

INITIAL STATEMENT OF REASONS

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.

Policy Statement Overview

Problem Statement: The Department must update its regulations to comply with a settlement agreement and the accompanying settlement agreement 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.

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).

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.

Detailed Discussion of Each Regulation

The Department proposes to amend the following section to implement the changes to regulations to address participant disqualification from the WIC program. These amendments include repealing 22 CCR section 40679(a)(2)(G), and re-designating 22 CCR sections 40679(a)(2)(H) through 40679(a)(2)(N) to maintain continuity throughout the section.

Section 40679. Actions Affecting Participation in Mid-Certification.

Amend subdivision (a)(2)(G) which lists "rude or abusive behavior" that does not amount to physical abuse or threat of physical abuse as an adequate basis for participant disqualification from the WIC program. This subdivision provides that the

Department may use a participant's rude or abusive behavior as adequate legal basis for disqualification. However, there is no federal counterpart to this basis. This subdivision should be removed to make it clear that state regulations are both in compliance with federal regulations regarding the WIC program and eliminate the potential challenge that this subdivision interferes with the participant's constitutional rights to free speech.

The Department agreed to repeal 22 CCR section 40679(a)(2)(G), pursuant to the settlement agreement in *Nicholas v. Bonta*, because state regulations were inconsistent with federal regulations and presented potential constitutional issues. 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 do not.

Since the settlement in 2002, the WIC Program has taken the following actions:

- Notified all staff of the intent to repeal 22 CCR section 40679(a)(2)(G).
- Updated the WIC Program Manual (WPM 280-20) and removed reference to "rude or abusive behavior" that does not amount to physical abuse or threat of physical abuse as a determinant for disqualification.
- The updated WIC Program Manual (WPM 280-20) clarified that 7 CFR part 246.2 and 22 CCR section 40679(a)(2)(F) limit grounds for participant abuse based on behavior to the physical abuse or threat of physical abuse of clinic and vendor staff.

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) 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. The proposed regulations remove sanctions for WIC participant's "rude or abusive" behavior and do not impact the creation or elimination of jobs in the State of California.
2. The creation of new businesses or the elimination of existing businesses within the State of California. The proposed regulations remove sanctions for WIC participant's "rude or abusive" behavior and do not impact the creation of new businesses or elimination of existing businesses in the State of California.

The expansion of businesses currently doing business within the State of California. The proposed regulations remove sanctions for WIC participant's "rude or abusive" behavior and do not impact the expansion of businesses currently doing business in the State of California.

(C) Effect on Housing Costs

The Department has determined that the regulations will have no impact on housing costs.

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.

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.

Specific Technologies or Equipment

This proposed regulation does not mandate the use of specific technologies or equipment.

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

The Department has made an initial determination that the proposed regulation would not have a significant adverse economic impact on business. The Department has not enforced sanctions for a violation of 22 CCR section 40679(a)(2)(G) since 2002 when the Department signed a Settlement Agreement agreeing to repeal this provision.

Vendor businesses experience no adverse economic impact as a result of this non-enforcement because participants that would receive the sanction of disqualification for violating this provision remain on the program, using vouchers at vendor businesses that are later reimbursed by the Department. This proposal to repeal 22 CCR section 40679(a)(2)(G) would make the California Code of Regulations consistent with the Department's existing actions and therefore, there would be no significant adverse economic impact on business.

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.

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.

Reporting Requirements

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

Documents Relied Upon

- Settlement Agreement Superior Court of California County of Sacramento, case number 01CS00678, May 12, 2001.