



J. Patrick O'Neal, M.D., Commissioner | Nathan Deal, Governor

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September 11, 2018

NOTICE OF PROPOSED RULEMAKING
Public Health Regulations Chapter 511-8-1
“Special Supplemental Nutrition Program
for Women, Infants and Children (WIC)”

Please take note that the Department of Public Health proposes to revise its Special Supplemental Nutrition Program for Women, Infants and Children (“WIC”) regulations that define important terms, establish conditions of participation, and set forth procedures for administrative review, hearings, and appeals by WIC vendors and farmers. The proposed revisions are intended to clarify the rules governing full administrative reviews for vendors, based on recent amendments to O.C.G.A. § 50-13-41; add provisions governing conditions of participation and procedures for administrative review, hearings, and appeals by WIC farmers, consistent with 7 C.F.R. §§ 248.16 and 249.16; and update the defined regulatory terms consistent with these changes. This action is taken by the Department of Public Health pursuant to its authority under O.C.G.A. Sections 31-2A-6 and 31-5-1.

Interested persons may submit comments on these proposed revisions in writing addressed to:

Kristin L. Miller
General Counsel
Georgia Department of Public Health
2 Peachtree Street, NW, 15th Floor
Atlanta, GA 30303

Comment may also be presented in person at a public meeting scheduled for 11:00 a.m. on October 11, 2018, in room 9-260, “Adina’s Room,” at 2 Peachtree Street, NW, Atlanta, Georgia 30303.

A handwritten signature in blue ink, appearing to read 'Kristin L. Miller', written over a horizontal line.

Kristin L. Miller
General Counsel
Georgia Department of Public Health

RULES OF THE DEPARTMENT OF PUBLIC HEALTH

CHAPTER 511-8-1 Special Supplemental Nutrition Program for Women, Infants, and Children (WIC)

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Rule 511-8-1-.03 Definitions.

(a1) "Adverse action" means an action taken by the State agency, and which is subject to full or abbreviated administrative review as provided by 7 C.F.R. § 246.18(a)(1)(i)(ii), as a result of a vendor violation of the Georgia WIC rules and regulations.

(b2) "Days" means calendar days.

(c3) "Department" means the U.S. Department of Agriculture.

FNS" means the Food and Nutrition Service of the U.S. Department of Agriculture.

(5e) "Food delivery system" means the method used by State and local agencies to provide supplemental foods to participants.

(6f) "State" means the state of Georgia.

(g7) State agency" means the Georgia Department of Public Health.State Plan" means the Georgia WIC plan of operation and administration that describes the manner in which the State agency intends to implement and operate all aspects of Georgia WIC.

(9i) "Vendor" means a sole proprietorship, partnership, cooperative association, corporation, or other business entity operating one or more stores authorized by the State agency to provide authorized supplemental foods to participants under a retail food delivery system. Each store operated by a business entity constitutes a separate vendor and must be authorized separately from other stores operated by the business entity. Each store must have a single, fixed location, except when the authorization of mobile stores is necessary to meet the special needs described in the Georgia WIC State Plan of operation."Vendor authorization" means the process by which the State agency assesses, selects, and enters into agreements with stores that apply or subsequently reapply to be authorized as vendors.

(k) "Farmer" means any individual authorized by the state agency to participant in the Georgia Farmers' Market Nutrition Program, for the purpose of providing fresh, unprepared fruits, vegetables and herbs to WIC participants, or the Senior Farmers' Market Nutrition Program, for the purpose of providing low-income seniors with fresh, unprepared fruits, vegetables, and herbs, at designated market sites.

(l) "Farmer Authorization" means the process by which the State agency assesses, selects, and enters into agreements with farmers that apply or subsequently reapply to be authorized as vendors.

Authority: 42 U.S.C. §1786; 7 C.F.R. Parts 246, 248, 249; O.C.G.A. §§ 31-2A-6, 31-5-1.

Rule 511-8-1-.05 Vendor and Farmer Terms and Conditions.

(a) The State agency shall publish the terms and conditions for vendor authorization and participation under the Georgia WIC State Plan of operation through the Georgia WIC Procedures Manual, the Vendor Agreement, and Georgia WIC Vendor Handbook. A copy of the Georgia WIC Vendor Handbook containing the terms and conditions for vendor authorization and participation shall be made available to each authorized vendor. Such terms and conditions may be amended from time to time when Georgia WIC finds it necessary or appropriate to do so. All such amendments shall be made available to vendors at the addresses provided by the vendors to Georgia WIC. Vendors are required to abide by the provisions of the current Vendor Handbook, as amended, including the sanction system outlined therein. Vendors will be subject to sanctions for program violations in accordance with the version of the handbook and all amendments in effect at the time the violation occurs. Amended terms and conditions shall be effective as specified by Georgia WIC at the time of publication.

(b) The State agency shall publish the terms and conditions for farmer authorization and participation in the Georgia WIC Farmers' Market Nutrition Program and the Senior Farmers' Market Nutrition Program under the Georgia WIC State Plan of operation through the Georgia WIC Procedures Manual, the Farmer Agreement, and the Georgia WIC Farmer Handbook. A copy of the Georgia WIC Farmer Handbook containing the terms and conditions for farmer authorization and participation shall be made available to each authorized farmer. Such terms and conditions may be amended from time to time when Georgia WIC finds it necessary or appropriate to do so. All such amendments shall be made available to farmers at the addresses provided by the farmers to Georgia WIC. Farmers are required to abide by the provisions of the current Farmer Handbook, as amended, including the sanction system outlined therein. Farmers will be subject to sanctions for program violations in accordance with the version of the handbook and all amendments in effect at the time the violation occurs. Amended terms and conditions shall be effective as specified by Georgia WIC at the time of publication.

Authority: 42 U.S.C. §1786; 7 C.F.R. §§ 246.1, 246.3, 248.1, 248.3, 249.1, 249.3; O.C.G.A. §§ 31-2A-6, 31-5-1.

Rule 511-8-1-.06 Procedures for Vendor and Farmer Administrative Review, Hearings and Appeals.

(a1) Intent. It is the intent of this regulation to comply with the requirements of 7 C.F.R. § 246.18, 7 C.F.R. § 248.16, and 7 C.F.R. § 249.16 while following the existing procedures of the Georgia Administrative Procedure Act, O.C.G.A. § 50-13-1 *et seq.*, and specifically O.C.G.A. § 50-13-41, in cases

entitled to full administrative review; and to provide for the prompt, fair, and efficient internal review of cases entitled to abbreviated administrative review in accordance with the requirements of 7 C.F.R. § 246.18, 7 C.F.R. § 248.16, and 7 C.F.R. § 249.16.

(b2) Full-Administrative Review Procedures for Vendors

(1a) Full Administrative Review

(A) The following adverse actions shall be subject to full administrative review upon timely request by the vendor:

~~(i1-)~~ Denial of authorization based on the application of the vendor selection criteria for minimum variety and quantity of authorized supplemental foods, or on a determination that the vendor is operating a store sold by its previous owner in an attempt to circumvent a sanction, as stated in 7 C.F.R. § 246.12(g)(7);

~~(ii2-)~~ Termination of an agreement for cause;

~~(iii3-)~~ Disqualification; and

~~(iv4-)~~ Imposition of a fine or a civil money penalty in lieu of disqualification.

(Bb) These procedures shall be followed in cases meriting full administrative review:

~~(i1-)~~ The State agency shall give written notice to the vendor of the adverse action, the procedures to follow to obtain full administrative review, the causes for and the effective date of the action. When a vendor is disqualified due in whole or in part for any of the violations listed in 7 C.F.R § 246.12(I)(1), the notice shall include the following statement: "This disqualification from WIC may result in disqualification as a retailer in SNAP. Such disqualification is not subject to administrative or judicial review under SNAP."

~~(ii2-)~~ A vendor seeking review must send a written request for review to the Commissioner of the State agency within fifteen days from the date of the notice of adverse action, with a copy of the decision to be reviewed;

~~(iii3-)~~ Upon receiving a timely request for review, the Commissioner shall refer the case to the Office of State Administrative Hearings (OSAH) for initial decision within a reasonable period of time, not to exceed thirty (30) days after receipt of such request.

~~(iv4-)~~ The hearing before OSAH shall be conducted in accordance with the Georgia Administrative Procedures Act and the rules of OSAH. In addition, the Administrative Law Judge (ALJ) shall ensure that the vendor is given:

~~(iI)~~ Adequate advance notice of the time and place of the administrative review to provide all parties involved sufficient time to prepare for the review;

~~(IIii)~~ The opportunity to present its case and at least one opportunity to reschedule the administrative review date upon specific request;

~~(IIIiii)~~ The opportunity to cross-examine adverse witnesses. When necessary to protect the identity of WIC Program investigators, such examination may be conducted behind a protective screen or other device to conceal the investigator's face and body;

~~(IViv)~~ The opportunity to be represented by counsel; and

(V*) The opportunity to examine prior to the hearing the evidence upon which the State agency's action is based.

(v5-) The ALJ's determination shall be based solely on whether the State agency has correctly applied Federal and State statutes, regulations, policies, and procedures governing the WIC Program, according to the evidence presented at the review.

~~(vi6-) Within 30 days after the close of the record, an ALJ shall issue a decision to all parties in the case, except when it is determined that the complexity of the issues and the length of the record require an extension of this period and an order is issued by an ALJ so providing. The Commissioner shall appoint an attorney from the Office of General Counsel as a reviewing official to review the ALJ's initial decision at the request of either party within ten days of the date of the ALJ's initial decision, to ensure that it conforms to approved policies and procedures, and to render the final agency decision in accordance with O.C.G.A. § 50-13-41. If neither party requests that the ALJ's decision be reviewed, then the ALJ's decision shall become the final agency decision thirty days after it was entered.~~

~~(vii7-) Every decision of an ALJ shall be a final decision. Any aggrieved party, including the state agency, may seek judicial review of an ALJ's final decision. When the ALJ's decision is reviewed at the request of either party, the reviewing official shall provide written notification of the final agency decision, including the basis for the decision, and the vendor's right to seek judicial review pursuant to O.C.G.A. § 50-13-19, within the time period prescribed by O.C.G.A. § 50-13-41. If the adverse action under review has not already taken effect, the review official's decision shall be effective on the date of receipt by the vendor.~~

(23) Abbreviated Administrative Review

(Aa) The following adverse actions shall be subject to abbreviated administrative review upon timely request by the vendor:

(1i-) Denial of authorization based on the vendor selection criteria for business integrity or for a current SNAP disqualification or civil money penalty for hardship;

(2ii-) Denial of authorization based on the application of the vendor selection criteria for competitive price;

(3iii-) The application of the State agency's vendor peer group criteria and the criteria used to identify vendors that are above-50-percent vendors or comparable to above-50-percent vendors;

(iv4-) Denial of authorization based on a State agency-established vendor selection criterion if the basis of the denial is a WIC vendor sanction or a SNAP withdrawal of authorization or disqualification;

(5v-) Denial of authorization based on the State agency's vendor limiting criteria;

(6vi-) Denial of authorization because a vendor submitted its application outside the timeframes during which applications are being accepted and processed as established by the State agency;

(7vii-) Termination of an agreement because of a change in ownership or location or cessation of operations;

~~(8viii.)~~ Disqualification based on a trafficking conviction;

~~(9ix.)~~ Disqualification based on the imposition of a SNAP civil money penalty for hardship;

~~(10x.)~~ Disqualification or a civil money penalty imposed in lieu of disqualification based on a mandatory sanction imposed by another WIC State agency;

~~(11xi.)~~ A civil money penalty imposed in lieu of disqualification based on a SNAP disqualification; and

~~(12xii.)~~ Denial of an application based on a determination of whether an applicant vendor is currently authorized by SNAP.

~~(bB)~~ These procedures shall be followed in cases meriting abbreviated administrative review:

~~(i1.)~~ The State agency shall give written notice to the vendor of the adverse action, the procedures to follow to obtain an abbreviated administrative review, the causes for and the effective date of the action;

~~(ii2.)~~ A vendor seeking review must send a written request for review to the Commissioner of the State agency within fifteen days from the date of the notice of adverse action, with a copy of the decision to be reviewed and any documents, argument, or information that the vendor contends would justify reversal;

~~(3iii.)~~ Upon receiving a timely request for review, the Commissioner shall appoint a decision-maker who is someone other than the person who rendered the ~~initial~~ decision on the action to review the information provided to the vendor concerning the causes for the adverse action and the vendor's response, and to make a determination based solely on whether the State agency has correctly applied Federal and State statutes, regulations, policies, and procedures governing the Program;

~~(4iv.)~~ The decision-maker shall provide written notification of the final agency decision, including the basis for the decision, and the vendor's right to seek judicial review pursuant to O.C.G.A. § 50-13-19, within 90 days of the date of receipt of the request for an administrative review. If the adverse action under review has not already taken effect, the decision-maker's ruling shall be effective on the date of receipt by the vendor.

(34) Actions not Subject to Administrative Review

~~(A)~~ The following adverse actions are not subject to administrative review:

~~(ia)~~ The validity or appropriateness of the State agency's vendor limiting criteria or vendor selection criteria for minimum variety and quantity of supplemental foods, business integrity, and current SNAP disqualification or civil money penalty for hardship;

~~(bii)~~ The validity or appropriateness of the State agency's selection criteria for competitive price, including, but not limited to, vendor peer group criteria and the criteria used to identify vendors that are above-50-percent vendors or comparable to above-50-percent vendors;

~~(iiie)~~ The validity or appropriateness of the State agency's participant access criteria and the State agency's participant access determinations;

- (ivd) The State agency's determination to include or exclude an infant formula manufacturer, wholesaler, distributor, or retailer from the list required pursuant to §246.12(g)(11);
- (ve) The validity or appropriateness of the State agency's prohibition of incentive items and the State agency's denial of an above-50-percent vendor's request to provide an incentive item to customers pursuant to §246.12(h)(8);
- (vif) The State agency's determination whether to notify a vendor in writing when an investigation reveals an initial violation for which a pattern of violations must be established in order to impose a sanction, pursuant to §246.12(l)(3);
- (viig) The State agency's determination whether a vendor had an effective policy and program in effect to prevent trafficking and that the ownership of the vendor was not aware of, did not approve of, and was not involved in the conduct of the violation;
- (viiih) Denial of authorization if the State agency's vendor authorization is subject to the procurement procedures applicable to the State agency;
- (viiiij) The expiration of a vendor's agreement;
- (xj) Disputes regarding food instrument or cash-value voucher payments and vendor claims (other than the opportunity to justify or correct a vendor overcharge or other error, as permitted by §246.12(k)(3); and
- (xiik) Disqualification of a vendor as a result of disqualification from SNAP.

(c) Administrative Review Procedures for Farmers

1) Full Administrative Review

(A) The following adverse actions shall be subject to full administrative review upon timely request by the farmer:

- (i) Denial of authorization based on the application of the farmer selection criteria;
- (ii) Termination of an agreement for cause;
- (iii) Sanction by the State agency; and
- (iv) Disqualification.

(B) These procedures shall be followed in cases meriting full administrative review:

- (i) The state agency shall provide the farmer with written notification of the adverse action, the cause(s) for the action, and the effective date of the action, including the State agency's determination of whether the action shall be postponed if it is appealed, in accordance with 7 C.F.R. § 248.16(b) and 7 C.F.R. § 249.16(c), and the opportunity for a hearing;
- (ii) A farmer seeking review must send a written request for review to the Commissioner of the State agency within forty-five (45) days from the date of the notice of adverse action;
- (iii) Upon receiving a timely request for review, the Commissioner shall refer the case to the Office of State Administrative Hearings (OSAH) for decision within a reasonable period of time, not to exceed thirty (30) days after receipt of such request.

(iv) The hearing before OSAH shall be conducted in accordance with the Georgia Administrative Procedure Act and the rules of OSAH. In addition, the Administrative Law Judge (ALJ) shall ensure that the farmer is given:

(I) The opportunity to appeal the action within the time specified by the State agency in its notification of adverse action;

(II) Adequate advance notice of the time and place of the hearing to provide all parties involved sufficient time to prepare for the hearing;

(III) The opportunity to present its case and at least one opportunity to reschedule the hearing date upon specific request;

(IV) The opportunity to confront and cross-examine adverse witnesses. When necessary to protect the identity of WIC Program investigators, such examination may be conducted behind a protective screen or other device to conceal the investigator's face and body;

(V) The opportunity to be represented by counsel, if desired; and

(VI) The opportunity to review the case record prior to the hearing.

(v) The ALJ's determination shall be based solely on whether the State agency has correctly applied Federal and State statutes, regulations, policies, and procedures governing the WIC Program, according to the evidence presented at the review.

(vi) Within 30 days after the close of the record, an ALJ shall issue a decision to all parties in the case, except when it is determined that the complexity of the issues and the length of the record require an extension of this period and an order is issued by an ALJ so providing.

(vii) Every decision of an ALJ shall be a final decision. Any aggrieved party, including the agency, may seek judicial review of an ALJ's final decision.

(2) Actions not Subject to Administrative Review

(A) The following adverse actions are not subject to administrative review: Expiration of a contract or agreement with a farmer, farmers' market, or roadside stand.

Authority: 42 U.S.C. §1786; 7 C.F.R. §§ 246.18, 248.16, 249.16; O.C.G.A. §§ 31-2A-6, 31-5-1, 50-13-41.