NOTICE OF PROPOSED RULEMAKING
Title 17, California Code of Regulations
DPH-07-005, WIC Participant Sanctions
Notice Published: April 08, 2016

PUBLIC PROCEEDINGS

The California Department of Public Health (Department) is conducting a 45-day written public proceeding during which time any interested person or such person's duly authorized representative may present statements, arguments or contentions (all of which are hereinafter referred to as comments) relevant to the action described in the Informative Digest/Policy Statement overview section of this notice.

PUBLIC HEARING

The Department has not scheduled a public hearing on this proposed action. However, the Department will hold a hearing if it receives a written request for a public hearing from any interested person, or his or her duly authorized representative, no later than 15 days prior to the close of the written comment period.

WRITTEN COMMENT PERIOD

Any written comments pertaining to these regulations, regardless of the method of transmittal, must be received by the Office of Regulations by 5 p.m. on May 23. 2016 which is hereby designated as the close of the written comment period. Comments received after this date will not be considered timely. Persons wishing to use the California Relay Service may do so at no cost by dialing 711.

Written comments may be submitted as follows:

1. By email to: regulations@cdph.ca.gov. It is requested that email transmission of comments, particularly those with attachments, contain the regulation package identifier "DPH-07-005" in the subject line to facilitate timely identification and review of the comment;

2. By fax transmission: (916) 440-5747;

3. By Postal Service to: California Department of Public Health, Office of Regulations, 1415 L Street, Suite 500, Sacramento, CA 95814;

4. Hand-delivered to Office of Regulations, 1415 L Street, Suite 500, Sacramento, CA 95814.

All submitted comments should include the regulation package identifier, DPH-07-005, author's name and mailing address.

Authority and Reference

The Department is proposing to repeal the regulation section identified under the authority provided in sections 131000, 131050, 131051, 131052, and 131200 of the Health and Safety Code. The aforementioned sections provide the Department with the authority to repeal 22 CCR section 40679(a)(2)(G).

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

Summary of Proposal

The California Department of Public Health (Department) proposes to repeal Title 22 California Code of Regulations (22 CCR) section 40679(a)(2)(G) pursuant to a settlement agreement so ordered by the court entered in 2002 that limits the grounds on which participants in the Women, Infants and Children (WIC) program can be sanctioned.

Pursuant to a settlement agreement entered on July 29, 2002, in *Nicholas v. Bonta et al*., Superior Court of California County of Sacramento, case number 01CS00678, the WIC program is no longer allowed to use a participant's "rude or abusive behavior" that does not amount to physical abuse or threat of physical abuse at a WIC clinic or food vendor as grounds to disqualify the individual from the program mid-certification.

Repealing 22 CCR section 40679(a)(2)(G) would improve the Department's alignment to federal law and regulations governing the federal WIC program. As such, the Department has determined that this proposal would create no financial impact, and would help further the goals and efficiency of the WIC program.

Background

The Department is tasked with administering the WIC Program, a federally-funded program for eligible Californians, under the Child Nutrition Act of 1966, in accordance with Title 7 Code of Federal Regulations (7 CFR) part 246 promulgated by the Food and Nutrition Service of the U.S. Department of Agriculture.

The WIC program provides nutritious supplemental foods, nutrition education, breastfeeding support, and referrals to other health services to low-income pregnant, postpartum women, infants, and children up to the age of five who are at nutritional risk.

The WIC program operates through 84 WIC local agencies that provide services throughout California to WIC participants. Participants receive food vouchers every month, which they redeem for WIC-specific supplemental foods in the form of healthy food items at food vendors (WIC vendors). The cost of providing WIC benefits varies widely depending on the recipient category (i.e., pregnant, breastfeeding, non-breastfeeding, infant, and child) and the food available to participants in that recipient category.

Participant violations of the WIC program can be an act of a participant; the parent, guardian or caregiver of an infant or child participant; or proxy that violates federal or state statutes, regulations, and policies governing the WIC program. Sanctions are imposed when a violation is committed. If it is the participant's first violation, they are commonly presented with a written warning. Depending on the severity of the violation and the number of participant violations, the participant may be disqualified for up to a year.

Federal regulations require the WIC program to disqualify a participant for a period of up to one year for any violation of physically harming or threatening to harm WIC clinic, farmer or vendor staff (22 CCR section 40679(a)(2)(F); 7 CFR part 246.7(h)(2)). Federal regulations give the state WIC program discretion in determining the appropriate time period of discipline for certain violations. When adopting the regulation concerning sanctions for rude or abusive behavior that does not amount to physical abuse or threat of physical abuse, California elected to sanction participants for a period of three months.

WIC local agencies report cases of actual physical abuse and threats of harm or physical abuse to the Department's WIC Division. WIC Division staff then work with the local agency's director and the participant to determine an appropriate response based on the type of violation.

Sanctions are applied to the participant based on the type of violation. In contrast to the regulation to be repealed, if a participant is disqualified due to physical harm or threats of harm toward a WIC employee or vendor, they will be disqualified from the program for a period of up to one year, in accordance with federal regulations, and will not be issued food instruments. The Department sends a Notice of Disqualification to the participant which lists the reason for disqualification as well as the participant's right to a fair hearing, including the method by which a fair hearing may be requested. Notifications of disqualification are also documented in the WIC program's management information system and in the participant's file.

The participant has the right to appeal the decision, pursuant to 7 CFR part 246.9(d) and has 60 calendar days from the notice of disqualification to request a fair hearing. The disqualified participant(s) must reapply for WIC benefits after the disqualifying period has expired.

In 2002, the Department agreed to repeal 22 CCR section 40679(a)(2)(G), pursuant to the settlement agreement in *Nicholas v. Bonta*, because at the time, state regulations were inconsistent with federal regulations. State regulations listed "rude or abusive

behavior" that does not amount to physical abuse or threat of physical abuse as grounds for disqualification from the WIC program, while federal regulations did not. In addition to this inconsistency, the state regulation also raised concerns regarding First Amendment protections of free speech in its vague and overbroad language. As such, the Department agreed to repeal the regulation.

Policy Statement Overview

Problem Statement: The Department must update its regulations to comply with a settlement agreement and the accompanying court order entered on July 29, 2002, and with federal law.

Currently, the Department's policies list a variety of reasons for which a WIC participant can be disqualified from the WIC program. These reasons include a basis for disqualification that is not listed in federal regulations and which the Department agreed to no longer use as a basis for disqualification when settling *Nicholas v. Bonta*.

Repealing this subdivision does not leave WIC clinic or vendor staff without protection from violence or the threat of violence from participants. In concurrence with federal laws and regulations, physical abuse or violence toward WIC clinic or vendor staff remains a basis for disqualification (22 CCR section 40679(a)(2)(F)).

Objectives (Goals): Broad objectives of this proposed regulatory action are:

- The Department's establishment of policies which are consistent with federal and state law.
- To provide clarity regarding grounds for disqualification from the WIC program.
- Compliance with the settlement agreement entered on July 29, 2002, in *Nicholas v. Bonta et al*., Superior Court of California, County of Sacramento, case number 01CS00678.

Benefits: Anticipated benefits, including nonmonetary benefits to the protection of public health and safety, worker safety, the environment, the prevention of discrimination, or the promotion of fairness or social equity, from this proposed regulatory action are:

- The prevention of unfair disqualification procedures.
- Improved consistency in participant disqualification.
- Local agencies and the Department will experience greater efficiencies in their internal processes due to federal and state regulatory alignment.
- Participants will feel more secure about their participation in the WIC program.
- Continues Department practice of not disqualifying participants for rude or abusive behavior, but maintains the ability to disqualify participants due to physical abuse or threats of physical abuse.

Determination of Inconsistency and Incompatibility with Existing State and Federal Regulations

The Department has determined that the proposed regulations are not incompatible or inconsistent with existing state or federal regulations. This evaluation included a review of the Department's existing general regulations and federal regulations specific to WIC participant violations and sanctions.

Cost Impacts on Representative Private Persons or Business

The Department is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action. Providers licensed by the Department and governed by these regulations would not incur additional costs to comply with the regulation.

Statement of Determinations

(A) Alternatives Statement

The Department has made the determination that no reasonable alternative considered by the Department or that has otherwise been identified and brought to the attention of the Department would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law. In addition, no other alternative would comply with the settlement agreement entered on July 29, 2002, in *Nicholas v. Bonta et al*., Superior Court of California County of Sacramento, case number 01CS00678, which requires the WIC program to repeal 22 CCR section 40679(a)(2)(G).

(B) Results of the Economic Impact Assessment

The Department has made the determination that the proposed regulations would not have a significant, statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states. The proposed regulations would not significantly affect the following:

1. The creation or elimination of jobs within the State of California.
2. The creation of new businesses or the elimination of existing businesses within the State of California.
3. The expansion of businesses currently doing business within the State of California..

Benefits of the Regulation to the Health and Welfare of California Residents, Worker Safety, and the State's Environment

The proposed regulations are reasonably necessary to protect the health and welfare of California WIC participants, employees, and vendors by maintaining the ability to disqualify participants due to physical abuse or threats of physical abuse.

(C) Effect on Housing Costs
The Department has determined that the regulations will have no impact on housing costs.

Local Mandate

The Department has determined that the regulations would not impose a mandate on local agencies or school districts, nor are there any costs for which reimbursement is required by part 7 (commencing with section 17500) of division 4 of the California Government Code.

Effect on Small Business

The Department has determined that the proposed regulatory action would not impact small businesses in California as defined by Government Code section 11342.610 because it removes only "rude or abusive behavior" as grounds for participant disqualification from the WIC program. The Department will continue to have the ability to disqualify participants from the program for "physical abuse, or threat of physical abuse" to the staff of a vendor store or local agency.

Fiscal Impact Analysis

(A) Other nondiscretionary cost or savings imposed on local agencies.
None.

(B) Cost or savings to any state agency.
None.

(C) Cost or savings in federal funding to the state.
None.

(D) Cost to any local agency or school district that is required to be reimbursed under Part 7 (commencing with section 17500) of Division 4.
None.

Reporting Requirements

The Department has determined that these proposed regulations do not require a report.

Significant Statewide Adverse Economic Impact Directly Affecting Business, Including Ability to Compete

The Department has made an initial determination that the proposed regulations would not have a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states. Thus, there will be no significant adverse economic impact on California businesses.

Documents Relied Upon

- *Nicholas v. Bonta et al*., Superior Court of California County of Sacramento, case number 01CS00678.

CONTACT PERSON: Maggie Young, WIC, Center for Family Health, CDPH (916) 928-8609. All other inquiries concerning the action described in this notice may be directed to Dawn Basciano, Office of Regulations, at (916) 440-7367, or to the designated backup contact person, Linda Cortez (916) 440-7683.

AVAILABILITY OF STATEMENT OF REASONS AND TEXT OF REGULATIONS: The Department has prepared and has available for public review an initial statement of reasons for the proposed regulations, all the information upon which the proposed regulations are based, and the text of the proposed regulations. The Office of Regulations, at the address noted above, will be the location of public records, including reports, documentation, and other material related to the proposed regulations (rulemaking file).

In order to request that a copy of this public notice, the regulation text, and the initial statement of reasons or alternate formats for these documents be mailed to you, please call (916) 440-7367 (or the California Relay Service at 711), send an email to regulations@cdph.ca.gov, or write to the Office of Regulations at the address previously noted. Upon specific request, these documents will be made available in Braille, large print, audiocassette, or computer disk.

AVAILABILITY OF CHANGED OR MODIFIED TEXT: The full text of any regulation which is changed or modified from the express terms of the proposed action will be made available by the Department's Office of Regulations at least 15 days prior to the date on which the Department adopts, amends, or repeals the resulting regulation.

FINAL STATEMENT OF REASONS: A copy of the final statement of reasons (when prepared) will be available upon request from the Office of Regulations.

INTERNET ACCESS: Materials regarding the action described in this notice (including this public notice, the regulation text, and the initial statement of reasons) that are

available via the Internet may be accessed at www.cdph.ca.gov by clicking on these links, in the following order: Decisions Pending and Opportunity for Public Participation, Regulations, Proposed.

Date:

Karen L. Smith, MD, MPH
Director and State Health Officer