



STATE OF NEW MEXICO
HUMAN SERVICES DEPARTMENT



HUMAN SERVICES REGISTER

I. DEPARTMENT

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II. SUBJECT

SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM (SNAP):

Amendments to 8.139.400 NMAC - STUDENT ELIGIBILITY STATUS

Amendments to 8.139.410 NMAC - IMMIGRATION STATUS REPORTING NON-CITIZENS

III. PROGRAMS AFFECTED

SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM (SNAP)

IV. ACTION

FINAL RULE

V. BACKGROUND

The Department is finalizing regulations that were proposed to the Supplemental Nutrition Assistance Program (SNAP) in the Human Services Register (HSR) Vol. 41 No. 2.

Concise Explanatory Statement:

The Human Services Department adopted the rule to be in compliance with the Code of Federal Regulations (CFR). The rule will be amended under the following statutory authority:

Under the statutory authority of the food stamp program as authorized by the Food Stamp Act of 1977 as amended (7 U.S.C. 2011 et. seq.). Regulations issued pursuant to the act are contained in 7 CFR Parts 270-282. State authority for administering the food stamp program is contained in Chapter 27 NMSA, 1978. Administration of the Human Services Department (HSD), including its authority to promulgate regulations, is governed by Chapter 9, Article 8, NMSA 1978 (Repl. 1983).

This HSR addresses comments received regarding the proposed sections Student Eligibility Status and Immigration Status Reporting Non-Citizens. A public hearing was held on April 30, 2018, where there were no attendees. The Department received four written comments, two of which do not specifically pertain to this rule and will be addressed with the individual commenters. All other comments are addressed in the responses below:

Comment:

HSD Should Not Use the Term "Illegal Immigrant". We restate our request from the prior comment and ask the Department to re-title the subsection, "Reporting Undocumented Aliens to U.S. Department of Homeland Security." We ask the Department to refrain from using the word illegal when describing undocumented persons in the NMAC.

NMHSD Response:

The Department appreciates the comment and has updated the language in Subsection F of 8.139.410.9 NMAC to reflect the requested changes from using the term "Illegal" to "Undocumented":

F. Reporting undocumented aliens:

(1) HSD shall inform the local DHS office only when an official determination is made that any individual who is applying for or receives benefits is present in the U.S. in violation of the INA. An official determination that an undocumented immigrant is in the U.S. in violation of the INA is only made when:

(a) the undocumented alien's unlawful presence is a finding of fact or conclusion of law that is made by HSD as part of a formal determination about the individual's eligibility; and

(b) HSD's finding is supported by a determination by DHS or the executive office of immigration review (EOIR) that the non-citizen is unlawfully residing in the US, such as a final order of deportation.

(2) A systematic alien verification for entitlements (SAVE) response showing no service record on an individual or an immigration status making the individual ineligible for a benefit is not a finding of fact or conclusion of law that the individual is not lawfully present.

(3) Undocumented immigrant status is considered reported when ISD enters the information about the non-citizen into the household's computer file.

(4) When a household indicates inability or unwillingness to provide documentation of immigrant status for any household member, HSD must classify that member as an ineligible immigrant. When a person indicates inability or unwillingness to provide documentation of immigrant status, HSD must classify that person as an ineligible immigrant. In such cases HSD must not continue efforts to obtain that documentation.

Comment:

HSD Should Make It Clear that Workers Cannot Report Immigrant Applicants to ICE in any other circumstances than those in NMAC 8.139.410 and only for TANF and SNAP. This section, as currently proposed, also instructs workers about the very limited set of circumstances under which they are permitted to report or share information about applicants for immigration enforcement purposes. These circumstances only exist for the

SNAP and TANF program. The Department should insert a statement in the NMAC that HSD workers may not share information about applicants with ICE for immigration enforcement purposes under any other circumstances or for any other program, as described in the confidentiality section of the NMAC at 8.100.100.13 NMAC.

NMHSD Response:

The Department appreciates the comment. Policy in Subsection F of 8.139.410.9 NMAC, has been updated to be in compliance with the Code of Federal Regulations. Confidentiality, as stated in the comment, is reflected in 8.100.100.13 NMAC.

VI. PUBLICATION DATE

May 29, 2018

VII. PUBLICATION

Publication of these final regulations approved on May 16, 2018 by:



BRENT EARNEST, SECRETARY
HUMAN SERVICES DEPARTMENT

This is an amendment to 8.139.400, Section 11, effective 06/01/2018.

8.139.400.11 SPECIAL MEMBERS:

A. Students:

(1) **Eligibility:** An individual who is enrolled at least half-time in an institution of higher education will be ineligible to participate in SNAP unless the individual qualifies for one of the exemptions contained in Paragraph (3) of Subsection A of 8.139.400.11 NMAC. Half-time enrollment status is determined by the definition of the institution in which the individual is enrolled or attending.

(2) **Enrollment:**

(a) Students enrolled in an institution of higher education less than half time are not considered students for purposes of SNAP eligibility, and do not have to meet an exemption at Paragraph (3) of Subsection A of 8.139.400.11 NMAC to be eligible for SNAP.

(b) ~~[Students who are enrolled in an institution of higher education in a program that is not in the regular curriculum are not considered students for purposes of SNAP eligibility, and do not have to meet an exemption at Paragraph (3) of Subsection A of 8.139.400.11 NMAC to be eligible for SNAP. The following programs are not in the "regular curriculum.":]~~ Students who are enrolled at least half-time in an institution of higher education in a program that normally requires a high school diploma or equivalency certificate for enrollment in a "regular curriculum," are students and have to meet an exemption at Paragraph (3) of Subsection A of 8.139.400.11 NMAC to be eligible for SNAP. The following programs are not in the "regular curriculum," and if enrolled in one of these programs, the student would not be considered a student for purposes of SNAP eligibility:

(i) Career or technical certificate programs. Career and technical certificate programs are programs which offer a sequence of courses that provide individuals with coherent and rigorous content aligned with challenging academic standards and relevant technical knowledge and skills needed to prepare for further education and careers in current or emerging professions; provide technical skill proficiency, an industry- recognized credential, a certificate, or an associate degree; and may include prerequisite courses that meet the requirements of this subparagraph; and include competency-based applied learning that contributes to the academic knowledge, higher-order reasoning and problem-solving skills, work attitudes, general employability skills, technical skills, and occupation- specific skills, and knowledge of all aspects of an industry, including entrepreneurship, of an individual.

(ii) English as a second language;

(iii) adult basic education;

(iv) literacy; or

(v) community education courses

(c) ~~[Students who are enrolled at least half time in a regular curriculum at a college or university that offers degree programs regardless of whether a high school diploma is required are students for SNAP purposes and are ineligible to receive SNAP unless they meet an exemption found at Paragraph (3) of Subsection A of 8.139.400.11 NMAC. Regular curriculum programs are: a program that requires a high school diploma or equivalent to enroll; an associate's degree program that is not career or technical as defined above; a bachelor's degree program; or an advanced degree program.]~~ Students who are enrolled at least half-time in a "regular curriculum," at a college or university that offers degree programs regardless of whether a high school diploma is required are considered students for purposes of SNAP eligibility, and have to meet an exemption found at Paragraph (3) of Subsection A of 8.139.400.11 NMAC to be eligible for SNAP.

(d) The enrollment status of a student shall begin on the first day of the school term. Such enrollment shall be deemed to continue through normal periods of class attendance, vacation and semester breaks. Enrollment status shall terminate when the student graduates, is expelled, does not re-enroll or is suspended for a period in excess of 30 calendar days

(e) Students who reside on campus as defined at 34 CFR 668.46(a) and who have opted to or are required to purchase a meal plan which provides fifty percent or more of their meals are ineligible for SNAP in accordance with 7 CFR 273.1(b)(7)(vi).

(3) **Student exemptions:** To be eligible, a student must meet at least one of the following exemptions:

(a) **Age:** Be age 17 or younger or age 50 or older.

(b) **Physical or mental unfitness:** For exemption purposes, physical or mental unfitness per Paragraph (3) of Subsection A of 8.139.400.11 NMAC and 7 CFR 273.5(b)(2) is defined as follows: An individual who has a mental or physical illness or disability, temporary or permanent, which reduces their ability to financially support themselves. Unfitness can be obvious to the department and documented in the case file; or

not obvious to the department, but is documented by a physician, physician's assistant, nurse, nurse practitioner, a licensed or certified psychiatrist or a licensed or certified psychologist, or social worker as being unfit to work; the claim of physical or mental unfitness must be substantiated by written documentation identifying the physical or mental condition and certifying that the person is unfit for employment.

(i) If an individual claims to be physically or mentally unfit for purposes of the student exemption, and the unfitness is not evident to ISD, verification may be required.

(ii) Appropriate verification may consist of receipt of temporary or permanent disability benefits issued by government or private sources, or of a statement from a physician or licensed or certified psychologist.

(c) **Education/training program:** Assigned to or placed in an institution of higher education through or in compliance with the requirements of:

(i) a program under the Job Training Partnership Act of 1974 (JTPA);

(ii) an employment and training program under ~~[the Food Stamp Act]~~ [

CFR 273.7;

2296]; or

(iii) a program under Section 236 of the Trade Act of 1974 [19 U.S.C.

(iv) an employment and training program for low-income households that is operated by a state or local government where one or more of the components of such program is at least the equivalent to an acceptable SNAP employment and training program component.

(d) **Employment:** Employed a minimum of 20 hours per week and paid for such employment, or, if self-employed, working a minimum of 20 hours per week, and receiving weekly earnings at least equal to the federal minimum wage multiplied by 20 hours. Students whose employment hours fluctuate week to week will be considered to have met the minimum work hour requirement, as long as they maintain an average of 20 hours per week or 80 hours per month.

(e) **Work study:** Be participating in a state or federally financed work study program during the regular school year.

(i) The student must be approved for work study at the time of application for SNAP benefits, the work study must be approved for the school term, and the student must anticipate actually working during that time.

(ii) The exemption will begin with the month in which the school term begins or the month work study is approved, whichever is later.

(iii) Once begun, the exemption will continue until the end of the month in which the school term ends, or it becomes known that the student has refused an assignment.

(iv) The exemption will not continue between terms when there is a break of a full month or longer, unless the student is participating in work study during the break.

(f) **Children:** Responsible for a dependent household member who:

(i) is under age 6; or

(ii) has reached the age of 6 but is under age 12 when ~~[the ISS]~~ ISD has determined that adequate child care is not available to enable the student to attend class and comply with the 20-hour work requirement in ~~[(4)]~~ (d) or the work study requirement in ~~[(5)]~~ (e) above.

(g) **Single parents:** ~~[Full-time students of higher education who are single parents with the responsibility for the care of a dependent child under age 12.]~~ Enrolled in an institution of higher education on a full-time basis (as determined by the institution) and be responsible for the care of a dependent child under age 12.

(i) This provision applies when only one natural, adoptive or stepparent (single, widow/ widower, separated, divorced) is in the same SNAP household as the child.

(ii) If there is no natural, adoptive or stepparent in the same SNAP household as the child, another full-time student in the same SNAP household as the child may qualify for eligible student status under this provision if he/she has parental control over the child and is not living with his/her spouse.

~~[(h)] **Two parents:** In a two-parent household, if both parents are responsible for the care of the dependent child then they both can be eligible for SNAP benefits. If only one is responsible for the care of the dependent child then only one can be eligible for SNAP benefits.~~

~~(i) This provision applies when only natural, adoptive or stepparent (single, widow/er, separated, divorced) is in the same SNAP household as the child.~~

~~(ii) If there is no natural, adoptive or stepparent in the same SNAP household as the child, another full-time student in the same SNAP household as the child may qualify for eligible~~

~~student status under this provision if he/she has parental control over the child and is not living with his/her spouse.]~~

~~(f)~~ **(h) Title IV-A:** Receiving Title IV-A cash assistance.

~~(j)~~ **(i) Work incentive program:** Participation in the job opportunities and basic skills program under Title IV of the Social Security Act or its successor programs.

~~(k)~~ **(j) On-the-job training:** Be participating in an on-the-job training program. An individual is considered to be participating in an on-the-job training program only during the period of time the individual is being trained by the employer.

B. Strikers: Households with members on strike are ineligible to participate in the SNAP, unless the household was eligible for benefits the day before the strike began and is otherwise eligible at the time of application. A striker is anyone involved in a strike or concerted stoppage of work by employees, including a stoppage because of the expiration of a collective bargaining agreement, and any concerted slowdown or other concerted interruption of operations by employees. Employees participating in a sympathy strike will be considered strikers. The household will not receive an increased SNAP benefit amount as a result of the decrease in income of the striking member(s) of the household.

(1) Nonstrikers: The following individuals are not considered strikers and are eligible for program participation:

- (a) any employee affected by a lockout;
- (b) an individual who goes on strike who is exempt from work registration (Subsection B of 8.139.410.12 NMAC) the day before the strike, except those who were exempt because of employment;
- (c) employees whose workplace is closed by an employer in order to resist demands of employees (i.e., a lockout);
- (d) employees unable to work as a result of other striking employees (e.g., truck drivers who are not working because striking newspaper pressmen prevent newspapers from being printed;
- (e) employees who are not part of the bargaining unit on strike but who do not want to cross a picket line for fear of personal injury or death;
- (f) employees who are fired or laid off, or who are permanently replaced or officially resign; and
- (g) employees who will not be permitted to return to their old jobs but are offered different ones.

(2) Striker eligibility:

- (a) Striker eligibility is determined by considering the day before the strike as the day of application and assuming the strike did not occur.
- (b) Eligibility at the time of application is determined by comparing the striking member's income before the strike to the striker's current income and adding the higher of the two to the current income of the nonstriking household members during the month of application.
- (c) To determine benefits (and eligibility for households subject to the net income eligibility standard), deductions will be calculated for the month of application as for any other household. Whether the striker's prestrike earnings are used or the current income is used, the earnings deduction is allowed if appropriate.
- (d) Strikers whose households are eligible to participate in the SNAP will be required to register for work unless otherwise exempt.

C. Boarders: Boarders are defined as individuals or groups of individuals residing with others and paying reasonable compensation to those others for lodging and meals. An individual furnished both lodging and meals by a household, but paying less than reasonable compensation to the household for such services, will be considered a household member. Foster care children placed in the home of relatives or other individuals or families will be considered boarders. Foster care payments made to the household will not be counted as income, unless the household chooses to include the foster child. Payment to a household for lodging and meals will be treated as self-employment income to the household.

(1) Reasonable compensation: To determine if an individual is paying reasonable compensation for meals and lodging in making a determination of boarder status, only the amount paid for meals will be used, provided that the amount paid for meals can be distinguished from the amount paid for lodging. A reasonable monthly payment will be either of the following:

- (a) A boarder whose board arrangement is for more than two meals a day must pay an amount which equals or exceeds the maximum SNAP benefit amount for the appropriate size of the boarder household.

(b) A boarder whose board arrangement is for two meals or less per day must pay an amount which equals or exceeds two-thirds of the maximum SNAP benefit amount for the appropriate size of the boarder household.

(2) **Included boarders:** A household which provides boarding services may request that the boarder be included as a member of the household. Boarders are not eligible to participate in the SNAP separately from the household providing the board. All the income and resources of included boarders will be counted in determining the eligibility and SNAP benefit amount of the household.

(3) **Excluded boarders:** The income and resources of boarders who are not included as household members will not be considered available to the household.

[02/01/95, 10/01/95, 02/15/96, 05/15/97, 07/01/97/ 06/01/99; 8.139.400.11 NMAC - Rn, 8 NMAC 3.FSP.403, 05/15/2001; A, 07/15/2013; A, 09/01/2017; A, 06/01/2018]

This is an amendment to 8.139.410 NMAC, Section 9, effective 06/01/2018.

8.139.410.9 CITIZENSHIP AND IMMIGRATION STATUS FOR ELIGIBILITY: Participation in SNAP is limited to individuals who live in the United States and who are U.S. citizens or are otherwise eligible per the criteria below. The department will determine eligibility for non-citizens in accordance with 7 CFR 273.2 and 7 CFR 273.4. No individual is eligible to participate in SNAP unless that individual is otherwise eligible and is:

- A. A U.S. citizen;
- B. A U.S. non-citizen national;
- C. An individual who is:
 - (1) a member of Hmong or Laotian tribe during the Vietnam era, when the tribe militarily assisted the U.S.; (including a spouse, surviving spouse, or child of tribe member) who are lawfully present in the U.S.;
 - (2) an American Indian born in Canada who possesses at least fifty percent of blood of the American Indian race to whom the provisions of section 289 of the Immigration and Nationality Act apply; or a member of an Indian tribe as defined at section 4(e) of 25 U.S.C. 450b(e) which is recognized as eligible for the special programs and services provided by the U.S. to Indians because of their status as Indians; or
 - (3) a victim of human trafficking and their derivative beneficiaries, in accordance with 7 CFR 273.4(a)(5); or
- D. A qualified immigrant meeting the criteria in Subsection D, Paragraph (2) below:
 - (1) A qualified immigrant is a:
 - (a) lawful permanent resident;
 - (b) refugee;
 - (c) asylee;
 - (d) person granted withholding of deportation or removal;
 - (e) conditional entrants, (in effect prior to April 1, 1980);
 - (f) person paroled into the U.S. for at least one year;
 - (g) Cuban/Haitian entrants;
 - (h) battered spouses and children with a pending or approved self-petition for an immigrant visa and whose need for benefits has a substantial connection to the battery or cruelty (including qualified parents, spouses, and children of same), or battered spouses and children with an application for cancellation of removal or suspension of deportation, and whose need for benefits has a substantial connection to the battery or cruelty (including qualified parents, spouses, and children of same).
 - (2) Qualified immigrants are eligible only if they:
 - (a) were 65 or older and were lawfully residing in the U.S. on August 22, 1996, or
 - (b) are under age 18, or
 - (c) have been in "qualified" immigrant status for at least five years, or
 - (d) are lawful permanent residents who have worked or can be credited with 40 qualifying quarters of employment, or
 - (e) were granted refugee or asylum status or withholding of deportation/removal; or
 - (f) are a Cuban/Haitian entrant, or Amerasian immigrant, or
 - (g) are receiving blindness or disability-related assistance or
 - (h) are a veteran, active duty military; or the spouse, or the surviving spouse who has not married, or the child.
 - (i) are in Iraqi or Afghan special immigrant status.

E. Verification of immigrant status is determined in accordance with 7 CFR 273.2(f) and reasonable opportunity is provided pursuant to 7 CFR 273.2(f)(1)(c).

F. Reporting undocumented aliens:

(1) HSD shall inform the local DHS office only when an official determination is made that any individual who is applying for or receives benefits is present in the U.S. in violation of the INA. An official determination that an undocumented immigrant is in the U.S. in violation of the INA is only made when:

(a) the undocumented alien's unlawful presence is a finding of fact or conclusion of law that is made by HSD as part of a formal determination about the individual's eligibility; and

(b) HSD's finding is supported by a determination by DHS or the executive office of immigration review (EOIR) that the non-citizen is unlawfully residing in the US, such as a final order of deportation.

(2) A systematic alien verification for entitlements (SAVE) response showing no service

record on an individual or an immigration status making the individual ineligible for a benefit is not a finding of fact or conclusion of law that the individual is not lawfully present.

(3) Undocumented immigrant status is considered reported when ISD enters the information about the non-citizen into the household's computer file.

(4) When a household indicates inability or unwillingness to provide documentation of immigrant status for any household member, HSD must classify that member as an ineligible immigrant. When a person indicates inability or unwillingness to provide documentation of immigrant status, HSD must classify that person as an ineligible immigrant. In such cases HSD must not continue efforts to obtain that documentation.
[02/01/95, 07/01/98, 02/01/99; 8.139.410.9 NMAC - Rn, 8 NMAC 3.SNAP PROGRAM.412, 05/15/2001; A, 02/14/2002; A, 10/01/2002; A, 04/01/2003; A, 10/01/2003; A, 06/01/2011; A, 03/01/2017; A, 07/01/2017; A, 06/01/2018]