

**STATE OF NEW YORK
OFFICE OF TEMPORARY AND DISABILITY ASSISTANCE**

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**THE 2008-2009 NEW YORK STATE HOME ENERGY
ASSISTANCE PROGRAM NEEDS ASSESSMENT**

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**COMMENTS OF
THE PUBLIC UTILITY LAW PROJECT OF NEW YORK, INC.**

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The Public Utility Law Project of New York, Inc. (“PULP”) represents low and fixed income persons in utility and energy matters. PULP welcomes this opportunity to provide comments to the New York State Office of Temporary and Disability Assistance (“OTDA”) as it develops a new plan for the 2008-2009 Home Energy Assistance Program (“HEAP”).

Background

HEAP is a federally funded block grant program, supervised by OTDA and implemented by local social services districts. The Low Income Home Energy Assistance Act of 1981 (“LIHEAA”), 42 U.S.C. §§ 8621, *et seq.*, sets broad parameters within which federal funding, appropriated annually by Congress and distributed through the federal Department of Health and Human Services (“HHS”), must be utilized. There are specific requirements of LIHEAA that all states must observe in their administration of the funds, *e.g.*, the federal definition of eligible households, and a mandatory emergency component requiring prompt resolution of energy crises within specific time frames. In general, however, program design and benefit levels are left to the states, to be developed through transparent needs assessment and public advisory processes.

The New York State legislature authorized the HEAP program by enactment of New York Social Services Law § 97. OTDA implements the program under its regulations in 18 NYCRR Part 393. OTDA, the lead state agency, develops the annual HEAP Plan. The State HEAP Plan is submitted annually by the Governor to HHS for federal approval. OTDA also supervises the administration of the HEAP program to assure its uniform implementation throughout the state. Social services districts (the City of New York and departments of social

services in each county outside New York City) administer the HEAP program locally. The State Office for the Aging and community organizations are also involved in program outreach and eligibility certification.

Each year, as part of the process of developing the State HEAP Plan for submission to HHS, OTDA conducts “needs assessment” hearings at which interested parties are invited to testify as to the home energy needs of low income households that should be addressed and the design of the program for the next year’s winter season. PULP submits these comments pursuant to that invitation and in lieu of verbal testimony.

COMMENTS

1. HEAP Payments Should Not be Diverted by Utilities to Pay Stale Arrears of Applicants for Service, Which Should be the Subject of a Deferred Payment Agreement.

Utilities have, in some instances, wrongfully denied service to applicants who owe money for service to a prior account in their name, instead of offering a negotiated payment plan as required by Public Service Law § 31.¹ Upon receipt of a HEAP payment, the utility provides service to such applicants, using the Regular HEAP payment to reduce bills that may be several years old. When a Regular HEAP grant is diverted this way, the household’s immediate home energy needs for the current winter are completely unaddressed by the HEAP grant. Utility vendor agreements need to be clarified and strengthened to assure that HEAP payments are used for immediate home energy needs and are not diverted by utilities to pay stale arrears of

¹ See *New Barriers to Service Erected by National Grid*, <http://pulpnetwork.blogspot.com/2007/10/new-barriers-to-service-erected-by.html>

applicants for service which should be the subject of a deferred payment agreement under requirements of the Home Energy Fair Practices Act, PSL § 31. While a reduction of the balance owed is helpful because it shortens the term of a payment agreement, it may be years before the benefit is realized by the customer. HEAP funds are limited. They should be used to defray current costs .

2. Utility Vendor Agreements Need to be Clarified to Assure that Regular HEAP Payments Provide Assistance Primarily to Meet Immediate Home Energy Needs, and Are Not Allocated to Reduce Utility Bills from Prior Years.

Currently, OTDA vendor agreements require utilities to provide 30 days of service to a customer on whose behalf a Regular HEAP payment is made. This adds little protection for the customer who is not in arrears, because the time for termination would not occur in such a time frame. If that customer owes the utility money for past arrears, however, and is retiring those arrears in monthly installments under an existing Deferred Payment Agreement, and has not defaulted in making the installment payments, the Vendor Agreement should make it clear that the HEAP payment is not to be used to reduce the DPA balance, but is to be used to reduce bills for current costs during the winter period. If the HEAP payment is larger than the current bill, the balance should be carried forward as a credit to reduce future bills to ease energy burdens during the current winter season. Otherwise, it is possible that Regular HEAP payment will have no impact on the amount of the customer's actual bills for the winter season, which would not be reduced at all. Such a result is out of harmony with the LIHEAA purpose of assisting eligible households "*primarily in meeting their immediate home energy needs.*" 42 U.S.C.A. § 8621(a). A payment of Regular HEAP to reduce the balance of a DPA that is not in default is not being applied to an "immediate" home energy need.

3. **The Plan Should Allow for Public Input Regarding Allocation of Supplemental Appropriations.**

This year, New York received \$82 million to supplement the HEAP program. The allocation of additional funds is always a limited sum game, requiring difficult choices, but it should be openly and publicly vetted. This year, the decision regarding allocation of supplemental funds was announced with no public notice or input, and without convening the HEAP Block Grant Advisory Committee (“BGAC”).² Such action is contrary to the spirit of the federal law, which allows states to tailor their programs on condition that they have an open and transparent advisory process, *i.e.*, “timely and meaningful public participation in the development of the plan...” 42 U.S.C.A. § 8624(b)(12).

In the decision of how to allocate this year’s \$82 million funding supplement, there was no “timely and meaningful public participation.” The supplement is a major part of the total HEAP funding this year, and it was allocated to program components in a manner that was not prescribed in the initial plan. The initial plan was to use 59.33% of the HEAP funds for Regular HEAP and 15.59% for Emergency Heap crisis assistance. No supplemental funds will be used to provide additional Regular HEAP payments. According to the February 12, 2008 OTDA press release, the new funds will be used for second Emergency HEAP payments, weatherization assistance, and administrative costs.

This year’s HEAP plan contains a paragraph which simply states that supplemental funds might be used for a list of purposes, including supplemental payments of regular HEAP and

² See *Governor Spitzer Announces Additional Heating Assistance To Combat Rising Energy Prices: Second Grant Available to Those in Crisis*, OTDA Press Release, Feb 12, 2008.

supplemental payments of Emergency HEAP, among other options.³ This “plan” for the use of additional funds gives no hint of any priority among the listed uses and provides for no further input from the public – or the BGAC, which includes members of the public – or other state agencies regarding the use of supplemental appropriations.

The decision taken was to allocate the bulk of the new money to the Emergency HEAP program component. This ignores customers with very high energy burdens who have been scrimping on other household necessities to pay high energy bills. Unless these customers promptly stop paying, they will receive no additional energy assistance, and they may suffer hardship. Thus the clear message sent by this allocation to these customers who also need help with their high energy burdens is to stop paying their utility and fuel bills now, so as to precipitate the preconditions needed to qualify the household for a crisis assistance payment.

It is also apparent from the press release that the use of the funds was designed to lighten expenditures in the state’s emergency utility assistance program, created in Section 131-s of the Social Services Law:

Enabling county social services agencies to authorize a second HEAP Emergency Benefit for those eligible will avoid approximately \$10 million in local costs by reducing the need for state and locally-funded emergency assistance payments.⁴

To the extent that limited HEAP funds are used simply to supplant expenditures that otherwise would be made in emergency cases under existing state and local programs, the net benefit to low income households is diminished.

³ See *N.Y. State 2007 - 08 HEAP Plan*, p. 6.

⁴ OTDA Press Release, *supra*.

4. The HEAP Plan Should Specify that the Heating System Repair and Replacement Assistance Program will Use Energy Star Equipment.

The state is required to obtain Energy Star equipment when it makes its purchases. There should be no lower standard for the HEAP program, when local social services districts or the state authorize heating system repairs or furnace replacement with HEAP funds. Otherwise, least cost purchases by local districts may saddle low income households with unnecessarily higher costs for many years in the future. PULP notes that a program clarification was issued this year by the OTDA Commissioner, directing the use of Energy Star equipment when feasible, and allowing higher payments for it. This clarification should be incorporated into the State HEAP Plan to promote the use of Energy Star equipment and to make it clear that this is now the standard.

5. The Heating System Repair and Replacement Program Should Not Exclude HEAP Eligible Households who Have a Contract for Deed.

The heating system repair and furnace replacement program generally is limited, for sound reasons, to customer owned equipment. There are situations where an eligible household is living in a home being purchased via a contract for deed. Many low-income people who cannot obtain a mortgage attempt to become home owners this way. The 2007-08 HEAP plan excludes such households regardless of the circumstances. The plan should be revised to permit, on a discretionary basis, heating system repair and replacement for households with a contract for deed. Failure to do so is likely to create added hardship and possible tragedies in situations where there is no heat, where the household cannot afford repair or replacement of the heating equipment, and where relocation is impractical or would cause a loss of potential home ownership.

6. The Tenant of Record Requirement Excludes Eligible HEAP Households, is Unnecessary, Should be Reconsidered, and Eliminated.

The Emergency HEAP program requires the applicant to be both the “customer of record” with an energy vendor and the “tenant of record.” In some situations, the HEAP applicant may not be both the customer and tenant of record, and the limited exceptions under OTDA rules may not apply. For example, an unmarried person living with another might not be both the customer and tenant of record. Under the federal and state financial eligibility requirements, the income of the entire *household* is considered, and so there is no reason to deny financially eligible *households* based on the type of relationship of its members, which household member is the utility customer, or which household member’s name is on the lease or deed. The federal law states that “[t]he term “household” means *any individual or group of individuals who are living together as one economic unit for whom residential energy is customarily purchased in common or who make undesignated payment for energy in the form of rent.*” 42 U.S.C.A § 8622(4).⁵ New York’s “tenant of record” rule narrows the definition of households eligible for HEAP under federal law, without regard to their household energy burdens, causes hardship, and may lead to tragedies when excluded households lack safe home energy.⁶

⁵ The “tenant of record” rule in the HEAP program was upheld in the state courts but has not been considered by the federal courts. See *Goodwin v. Perales*, N.Y. 88 N.Y.2d 383 (1996), relying on *Rodriguez v Cuomo*, 953 F2d 33 (2d Cir. 1992), a case which granted deference to the state’s judgment that certain households in subsidized housing with heat included in rent had lower energy needs. There is no evidence, and there can be no assumption, that similarly situated households whose incomes and energy costs are identical have lower energy needs because, for example, the tenant of record is not married to the customer of record. The energy burden is the same whether or not they are married.

⁶ See *Candle Fires: A Symptom of “Rolling Blackouts” Affecting Low Income Households*.

7. HEAP Funding Must Be Increased

Recently, President Bush proposed a significant reduction of LIHEAP funds for federal fiscal year 2009, beginning in October 2008.⁷ New York State must react to that drastic proposal, identify the impact of such a cut if it were to be implemented, and adopt plans to supplement the HEAP program with state funds to provide an adequate level of assistance.

In all likelihood, as in the past, federal funds will not be cut as proposed by the President, but will still not be adequate to meet the needs of all households eligible for HEAP assistance. Some states regularly supplement their HEAP programs, but New York does not. As a result, the New York HEAP program normally closes in the Spring without addressing the needs of large numbers of eligible households, and without addressing summer cooling needs.

The state should supplement the HEAP program. If general revenue is not available, PULP suggests OTDA proactively identify potential new revenue streams for this purpose.⁸

⁷ See *Bush Proposes LIHEAP Cuts in 2009 Budget*.

⁸ For example, royalties from increased production of natural gas in the state could be streamed to the HEAP program to provide further assistance to natural gas consumers, and a per kWh surcharge could be assessed at the NYISO level to evenly distribute the cost of alleviating hardship to the poor caused by rising wholesale electricity prices. Obviously, such measures would require legislative reform.

CONCLUSION

PULP respectfully requests that these comments be considered in the formulation of the New York State HEAP Plan for 2008 -2009. If there are any questions, please contact us.

Respectfully submitted



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