

Department of State Health Services
Council Agenda Memo for State Health Services Council
April 23, 2009

Agenda Item Title: Amendments concerning the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC)

Agenda Number: 5a

Recommended Council Action:

For Discussion Only

For Discussion and Action by the Council

Background:

The WIC Program is administered by the Nutrition Services Section in the Family and Community Health Services Division. WIC provides healthy supplemental foods, including infant formula, nutrition education, breastfeeding promotion and support, and aid to clients in accessing other health and human services. WIC serves close to 960,000 low-income pregnant and postpartum women, infants, and children under age five in Texas each month, including 70% of the infants born in the state.

The program is funded by federal grants and by rebates received from infant cereal and formula manufacturers. The Department of State Health Services (DSHS) receives grant funds from the United States Department of Agriculture (USDA) to administer the program, provided DSHS does so in accordance with federal laws and regulations and in accordance with an annual state plan approved by the USDA. By federal regulation, rebates can only be used to offset WIC food costs. For federal fiscal year 2009, federal grant funds exceed \$590,000,000 with rebates anticipated to be \$238,000,000 for a total estimated budget of \$828,000,000.

Local service providers prescribe the food benefits authorized by federal regulations for clients who then obtain them at authorized grocery stores known as WIC vendors. Both service providers and vendors operate under contract with DSHS to provide WIC services.

Summary:

The purpose of the amendments is to improve access to nutrition services by streamlining the certification process for WIC eligibility for breastfeeding women, and align DSHS rules with federal regulations by adding new foods and eliminating unnecessary detailed descriptions of food types.

The amendment to Section 31.25 concerning certification time periods for WIC eligibility conforms to federal regulations governing the WIC Program at 7 CFR Part 246.7(g), which gives state WIC programs the option to set the certification of eligibility time period for breastfeeding women at intervals of approximately six months or a period of up to one year (to the last day of the month in which the infant turns one year old or the mother ceases breastfeeding, whichever comes first). DSHS proposes to amend the rule to exercise the option allowing up to one year. The extended eligibility eliminates the time-consuming certification process at six months, saving both the client and clinic staff time; therefore, it is expected to result in an increased incentive for women to continue breastfeeding.

The amendment to Section 31.37 concerning the selection of allowable foods for the WIC program will align DSHS with new federal regulations governing WIC at 7 CFR Part 246.10 that added new foods to the current foods issued to WIC recipients. DSHS proposes to update the rule to add these new foods. In addition, the process for informing food manufacturers about food changes is being amended to eliminate detail that could become out of date. The proposed language continues to mandate notification to food manufacturers without

specifying the process, thus making it subject to DSHS and state policies, rules, and laws governing this type of business interaction. Detailed descriptions concerning individual food types, such as whether or not milk must be low fat, are being eliminated as unnecessary and of an inappropriate level of detail for administrative rules. The expected outcome of the amendment is the public will be assured that DSHS's rules conform to federal and state laws and regulations, therefore, the WIC Program will continue providing services to needed recipients. In the year following the change to incorporate new foods, both USDA and DSHS will conduct surveys and studies of clients, grocers, food manufacturers, and advocates to measure the impact of the new foods on WIC recipients.

Summary of Input from Stakeholder Groups:

During the development of the rules, WIC staff informed the Executive Board of the Texas Association of Local WIC Directors (TALWD), representing the 72 local service providers, of the proposed changes at the group's quarterly meetings in 2008. TALWD is strongly supportive of the changes.

Stakeholders representing grocery stores participating in WIC were also informed during the rules development of the proposed changes to Section 31.37 at various meetings conducted by DSHS around the state held in March, April, May, June, July, August, and September 2008. All 2,000-plus grocers and pharmacies participating in WIC received invitations to attend one or more of the meetings. The response from grocers has been favorable.

No changes to the rules were made as a result of the stakeholder input.

Proposed Motion: Motion to recommend HHSC approval for publication of rules contained in agenda item #5a

Approved by Assistant Commissioner/Director: Evelyn Delgado **Date:** 3/10/09

Presenter: Mike Montgomery **Program:** Nutrition Services Section **Phone No.:** 512-341-4563

Approved by CPCPI: Carolyn Bivens **Date:** 3/06/09

Title 25. HEALTH SERVICES

Part 1. DEPARTMENT OF STATE HEALTH SERVICES

Chapter 31. Nutrition Services

Subchapter C. Special Supplemental Nutrition Program for Women, Infants, and Children (WIC)
Amendments §31.25, §31.37

Proposed Preamble

The Executive Commissioner of the Health and Human Services Commission, on behalf of the Department of State Health Services (department), proposes amendments to §31.25 and §31.37 concerning the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC).

BACKGROUND AND PURPOSE

Under federal and state enabling legislation, the WIC Program is funded entirely by a combination of federal grant funds and by rebates from manufacturers of infant formula and infant cereal that can only be expended to defray WIC food costs. The United States Department of Agriculture (USDA) awards federal grant funds to the department to administer the program, provided the department does so in accordance with federal law and regulations and in accordance with the department's annual submission of a state plan approved by USDA. USDA deems the following types of changes to be substantive amendments to the state plan that require federal approval: rule or policy changes initiated by legislation, USDA, or the state agency; changes affecting client or vendor services and benefits; changes in the monitoring/oversight of vendors and local agencies; any other operational changes aimed at improving or enhancing program delivery or accountability; and changes in related state procedures.

Revisions to these rules are proposed primarily to comply with new federal regulations governing the WIC program in 7 Code of Federal Regulations (CFR) Part 246.

SECTION-BY-SECTION SUMMARY

The amendment to §31.25, concerning certification time periods for WIC eligibility, is authorized by federal regulations governing the WIC Program at 7 CFR, §246.7(g), which give state WIC programs the option to set the certification of eligibility time period for breastfeeding women at intervals of approximately six months or a period of up to one year (to the last day of the month in which her infant turns one year old or she ceases breastfeeding, whichever occurs first). The department proposes to amend the certification time from a six-month period to up to one year to eliminate the necessity for a second in-person certification interview that is no longer required by federal regulations for many breastfeeding clients.

The amendment to §31.37, concerning the selection of allowable foods for the WIC program, will align the department with new federal WIC regulations at 7 CFR, §246.10, that add new foods to the foods currently issued to WIC recipients. The current list of foods must be updated to add the new foods. Detailed descriptions concerning individual food types, such as whether or not milk must be low fat, are being eliminated as unnecessary. In addition, the process for

informing food manufacturers about food changes is being amended to eliminate information that could become out of date. The proposed language continues to mandate notification to food manufacturers without specifying the process, thus making it subject to department and state policies, rules, and laws affecting such business transactions.

FISCAL NOTE

Mike Montgomery, Director, Nutrition Services Section, has determined that for each year of the first five years the sections are in effect, there will be no fiscal implications to state or local governments as a result of enforcing or administering the sections as proposed. All activities required by §31.25 and §31.37 will be performed by existing department staff and with existing funding.

SMALL AND MICRO-BUSINESS ECONOMIC IMPACT ANALYSIS

Mr. Montgomery has also determined that there will be no adverse economic impact on small businesses or micro-businesses. This was determined by interpretation of the rules that small businesses and micro-businesses will not be required to alter their business practices as a result of the changes. The change to §31.25 applies only to breastfeeding women who are enrolled in WIC and has no implications or effect on businesses. The change to §31.37 is to add new foods to those offered to recipients by the WIC program to comply with federal regulations. No food manufacturers classified as small or micro-businesses are required to provide WIC foods to contracted food vendors for purchase by the WIC Program, and none that do so will be deprived of a business opportunity to provide WIC foods since the amendment only adds new foods to the current selection of allowable foods. An economic impact statement and regulatory flexibility analysis are not required. There are no anticipated economic costs to persons, including WIC applicants and WIC recipients, as proposed. There is no anticipated negative impact on local employment.

PUBLIC BENEFIT

Mr. Montgomery has determined that for each year of the first five years the sections are in effect, the public will benefit from adoption of the sections. The public benefit anticipated as a result of enforcing or administering the sections is improved access to nutrition services by streamlining the certification process for WIC eligibility for breastfeeding women and an assurance that the department is in compliance with federal regulations governing the WIC Program.

REGULATORY ANALYSIS

The department has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety

of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The department has determined that the proposed amendments do not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, do not constitute a taking under Government Code, §2007.043.

PUBLIC COMMENT

Comments on the proposal may be submitted to Valerie Wolfe, Nutrition Services Section, Mail Code 1933, Department of State Health Services, P.O. Box 149347, Austin, Texas 78714-9347, (512) 341-4533 or by email to Valerie.Wolfe@dshs.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the proposed rules have been reviewed by legal counsel and found to be within the state agencies' authority to adopt.

STATUTORY AUTHORITY

The proposed amendments are authorized under Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

The proposed amendments affect Government Code, Chapter 531; and Health and Safety Code, Chapter 1001.

Legend: (Proposed Amendments)

Single Underline = Proposed new language

[Bold, Print, and Brackets] = Current language proposed for deletion

Regular Print = Current language

(No change.) = No changes are being considered for the designated subdivision

§31.25. Participant Certification Periods.

(a)-(c) (No change.)

(d) A breastfeeding woman shall be certified to receive one set of food instruments each month for up to one year **[a six-month period]**. The certification expiration date shall be set to the last day of the month in which her infant turns one year old or she ceases breastfeeding, whichever occurs first **[for the last day of the sixth month. Any subsequent certification shall expire on the day of the infant's first birthday]**.

(e)-(g) (No change.)

§31.37. Selection of Allowable WIC Program Supplemental Foods.

(a)-(c) (No change.)

(d) The state agency shall review the WIC Program list of allowable foods annually to determine the need for adding or deleting food products. If the state agency determines that the list of allowable foods should be changed, the state agency shall notify the appropriate manufacturers of that intent.

[(1) If the state agency determines that the list of allowable cereals or juices should be changed, the state agency shall notify both juice and cereal manufacturers of that intent through a request for information (RFI).]

[(2) Juice and cereal manufacturers may contact the WIC Program at any time during the year to request that their names and addresses be added to the mailing list for an RFI.]

[(3) Manufacturers of juice and cereal shall certify through their RFI response that their products meet the requirements for nutritional content as specified in federal regulations governing the program.]

(e)-(k) (No change.)

(l) Allowable foods may include: milk; cheese; tofu; soy-based beverages; breakfast cereal; juice; beans; peas; lentils; peanut butter; tuna; salmon; mackerel; sardines; fruits; vegetables; whole wheat bread; whole grain bread; brown rice; bulgur; oatmeal; whole grain barley; corn or whole wheat tortillas; infant cereal; infant fruits; infant vegetables; infant meats; infant formula; exempt infant formula; and WIC-eligible medical foods.

[(I) Additional criteria for each food type are as follows:]

[(1) Milk. Milk shall be:]

[(A) unflavored, fresh, whole, reduced fat, low-fat or fat-free (nonfat or skim) milk including cultured buttermilk fortified with vitamins A and D to meet the federal standards;]

[(B) whole, low-fat, or fat-free (nonfat) evaporated milk fortified with vitamins A and D to meet the federal standards; and/or]

[(C) nonfat, dry, powdered milk fortified with vitamins A and D to meet the federal standards.]

[(2) Cheese. Cheese shall be unflavored and pasteurized.]

[(3) Cereals.]

[(A) Cereal shall contain a minimum of 28 milligrams of iron per 100 grams of dry cereal, and not more than 21.2 grams of sucrose and other sugars per 100 grams of dry cereal (6 grams per ounce).]

[(B) The state agency reserves the right to determine the number and brands of cereals, which shall include at least one hot cereal and at least one corn, wheat, oat, rice, and multi-grain cereal.]

[(4) Juice.]

[(A) Juices shall be single-strength fluid fruit or vegetable juices containing a minimum of 30 milligrams of vitamin C per 100 milliliters and/or concentrated fruit or vegetable juices containing a minimum of 30 milligrams of vitamin C per 100 milliliters of reconstituted juice.]

[(B) Juices shall be 100% juice and shall contain no added sugar, or other natural or artificial sweeteners.]

[(C) Juices packaged in a variety of containers, even though made by the same manufacturer, shall be evaluated separately.]

[(5) Eggs. Eggs shall be fresh grade A or grade AA large, medium, or small.]

[(6) Beans/Peas/Lentils. Beans, peas, and lentils shall be dry with the exception of canned beans/peas/lentils which may be authorized only for the homeless food package.]

[(7) Peanut Butter. Peanut butter shall contain no other ingredients such as jelly or candy pieces.]

[(8) Tuna. Tuna shall be packed in water.]

[(9) Carrots. Carrots shall be bagged, fresh, large carrots without tops and/or canned, sliced carrots.]

[(10) Infant formula. Infant formulas shall be registered with the United States Food and Drug Administration as complying with the legal definition of infant formula.]

[(11) Infant cereal. Infant cereal shall contain a minimum of 45 milligrams of iron per 100 grams of dry cereal in dehydrated flake form.]