes impact members of protected groups is critical to ensuring the completeness of this public record. Disparate or adverse impact, a legal concept evolving first in the realm of employment discrimination case law, describes a situation where “a facially neutral employment practice...has an unjustified adverse impact on members of a protected class.”<sup>21</sup>

The current regulatory proposal substantially limit BBCE will disproportionately impact persons of color where USDA substantially ignored aspects of the proposed change that heavily weigh on communities of color, as described above. This is offensive and illegal. The proposed regulatory changes should not be implemented as drafted. If implementation is unavoidable, the changes should be much more narrowly tailored to meet an objective that falls within the allowable bounds of SNAP and not an overbroad shot at indirectly curtailing usage of TANF funds.

Thank you again for the opportunity to provide input and comments regarding proposed changes to the regulations pertaining to categorical eligibility for SNAP benefits. Empire Justice Center vehemently opposes these proposed rule changes that will end benefits for hundreds of thousands of food insecure New Yorkers, disrupt existing program efficiencies and create massive administrative burdens in SNAP and myriad other assistance programs, and hinder the ability of states to work against hunger in a manner thoughtful and responsive to local need and variations that inevitably occur.

Sincerely,

A handwritten signature in black ink, appearing to read 'Saima Akhtar', with a long horizontal flourish extending to the right.

Saima Akhtar  
Senior Staff Attorney  
Empire Justice Center  
119 Washington Avenue  
Albany, NY 12210  
(518) 462-6831 x 2851  
[sakhtar@empirejustice.org](mailto:sakhtar@empirejustice.org)  
[www.empirejustice.org](http://www.empirejustice.org)

---

<sup>21</sup> *Griggs v. Duke Power Co.*, 401 U.S. 424, 431(1971) *construing* 42 U.S.C. § 2000-e(2).