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Comments re the NYC Department of Finance's proposed amendments to Chapter 52 of Title 19 of the Rules of the City of New York, regarding the Rent Freeze Program

The Legal Aid Society appreciates the opportunity to comment on the latest version of amendments to the SCRIE and DRIE program rules that the New York City Department of Finance ("DOF") has proposed. We commend the DOF for having taken seriously many of the comments it received last December in response to its previous set of proposed amendments, but we urge the agency to make additional changes in line with those recommendations.

The Legal Aid Society is the oldest and largest not-for-profit public interest law firm in the United States, working on more than 300,000 individual legal matters annually for low-income New Yorkers with civil, criminal, and juvenile rights problems in addition to law reform representation that benefits all two million low-income children and adults in New York City. The Society delivers a full range of comprehensive legal services to low-income families and individuals in the City. Our Civil Practice has local neighborhood offices in all five boroughs, along with centralized city-wide law reform, employment law, immigration law, health law, and homeless rights practices.

1. **THE RULES UNDER REVIEW REPRESENT AN IMPROVEMENT ON THOSE THAT THE DOF PROPOSED IN DECEMBER 2019**

For half a century, the SCRIE program (and, more recently, the DRIE program) has been a critical lifeline for low-income, vulnerable older New Yorkers in rent-regulated apartments who want to age in place without fear of displacement due to rising rents. Because the proposed rules that the DOF released in December 2019 would have considerably weakened

this crucial program, we commend the agency for having improved its proposed rule amendments in several ways, including the following:

a. Under the new proposed amendments, the DOF now recognizes co-heads of households.

b. § 52-02(f) would allow a tenant who has not received a countersigned renewal lease from the landlord to submit a renewal lease signed only by the tenant, along with documentation of the rent increase.[1] The DOF presumably removed its previous proposed subsection defining "proof of tenancy" because it recognizes that such proof may consist of documentation other than a rent or utility bill.

c. Although § 52-02(g)(1) still contains a requirement that the tenant pay a rent increase when a lease signed by the landlord is not supplied in support of a renewal application, that requirement obtains under the new proposed rule only where the tenant cannot document the new rent amount (not, as was previously proposed, where the tenant could not obtain a countersigned lease).

d. § 52-02(g)(4) permits a tenant to submit more than one initial or renewal application in a year.

e. § 52-03(b)(1) reflects the longstanding practice of freezing an applicant's rent at the level during the rental period preceding the application.

f. § 52-03(b)(5) appears to require that where a rent reduction order is in effect, the tenant's frozen rent amount will be adjusted downward by the amount of the reduction. We suggest that the DOF add an elucidating example to this subsection, such as the one provided in connection with § 52-03(b)(1).

g. § 52-04 now allows a tenant representative to submit documentation and notes that the 120-day rule does not apply in the event of a good cause- or disability-related reason for the delay.

h. Recipients of "Section 8" benefits or other housing subsidy programs are no longer considered categorically ineligible for the RFP, as would have been the case under § 52-05(c) of the agency's prior proposed rules.

i. The proposed rules no longer focus on succession rights as a necessary component of a benefit takeover but rather refer generally to an agency approval. § 52-07, § 52-14.

j. § 52-20 no longer declares that a remaining tenant will be responsible for tax credits improperly given to a landlord after a RFP beneficiary's vacatur.

[1] At the end of this subsection, the following sentence appears: "All correspondence from the Department concerning an application will be sent to both the tenant and, if applicable, the tenant's representative or agent." How this sentence relates particularly to this subsection is unclear.

2. THE DOF SHOULD FURTHER MODIFY ITS PROPOSED RULE AMENDMENTS IN REGARD TO THE IDENTIFICATION OF REDETERMINATION OPPORTUNITIES, THE SIGNING AUTHORITY OF THIRD PARTIES, THE PERMANENCE OF RENT FREEZES, AND OTHER MATTERS

a. The DOF should proactively identify renewal and takeover applications where household income has dropped by over 20 percent and promptly notify those applicants of their right to request redeterminations

We are mystified that the DOF continues to refuse to use the income information in its possession to proactively identify households where a 20 percent drop in income has occurred, thus potentially entitling a RFP beneficiary, or a RFP takeover applicant, to a crucial redetermination of their frozen rent.

The proposed rules pertaining to redetermination applications, set forth in § 52-15, still unreasonably place the onus upon RFP beneficiaries and takeover applicants to request a benefit redetermination upon a reduction of household income exceeding 20 percent. At our Brooklyn Office for the Aging, where we have handled well over a thousand SCRIE and DRIE applications over the years, we have found that the vast majority of RFP beneficiaries and takeover applicants are entirely unaware of their right to request a redetermination of the benefit, and consequently most of the redetermination applications that we submit are for clients who had no idea that such a right or application existed and learned of it only when we brought the option to their attention. Even if a DRIE or SCRIE beneficiary was made aware upon their first benefit approval of the concept of a benefit redetermination, it is unreasonable to assume that they will remember this aspect of the program many years later, when the program beneficiary is not only older and perhaps less capable but also is coping with the recent loss of a member of the household. It bears mention that residents of public housing, and recipients of "Section 8" housing subsidy benefits, are not obligated to affirmatively request that the administering agency adjust their rent share downward when the household income drops; the agency does this recalculation as a matter of course when it receives information from the head of household indicating that the household income has decreased.

The DOF therefore should screen every renewal and takeover application for a drop in household income that exceeds 20 percent and, where such a reduction is identified, the agency should be required to promptly notify the beneficiary or applicant. We recognize

that not every drop in income of 20 percent or more is permanent, and therefore it would not be appropriate for the DOF to automatically redetermine the RFP benefit in every case in which the agency's records reveal an income decrease. But the fact that not all decreases in income warrant an automatic redetermination should not mean that all RFP beneficiaries and applicants must identify their right to request a redetermination upon a household income decrease, when the agency that administers the benefit can easily identify such cases using existing data – data that the agency will use to increase an RFP applicant's "frozen" rent should it implement § 52-10. (See subsection "c" below.)

And for as long as the DOF continues to insist that RFP applicants alert the agency to household income decreases that the agency could easily identify by reviewing its own data, the DOF should consider an RFP applicant's previous unawareness of his or her right to a rent redetermination as an instance of the good cause needed for an extension of the six-month application deadline set forth in § 52-15(c).

b. A third party should be able to sign RFP application documents on behalf of the applicant, just as a third party can sign a New York power of attorney pursuant to legislation recently passed by the legislature

Although, as noted above, the new proposed rules permit a tenant representative to submit documents on an applicant's behalf (see § 52-04), the proposed rules still unfairly force an applicant to sign an application him- or herself unless he or she is subject to a guardianship order or has previously executed a power of attorney appointing an agent who can sign. The DOF should follow the legislature's lead by permitting third-party execution of important RFP documents.

RFP beneficiaries are, to state the obvious, more likely than the general population to have disabilities that interfere with their ability to execute application documents, and we find that many of our clients, especially as they age, return to us again and again for help preparing and executing their renewal applications. Furthermore, low-income New Yorkers are very unlikely to have executed a power of attorney, in part because the New York statutory power of attorney document is very complex, and there is precious little free legal assistance available to the small minority of people who wish to and can execute one.

But an RFP applicant should not have to execute a power of attorney, or reach the point where they are so incapacitated as to need a court-appointed guardian, in order for a

third party to be able to execute RFP application documents on their behalf. Instead, an RFP applicant should be able to direct their tenant representative to sign. Notably, the New York power of attorney law has been criticized for years by disability advocates because it contains no provision allowing the principal to direct a third party to sign on his or her behalf. That will change when the Governor signs new legislation recently passed by the legislature that amends New York's power of attorney law to, among other things, allow a third party to execute a power of attorney on behalf of the principal. See A.5630-A/S.3923-A at § 4(1)(b).[2] The serious risk of abuse and misuse of a power of attorney is well known; and yet the New York State legislature recognized that this risk was outweighed by the harm to disabled people that has been caused by the law's failure to accommodate their disabilities by allowing a third party to sign on their behalf. Any risk associated with allowing a third party to sign RFP documents is lower – surely substantially lower – than that connected with permitting a third party to sign a power of attorney on behalf of the principal, and therefore the DOF should allow not just the submission, but also the execution, of an RFP applicant's documents by a tenant representative.

c. The proposed rules still unfairly require an increase in an RFP beneficiary's "frozen" rent where that rent amount has dropped below one-third of the monthly income

To its credit, several years ago the DOF retitled the SCRIE and DRIE programs as the Rent Freeze Program in an effort to make the name more intuitive; but, counterintuitively, § 52-10 of the proposed rules calls for the agency to increase a frozen rent where the agency determines upon review of a renewal application that the "frozen" rent amount drops below the amount that is one-third of the monthly household income. This proposed rule would remove the permanence that until now RFP beneficiaries have relied on. And it is extraordinary that the DOF would, on the one hand, refuse to use its RFP income data to identify applicants potentially entitled to a redetermination due to a drop in income, and, on the other hand, use the very same data to identify applicants whose "frozen" rent the agency believes should be increased. The DOF should maintain the longstanding practice of permanently freezing an RFP beneficiary's rent, except in the instance of drop in household income of 20 percent or more.

[2] Available at https://www.nysenate.gov/legislation/bills/2019/A5630.

d. An RFP beneficiary should be able to use the "Certification without a Renewal Lease Form" more than two times in a row

§ 52-02(g)(2) of the proposed rules declares that "A Certification without a Renewal Lease Form cannot be utilized for more than two consecutive lease periods." This subsection appeared as § 52-02(g)(3) in the rules that the DOF proposed last year and is now even more restrictive, in that the earlier version allowed for more than two consecutive filings under certain circumstances. We do not understand why the DOF would enact such a punitive rule when landlords, not RFP beneficiaries, are responsible for countersigning and returning RFP beneficiaries' renewal leases.

e. The DOF should accept any court order declaring a head of the household's permanent vacatur as evidence that that person has vacated permanently

§ 52-14(b)(5)(iii) states that acceptable documentary evidence proving the death or permanent vacatur of a head of the household may include a "court order showing that such head of the household has permanently vacated due to legal separation, a divorce decree or an order of protection." The rule should state simply that the agency will accept a court order indicating vacatur; there is no reason to limit such documentary evidence to court orders pertaining only to separation, divorce, or protective orders.

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