

APA-1
6/93

TRANSMITTAL SHEET FOR NOTICE OF INTENDED ACTION

Control 420 Department or Agency Alabama Department of Public Health

Rule Number 420-10-2

Rule Title Women, Infants, and Children Supplemental Nutrition Program

New Amend Repeal Adopt by Reference

Would the absence of the proposed rule significantly harm or endanger the public health, welfare or safety? Yes

Is there a reasonable relationship between the state's police power and the protection of the public health, safety or welfare? Yes

Is there another, less restrictive method of regulation available that could adequately protect the public? No

Does the proposed rule have the effect of directly or indirectly increasing the costs of any goods or services involved and, if so, to what degree? No

Is the increase in cost, if any, more harmful to the public than the harm that might result from the absence of the proposed rule? n/a

Are all facts of the rulemaking process designed solely for the purpose of and so they have as their primary effect, the protection of the public? Yes

Does the proposed rule have an economic impact? No

If the proposed rule has an economic impact, the proposed rule is required to be accompanied by a fiscal note prepared in accordance with subsection (f) of §41-22-23, Code of Alabama, 1975.

Certification of Authorized Official

I certify that the attached proposed rule has been in full compliance with the requirements of Chapter 22, Title 41, Code of Alabama, 1975, and that it conforms to all applicable filing requirements of the Administrative Procedure Division of the Legislative Reference Service.

Signature of Certifying Officer Patricia Blue Date March 20, 2013

**FORM APA2
11/96**

**STATE BOARD OF HEALTH
NOTICE OF INTENDED ACTION**

AGENCY NAME: Alabama Department of Public Health

RULE NUMBER AND TITLE: 420-10-2, Women, Infants, and Children Supplemental Nutrition Program


INTENDED ACTION: Amendment to Rule 420-10-2

SUBSTANCE OF PROPOSED ACTION: To ensure that the Alabama WIC Program is in accordance with the federal regulations governing the WIC Program.

TIME, PLACE, AND MANNER OF PRESENTING VIEWS: A public hearing will be held on April 10, 2013 at the RSA Tower, 201 Monroe Street, Suite 1540, Montgomery, AL 36104 at 9:00 a.m.

FINAL DATE FOR COMMENTS AND COMPLETION OF NOTICE: Written or oral comments will be received until the close of the record at 5:00 p.m. on May 3, 2013. All comments and requests for copies of the proposed amendments should be addressed to the contact person listed below.

CONTACT PERSON AT AGENCY: Stacey Neumann, Department of Public Health, 201 Monroe Street, Suite 1300, Montgomery, Alabama 36104. Telephone number (334) 206-5673.



Patricia E. Ivie, Agency Secretary

STATE BOARD OF HEALTH
BUREAU OF FAMILY HEALTH SERVICES
DIVISION OF WIC
ADMINISTRATIVE CODE

CHAPTER 420-10-2
WOMEN, INFANTS, AND CHILDREN
SUPPLEMENTAL NUTRITION PROGRAM

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420-10-2-.01 **Applicability.** This Chapter prescribes general procedures that apply to the Women, Infants, and Children Supplemental Nutrition Program, hereinafter referred to as WIC, adoption, amendment, and repeal of rules of the State Board of Health ~~hereinafter referred to as "WIC"~~. The Alabama Department of Public Health is hereinafter referred to as "the Department."

Author: James M. Richard; Carolyn Battle; Stacey Neumann
Statutory Authority: Code of Ala. 1975, §§22-2-2(6), 22-12c-2 and 3.

History: **New Rule:** Filed October 24, 1995; effective November 28, 1995. **Repealed and New Rule:** Filed October 20, 1999; effective November 24, 1999. **Repealed and New Rule:** Filed November 20, 2003; effective December 25, 2003. **Repealed and New Rule:** Filed August 20, 2004; effective September 24, 2004.

420-10-2-.02 Certification Defined. Certification is the use of criteria and procedures to assess and document each applicant's eligibility for participation in the Alabama WIC Program.

(a) This eligibility determination is to be made at no cost to the participant. During this process, the ~~wholistic needs~~ holistic and social needs of the participant are considered.

(b) ~~NO FOOD INSTRUMENTS SHALL BE ISSUED TO A PARTICIPANT UNLESS THAT PERSON'S CERTIFICATION IS CURRENT.~~ Food instruments may not be issued to a participant unless that participant's certification is current.

Author: James M. Richard; Carolyn Battle; Stacey Neumann
Statutory Authority: Code of Ala. 1975, §§22-2-2(6), 22-12c-2 and 3.

History: **New Rule:** Filed October 24, 1995; effective November 28, 1995. **Repealed and New Rule:** Filed October 20, 1999; effective November 24, 1999. **Repealed and New Rule:** Filed November 20, 2003; effective December 25, 2003. **Repealed and New Rule:** Filed August 20, 2004; effective September 24, 2004.

420-10-2-.03 Eligibility Requirements. To be certified as eligible for the Alabama WIC Program, the applicant shall meet the following requirements and provide proof of identification, residence, and income.

(a) **Individual Status.** Applicants ~~must~~ shall be one of the following:-

1. A woman who is:

(i) ~~is~~ pregnant; ~~or~~

(ii) ~~is~~ within six months postpartum of delivering an infant (alive or deceased); or

(iii) ~~is~~ breast-feeding within ± one year postpartum.

2. An infant up to ± one year of age.

3. A child up to his or her ~~5th~~ fifth birthday. Benefits terminate at the end of the month a child turns ± five years old.

(b) **Residence Status.** ~~Applicants must~~ shall be a resident of the State of Alabama and a resident of the area or a member of the population served by the local clinic. (Length of residency ~~shall~~ is not be a consideration.) This requirement does not apply to migrants, homeless, incarcerated, or Native Americans. A discussion of consideration relative to migrants, foreign citizens, persons affiliated with institutions, and homeless is in the Fee System Manual, Income Assessment Sections.

(c) **Income Standards.** ~~Meet Applicants shall~~ meet the prescribed income standards specified in the ADPH Department's Fee System Manual. ~~The ADPH Fee System Manual is hereby adopted by reference.~~

(d) **Nutritional Risk Criteria.** ~~Meet Applicants~~ shall meet at least one of the Nutritional Risk Criteria specified in the Alabama WIC Procedure Manual.
Author: James M. Richard; Carolyn Battle; Stacey Neumann
Statutory Authority: Code of Ala. 1975, §§22-2-2(6), 22-12c-2 and 3.
History: **New Rule:** Filed October 24, 1995; effective November 28, 1995. **Repealed and New Rule:** Filed October 20, 1999; effective November 24, 1999. **Repealed and New Rule:** Filed November 20, 2003; effective December 25, 2003. **Repealed and New Rule:** Filed August 20, 2004; effective September 24, 2004.

420-10-2-.04 Food Delivery System.

(1) **Approved Food Selection Criteria.** Federal criteria are written for all foods used in the WIC Program. The Department shall follow federal criteria when selecting food items to be part of the state's approved food list. The State Department reserves the right to, at any time, disallow certain brands, ~~or~~ types, or varieties of foods because of cost, availability, packaging, or any other reason deemed necessary.

(2) **Deletion of food items or addition of new food items** will be considered every ~~three~~ two years. ~~Suggestions from manufacturers~~ Manufacturers, staff, participants, or any other interested parties ~~will be accepted anytime except during~~ may submit suggestions prior to April of the food review year.

Author: James M. Richard; Carolyn Battle; Stacey Neumann
Statutory Authority: Code of Ala. 1975, §§22-2-2(6), 22-12c-2 and 3.

History: **New Rule:** Filed October 24, 1995; effective November 28, 1995. **Repealed and New Rule:** Filed October 20, 1999; effective November 24, 1999. **Repealed and New Rule:** Filed November 20, 2003; effective December 25, 2003. **Repealed and New Rule:** Filed August 20, 2004; effective September 24, 2004.

420-10-2-.05 Vendor Management.

(1) **General.** The Department through the Alabama WIC Program provides special supplemental food to ~~their~~ its participants through a retail purchase delivery system. Some special infant formulas are exceptions to this; these infant formulas are provided by direct distribution at the local WIC clinics. The retail purchase delivery system allows a WIC participant to redeem food instruments for special supplemental food at authorized grocery stores vendors. The State WIC Office issues blank ~~Blank stock of food instrument paper is issued to each clinic. by the State Agency where the~~ The clinics produce a computer printed or manual food instrument. Each food instrument, whether computer generated or manual, has a unique sequential identifying number. The clinics make appropriate entries on the food instrument ~~which that~~ are then issued to WIC participants for the purchase of authorized foods. The participant may redeem the food instrument at any ~~retail-grocery store~~ vendor under contract with the Alabama WIC Program. The ~~grocery~~ vendor will make appropriate entries on the food instruments and deposit them in their bank. ~~The bank credits the vendor's account and forwards the deposited food instruments to the State's contract bank.~~ The food instruments are processed through the Alabama WIC Program's contract bank for payment to the vendor.

(2) **Vendor Authorization-Criteria for Participation.** Vendors who are authorized to participate in the Alabama WIC Program shall enter into a written contract with the Alabama Department of Public Health Department. ~~Any authorized vendor may be reassessed~~ The Department may reassess any authorized vendor at anytime during the vendor agreement period using the criteria for participation in effect at the time of the reassessment. ~~Vendors found to be in violation of any criteria for participation must be~~

~~terminated for cause. A vendor whose contract has been terminated for cause may submit a new application for authorization to participate in the WIC Program 90 days after the effective date of the contract termination. The Department shall terminate a vendor who violates any criteria for participation. Out of state vendors located more than five miles from the state line will not be approved will not receive approval unless needed for adequate participant access. A grocery vendor must comply with the following standards of participation criteria for participation at all times:~~

(a) **Square Footage of Retail Space.** ~~+~~ The ~~store~~ must vendor shall have a minimum of 1,000 square feet of retail space ~~which~~ that is exclusively devoted to food sales. Retail space is defined as areas in which the public has access. Retail space does not include storage areas or restrooms.

(b) **Hours of Operation.** ~~+~~ The ~~store~~ must vendor shall be open for business to customers at least eight ~~(8)~~ hours per day and six ~~(6)~~ days per week.

(c) **Food Sales.** ~~+~~ At least ~~60%~~ 60 percent of the vendor's total sales must be in staple foods with the exception of ~~retailers~~ vendors whose square footage exceeds 10,000 square feet. This requirement allows the ~~general public~~ WIC participant to purchase a variety of foods for home preparation and consumption and as recommended by the USDA FNS Food Guide Pyramid United States Department of Agriculture MyPlate dietary guidance.

1. Staple foods are defined as groups include meat, poultry, fish, breads, cereal, vegetables, fruit, juices, and dairy products, and similar foods. A portion of the vendor's total staple foods must include perishable foods that are either frozen staple food items; or fresh, un-refrigerated or refrigerated staple food items that will spoil or suffer significant deterioration in quality within two to three weeks. Staple foods do not include accessory foods such as coffee; tea; cocoa; soda; non-carbonated drinks such as sports drinks, punches, and flavored waters; candy; chips; condiments; spices; hot foods; or foods ready to go or made to take out, like prepared sandwiches or salads.

2. All ~~stores~~ must maintain vendors shall have a recognized grocery department in a stationary location,

that is a separate and distinct area. ~~which stocks~~ The vendor, on any given day of operation, shall offer for sale and normally display a variety of different types of staple foods in addition to Alabama WIC Program approved foods.

(d) **Health Department Food Permit.** ~~+~~ The store must vendor shall have a current Health Department Food Permit issued by the Alabama Department of Public Health or a state inspection certificate as approved by the Alabama WIC Program.

(e) **Minimum Stock of WIC-Approved Foods.** ~~+~~ The store must have vendor shall meet and maintain the minimum stock of WIC-approved foods at all times. the time of the WIC representative's visit.

(f) **Competitive Pricing.**

1. ~~Individual food prices will be analyzed by~~ The Department shall analyze individual food item prices by peer groups, as defined in Rule 420-10-2-.05(3). Averages and standard deviations will be computed for all individual food item prices.

2. ~~Type I-IV vendors' individual food item prices shall not exceed the average individual food item prices in their peer group by more than two standard deviations.~~ The competitive price determination for individual food items of Type 1 to 4 vendors will be computed by peer group using the most recent shelf prices submitted by authorized vendors. Vendors whose individual food item prices fall within one standard deviation of the mean are cost competitive. In analyzing food item prices, the Department shall ensure that the distribution is not skewed by outliers or sample size. If a food item price is skewed by outliers or sample size, the Department, in its discretion, may use an alternative statistical principle to establish the maximum reimbursement level for that food item.

~~(i)-~~ Price maximums shall be published on a periodic basis. The Department shall reassess the maximum reimbursement level of individual food items at least twice a year.

3. ~~Type V~~ 5 vendors, vendors deriving more than ~~50%~~ 50 percent of their annual food sales revenue from

WIC food instruments, may charge up to the statewide individual food instrument average of all vendors, excluding ~~stores~~ vendors receiving more than ~~50%~~ 50 percent of their food sales from WIC food instruments.

(i) No prices from ~~stores~~ vendors receiving more than ~~50%~~ 50 percent of their food sales from WIC food instruments will be included in this analysis.

(ii) ~~Prices~~ Maximum reimbursement levels for each type of food instrument ~~averages~~ will be distributed to Type 5 vendors. ~~published on a periodic basis.~~

~~(iii) The food instrument averages will be the maximum reimbursement allowed for Type V stores.~~

~~(iiiiv)~~ The average price ~~of each type of~~ for each food instrument type will be calculated by dividing the total dollar amount of redeemed food instruments for Type ~~I-IV~~ 1 to 4 vendors by the total number of redeemed food instruments for Type ~~I-IV~~ 1 to 4 vendors.

4. The ~~State WIC program~~ Department may make price adjustments to the purchase price on food instruments submitted by the vendor for redemption or seek recoupment of excess payments made to ~~vendors~~ the vendor to ensure compliance with allowable reimbursement levels applicable to the vendor. A vendor's failure to remain price competitive is cause for termination of the vendor ~~agreement~~ contract, even if actual payments to the vendor are within the maximum reimbursement amount.

(g) **Disqualification from Supplemental Nutrition Assistance Program (SNAP) or WIC.** ~~Owner, co-owner, corporate official or manager must~~ A vendor applicant or authorized vendor may not currently be disqualified from the a SNAP Program or WIC Program in any state, and/or must may not currently be paying a SNAP Program civil money penalty unless the civil money penalty is due to inadequate participant hardship access.

(h) **Business Integrity.** ~~Unless it is necessary to ensure adequate participant access the Department determines denial of the vendor applicant would result in inadequate participant access, the WIC Program Department may not authorize an applicant vendor a vendor applicant if during the last 6 six years, the vendor applicant's current owners, officers, or managers have been convicted~~

of or have had a civil judgment for: fraud, antitrust violations, embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims, or obstruction of justice.

(i) **50% 50 Percent Criterion.**

1. Vendors that derive more than 50 percent of their annual food sales revenue from WIC food instruments, and new vendor applicants expected to meet this criterion based upon assessments conducted by the Department are defined as above-50-percent vendors.

2. A ~~for-profit~~ vendor applicant ~~will~~ may not be ~~authorized to participate in the WIC vendor program if that vendor is expected to be an above-50-percent vendor, unless that vendor is necessary to assure participant access to program benefits.~~ The foregoing also applies to a new location of a currently authorized ~~for-profit~~ vendor.

3. The Department shall assess the status of a new vendor ~~shall be assessed~~ within six ~~(6)~~ months after authorization to determine whether or not the vendor is an above-50-percent vendor. If WIC redemptions for the period evaluated are more than 50 percent of the vendor's total food sales, the vendor ~~shall be deemed to be~~ is an above-50-percent vendor, and the Department shall terminate the vendor contract shall be terminated and the vendor shall be disqualified and disqualify the vendor from participating in the WIC vendor program Alabama WIC Program.

4. The Department may assess the status of a currently authorized ~~type~~ Type 1, 2, 3, or 4 vendor ~~may be assessed~~ as necessary to determine whether or not the vendor meets the above-50-percent criterion. If WIC redemptions for the period evaluated are more than 50 percent of the vendor's total food sales, the vendor ~~shall be deemed to be~~ is an above-50-percent vendor. If, based upon an annual assessment of sales data, ~~it is determined that a type~~ a Type 1, 2, 3, or 4 vendor has become an above-50-percent vendor, the Department shall terminate the vendor contract shall be terminated and the vendor shall be disqualified and disqualify the vendor from participating in the WIC vendor program Alabama WIC Program.

(j) **Formula Purchase Requirement.** The store

~~must~~ vendor shall purchase formula from entities approved by the Department. A The Department maintains a list of approved entities. is maintained at the WIC Division of the Department of Public Health.

(k) **Supplemental Nutrition Assistants**

Assistance Program (SNAP). + ~~The store~~ must vendor shall be an authorized as a USDA United States Department of Agriculture SNAP retailer.

(l) **Incentive Items.** ~~For-profit vendors~~ Vendors who derive or are expected to derive more than 50% 50 percent of their annual food revenue from WIC food instruments shall may not provide incentive items of any value or other free merchandise to program to WIC participants. Type 1, 2, 3, or 4 vendors may not offer any incentive items to WIC participants that are not also offered to non-WIC participants.

(3) **Vendor Peer Groups.** + All vendors will be assigned to one of the following peer groups:

(a) Type 1 - Chain ~~stores~~ vendors with own wholesaler.

(b) Type 2 - Major independent ~~stores~~ vendors, ~~5~~ five or more cash registers.

(c) Type 3 - Minor independent ~~stores~~ vendors, ~~3~~ three to ~~4~~ four cash registers.

(d) Type 4 - Small ~~stores~~ vendors, ~~1~~ one to ~~2~~ two cash registers.

(e) Type 5 - ~~Stores~~ Vendors receiving more than ~~50%~~ 50 percent of their annual food sales from WIC food instruments.

(4) **Vendor Application.**

(a) Vendors who wish to participate in the Alabama WIC Program ~~must~~ shall submit a complete a Vendor Application. ~~A Vendor Application package shall be available for grocery vendors~~ Vendors can obtain an application packet at all local WIC clinics and on the Department's Web site. Vendors who submit applications after August 15 will not be approved to accept food instruments considered for authorization until October 1.

If a vendor application is denied for failure to comply with the criteria for participation, the vendor may reapply 90 days after service of the notice of denial of the application. A vendor applicant may not submit more than two applications in a 12-month period.

(b) ~~The WIC Program Director~~ Department may in its discretion waive any of the vendor ~~authorization~~ ~~criteria in order to assure~~ criteria for participation to ensure adequate participant access to program WIC Program benefits. ~~Participant access is assured when there is Adequate participant access exists if an authorized WIC vendor is within five (5) miles of the vendor applicant and when there are ten miles and no geographic barriers or other conditions make participant access unreasonably difficult. which would make impossible normal travel to another authorized WIC vendor.~~

(c) If the new vendor applicant indicates that less than ~~50%~~ 50 percent of ~~his~~ the vendor's food sales will be derived from WIC food instruments, the Department shall conduct an assessment using the chart in Appendix "A" of these rules to determine whether the vendor applicant may be authorized. The Department ~~shall~~ may not authorize a vendor applicant who is expected to derive more than ~~50%~~ 50 percent of ~~his/her~~ annual food revenue from WIC instruments.

(5) **Vendor Compliance.** The Department is responsible for ensuring that vendors comply with ~~program~~ state and federal WIC Program requirements. Vendors shall make all records available to the Department upon request. Methods of ensuring compliance include:

(a) **Vendor Monitoring.** Representatives of the ~~State~~ Department may conduct unannounced ~~overt~~ monitoring visits any time that the vendor is open for business. All records pertinent to this monitoring visit must be available for review by the representative upon request.

(b) **Compliance Buys.** Compliance buys are covert investigations conducted by the ~~State WIC Office,~~ Compliance Unit Department.

(c) **Inventory Audits.** ~~Inventory audits are sometimes performed by the State WIC Office Compliance Unit in lieu of or in conjunction with compliance buys.~~ An inventory audit is the official examination and

documentation of a WIC vendor's inventory, accounts, and records to determine whether the vendor has purchased sufficient quantities of supplemental foods to provide participants the quantities specified on the food instruments redeemed by the vendor during a given time period.

(d) **Recoupment of Funds.** The State WIC Office Department may recoup funds for price adjustments and overcharges.

(e) **Vendor Sanctions.** The Department shall impose the following are vendor sanctions:-

1. **Category VIII--Mandatory Permanent Disqualification.** ~~MANDATORY PERMANENT DISQUALIFICATION~~

(i) Trafficking in food instruments or cash-value vouchers or selling firearms, ammunition, explosives, or controlled substances as defined in Section 102 of the Controlled Substances Act (21 U.S.C. 802) in exchange for food instruments or cash-value vouchers.

(ii) Permanent disqualification from the Supplemental Nutrition Assistance Program.

~~(iii) Deriving more than 50 percent of sales-revenue from WIC food instruments. This violation and sanction does not apply to vendors who were classified as Type 5 vendors as of January 1, 2008.~~

2. **Category VII--Mandatory Disqualification for Six Years.** ~~MANDATORY DISQUALIFICATION FOR SIX YEARS~~

(i) One incidence of buying or selling food instruments for cash (trafficking).

(ii) One incidence of selling firearms, ammunition, explosives, or controlled substances as defined in 21 U.S.C. 802, in exchange for food instruments or cash-value vouchers.

3. **Category VI--Mandatory Disqualification for Three Years.** ~~MANDATORY DISQUALIFICATION FOR THREE YEARS~~

(i) One incidence of the sale of alcohol or alcoholic beverages or tobacco products in exchange for food instruments or cash-value vouchers.

(ii) A pattern of claiming reimbursement for the sale of an amount of a specific WIC food item ~~which~~ that exceeds the ~~store~~ vendor's documented inventory of that WIC food item for a specific period of time.

(iii) A pattern of vendor overcharges.

(iv) A pattern of receiving, transacting, ~~and~~ or redeeming food instruments or cash-value vouchers outside of authorized channels, including the use of an unauthorized vendor ~~and~~ or an unauthorized person.

(v) A pattern of charging for supplemental food not received by the participant.

(vi) A pattern of providing credit ~~for~~ or non-food items, other than alcohol, alcohol beverages, tobacco products, cash, firearms, ammunition, explosives, or controlled substances as defined in 21 U.S.C. 802, in exchange for food instruments or cash-value vouchers.

4. Category V--Mandatory Disqualification for One Year. MANDATORY DISQUALIFICATION FOR ONE YEAR.

(i) A pattern of providing unauthorized food items in exchange for food instruments or cash-value vouchers including charging for supplemental foods provided in excess of those listed on the food instrument.

(ii) A pattern of an above-50-percent vendor providing prohibited incentive items to WIC participants.

5. Category IV--Warning on First Offense; On Second or Subsequent Offense, Disqualification for One Year. DISQUALIFICATION FOR ONE YEAR FOR EACH VIOLATION

(i) Entering false information on a food instrument or cash-value voucher.

(ii) Nonpayment of a claim made by DEPARTMENT. Requiring a participant to make a cash purchase to redeem a food instrument or cash-value voucher.

(iii) Entering false information on a Vendor Contract or Application. Providing a WIC participant with transportation to or from the vendor's premises or

delivering supplemental foods to a WIC participant's residence.

~~(iv) Failure to allow store monitoring by authorized WIC representative.~~

6. Category III--Warning on First Offense; On Second Offense, \$400.00 Fine and Vendor Submits a Written Corrective Action Plan and Attends Mandatory Training as Defined by the Department; On Third or Subsequent Offense, Disqualification for 12 Months. WARNING ON FIRST OFFENSE, THEN \$300 PER OFFENSE

(i) Discrimination, such as, separate WIC check-out lines, denying trading stamps or other customer courtesies or store specials. Failing to properly process a food instrument or cash-value voucher, which includes not checking a participant's WIC ID card, requiring participants to sign a food instrument or cash-value voucher before first entering the purchase amount, failing to obtain a signature at the time of the WIC transaction, or accepting a food instrument or cash-value voucher outside of the valid dates to use.

(ii) Giving rain checks or IOUs Issuing a rain-check or IOU when unable to fill a WIC food instrument or cash-value voucher.

(iii) Requiring cash purchases to redeem food instruments. Failing to mark the price of a WIC-approved food on the shelf or item.

(iv) Unjustified increase in retail price of infant formula with no supporting evidence of increase in wholesale price. Stocking a WIC-approved food outside of the manufacturer's expiration date.

(v) Attempting to seek restitution from a participant for a food instrument or cash-value voucher returned not paid.

(vi) Contacting a WIC participant regarding an improperly processed food instrument or cash-value voucher.

(vii) Excessive errors in depositing food instruments or cash-value vouchers.

(viii) Failing to provide the quantity or type of infant formula specified on the food instrument.

(ix) Requiring a separate check-out lane for WIC participants or failing to offer a WIC participant any courtesy offered to other customers, including, but not limited to, a promotional opportunity, bonus card, coupon, or additional free product.

(x) Threatening or abusing, either verbally or physically, a WIC participant or WIC personnel in the conduct of official WIC business.

7. Category II--Warning on First Offense; On Second Offense, \$300.00 Fine and Vendor Submits a Written Corrective Action Plan and Attends Mandatory Training as Defined by the Department; On Third or Subsequent Offense, Disqualification for Nine Months. ~~WARNING ON FIRST OFFENSE, THEN \$200 PER OFFENSE~~

(i) ~~Redeeming food instruments outside valid periods.~~ Failure to submit a vendor price survey within the specified time frame.

(ii) ~~Failure to attend vendor training sessions without written justification.~~ Requiring additional ID from a person who has signed the WIC ID folder.

(iii) ~~Accepting unauthorized altered food instruments.~~ Allowing the purchase of a WIC food in an unauthorized container size.

(iv) ~~Providing related but non-approved foods.~~

(v) ~~Failure to stock and maintain minimum inventory as outlined in the Alabama WIC Vendor Guidelines and Procedure Handbook.~~

8. Category I--Warning on First Offense; On Second Offense, \$200.00 Fine and Vendor Submits a Written Corrective Action Plan and Attends Mandatory Training as Defined by the Department; On Third or Subsequent Offense, Disqualification for Six Months. ~~ONE WARNING FOR OFFENSE, THEN \$100 PER OFFENSE~~

(i) ~~Failure to properly process food instruments at the store, for example, not checking participant's WIC ID card, not completing "Pay Exactly"~~

~~amount prior to obtaining participant's signature, failure to provide the quantity and type of infant formula specified on the food instrument. Allowing the exchange of a WIC food item other than items that are defective, spoiled, or outside their sell/use date at time of redemption.~~

(ii) ~~Failure to report to the local WIC Program attempts by participants/proxies to return WIC foods for credit/cash. Allowing a refund for a returned food item.~~

(iii) ~~Excessive or continued errors in depositing food instruments. Requiring the purchase of a specific brand if more than one WIC-approved food brand is available and allowed by the State WIC Program.~~

(iv) ~~Stocking WIC foods outside manufacturer's expiration date. Failure to provide a WIC participant a cash register receipt.~~

(v) ~~Failure to have prices marked on item of shelf. Failure to provide employee training on WIC procedures.~~

(vi) ~~Failure to submit vendor price survey within time frame specified on price survey.~~

(vii) ~~Distribution of incentive items of any description and of any value. (Only applies to for-profit vendors deriving more than 50% of their food revenue from WIC transactions.)~~

(viii) ~~Providing services to participants such as transportation to and from vendor's premises, or delivery of supplemental foods to participant residences. The only exception would be minimal customary courtesies of the retail food trade, such as bagging supplemental food for the participant and assisting the participant with loading the supplemental food into his/her automobile. (Only applies to for-profit vendors deriving more than 50% of their food revenue from WIC transactions.)~~

(ix) ~~Obtaining infant formula from an unlisted source.~~

(f) **Pattern.** A pattern for the purpose of determining the vendor sanction for a violation of

paragraph (5)(e)3.(ii) of this rule can be established during a single review ~~where~~ if a vendor's records indicate that, for a two month audit period, the ~~store's~~ vendor's redemptions for a specific food item exceeds its documented inventory for a two month audit period. For the purpose of determining other vendor sanctions in paragraphs (5)(e)(1) through (4), a pattern is defined as committing the same violation two ~~(2)~~ or more times during a compliance buy investigation ~~which~~ that consists of at least three ~~(3)~~ buys.

(g) **Second Mandatory Sanction.** When a vendor, who previously has been assessed a sanction for any of the violations in Category V through Category VIII, receives sanctions for any of these violations, the ~~State agency~~ must Department shall double the second sanction. Civil money penalties may only be doubled up to the limits allowed under 7 CFR \$246.12. ~~Section 246.12 of the USDA-WIC Program Regulations.~~

(h) **Subsequent Mandatory Sanctions.** When a vendor, who previously has been assessed two or more sanctions for any of the violations listed in Category V through Category VIII, receives sanctions for any of these violations, the ~~State agency~~ must Department shall double the third sanction and all subsequent sanctions. The ~~State~~ Department may not impose civil money penalties in lieu of disqualification for third and subsequent sanctions for violations listed in Category V through VIII.

(i) **Participant Access and Civil Money Penalty.**

~~(1.)~~ Prior to disqualifying a vendor for a Supplemental Nutrition Assistance Program disqualification or any violations listed in paragraphs (5)(e)(2) through (4) of this rule, the Department ~~must~~ shall determine if disqualification would result in inadequate participant access. If the Department determines that disqualification of a vendor would result in inadequate participant access, the Department ~~must~~ shall impose a civil penalty, calculated in accordance with 7 CFR \$246.12, in lieu of disqualification. ~~The civil money penalty shall be calculated in accordance with 7 CFR \$246.12.~~ However, the Department may not impose a civil penalty in lieu of disqualification for third or subsequent sanctions for violations of paragraphs ~~(f)~~ (5)(e)(2) through (4) of this rule.

~~(2.)~~ The Department shall determine there is inadequate participant access ~~when there are~~ if geographic barriers or ~~conditions which would make impossible normal travel to another authorized WIC vendor and where there are~~ other conditions make participant access unreasonably difficult and no authorized WIC vendors are within ~~five-~~ ~~(5)~~ ten miles of the violative vendor.

(j) **Notification of Violations.**

~~(1.)~~ The Department shall notify a vendor in writing ~~when~~ if an investigation reveals an initial violation for which a pattern of violations must be established ~~in order~~ to impose a sanction, before another such violation is documented, unless the Department determines that notifying the vendor would compromise the investigation. In determining whether an initial notice would compromise the investigation, the Department may consider factors including, but not limited to, the severity of the initial violation, the compliance history of the vendor, whether the vendor has been determined to be high-risk consistent with 7 CFR §246.12(j)(3), and whether the notice could compromise a covert investigation, such as a compliance buy investigation ~~which~~ that involves an investigative agent posing as a WIC participant and transacting WIC food instruments.

~~(2.)~~ The ~~Department's~~ Department shall document the basis for determining that such written notice would compromise the investigation ~~shall be documented~~ in the vendor's file.

~~(3.)~~ Notice is not required for violations involving a vendor's redemptions exceeding his inventory ~~since~~ because there are no initial violations in such instances. Additionally, notice is not required for WIC vendor disqualifications or civil money penalties based upon Supplemental Nutrition Assistance Program sanctions. Neither is notification required for violations that only require one incidence before a sanction is imposed.

Authors: James M. Richard; Wendy S. Blackmon; Dana Driscoll; Greg Locklier; Carolyn Battle; Stacey Neumann
Statutory Authority: Code of Ala. 1975, §§22-2-2(6), 22-12C-2 and 3; CFR §§246.12 and 246.18.

History: **New Rule:** Filed October 24, 1995; effective November 28, 1995. **Repealed and New Rule:** Filed October 20, 1999; effective November 24, 1999. **Amended:** Filed May 16, 2002; effective June 20, 2002. **Repealed and**

New Rule: Filed November 20, 2003; effective December 25, 2003. **Repealed and New Rule:** Filed August 20, 2004; effective September 24, 2004. **Amended:** Filed September 21, 2005; effective October 26, 2005. **Amended:** Filed February 17, 2006; effective March 24, 2006. **Amended:** Filed November 8, 2006; effective December 13, 2006. **Amended:** Filed February 20, 2008; effective March 26, 2008. **Amended:** Filed September 17, 2010; effective October 22, 2010.

420-10-2-.06 Appeals For Vendors And Local Agencies.

(1a) Adverse actions subject to administrative reviews.

(a)1- Vendor appeals.

1.(i) Adverse actions subject to full administrative reviews. ~~The State agency must~~ The Department shall provide full administrative reviews to vendors that appeal the following adverse actions:

(i I) 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 attempting to circumvent a sanction;

(ii II) termination of an agreement for cause;

(iii III) disqualification;

(iv IV) imposition of a fine or a civil money penalty in lieu of disqualification;

(v V) denial of authorization based on the vendor selection criteria for business integrity or for a current ~~Food Stamp Program~~ Supplemental Nutrition Assistance Program disqualification or civil money penalty for hardship;

(vi VI) denial of authorization based on a State agency-established vendor selection ~~criteria~~ criteria if the basis of the denial is a WIC vendor sanction or a Food Stamp Program withdrawal of authorization or disqualification;

(vii ~~VII~~) denial of authorization based on the ~~State-agency's~~ Department's vendor limiting criteria;

(viii ~~VIII~~) denial of authorization because a vendor submitted its application outside the time frames during which applications are being accepted and processed as established by the ~~State-agency~~ Department under 7 CFR §246.12(g)(7);

(ix ~~IX~~) termination of an agreement because of a change in ownership or location or cessation of operations;

(x ~~X~~) disqualification based on a trafficking conviction;

(xi ~~XI~~) disqualification based on the imposition of a ~~Food Stamp Program~~ Supplemental Nutritional Assistance Program civil money penalty for hardship; ~~and~~

(xii ~~XII~~) disqualification or a civil money penalty imposed in lieu of disqualification based on a mandatory sanction imposed by another WIC ~~State~~ state agency; ~~-~~

(xiii ~~XIII~~) a civil money penalty imposed in lieu of disqualification based on a ~~Food Stamp Program~~ Supplemental Nutritional Assistance Program disqualification under 7 CFR §246.12(l)(1)(vii);

(xiv ~~XIV~~) denial of an application based on a determination of whether an applicant vendor is currently authorized by the ~~Food Stamp Program~~ Supplemental Nutritional Assistance Program;

(xv ~~XV~~) denial of authorization based on the application of the vendor selection criteria for competitive price; ~~and~~

(xvi ~~XVI~~) the application of the ~~State-agency's~~ Department'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.

2. ~~(ii)~~ Actions not subject to administrative reviews. The ~~State-agency~~ Department may not provide administrative reviews pursuant to this section to vendors that appeal the following actions:

(i ~~I~~) the validity or appropriateness of the

~~State agency's~~ Department's vendor limiting criteria or vendor selection criteria for minimum variety and quantity of supplemental foods, business integrity, and current Supplemental Nutrition Assistance Program disqualification or civil money penalty for hardship;

(~~ii II~~) the validity or appropriateness of the ~~State agency's~~ Department's participant access criteria and the ~~State agency's~~ Department's participant access determinations;

(~~iii III~~) the ~~State agency's~~ Department'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;

(~~iv IV~~) denial of authorization if the ~~State agency's~~ Department's vendor authorization is subject to the procurement procedures applicable to the ~~State agency~~ Department;

(~~v V~~) the expiration of a vendor's agreement;

(~~vi VI~~) 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 7 CFR §246.12(k)(3);

(~~vii VII~~) disqualification of a vendor as a result of disqualification from the ~~Feed Stamp Program~~ Supplemental Nutritional Assistance Program;

(~~viii VIII~~) The validity or appropriateness of the ~~State agency's~~ Department'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;

(~~ix IX~~) the ~~State agency's~~ Department's determination to include or exclude an infant formula manufacturer, wholesaler, distributor, or retailer from the list required pursuant to 7 CFR §246.12(g)(11);

(~~x X~~) the validity or appropriateness of the ~~State agency's~~ Department's prohibition of incentive items and the ~~State agency's~~ Department's denial of an above-50-

percent vendor's request to provide an incentive item to customers pursuant to 7 CFR §246.12(h)(8); and

~~(xi XI)~~ the State agency's Department'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 7 CFR §246.12(1)(3).

~~(b)2-~~ Effective date of adverse actions against vendors. ~~The State agency must~~ Department shall make denials of authorization and disqualifications imposed under 7 CFR §246.12(1)(1)(i) effective on the date of receipt of the notice of adverse action. ~~The State agency must~~ Department shall make all other adverse actions effective no earlier than 15 days after the date of the notice of the adverse action and no later than 90 days after the date of the notice of adverse action or, in the case of an adverse action that is subject to administrative review, no later than the date the vendor receives the review decision.

~~(c)3-~~ Local agency appeals.

~~1.(i)~~ Adverse actions subject to full administrative reviews. ~~The State agency must~~ Department shall provide full administrative reviews to local agencies that appeal the following adverse actions:

~~(i I)~~ denial of a local agency's application;

~~(ii II)~~ disqualification of a local agency; and

~~(iii III)~~ any other adverse action that affects a local agency's participation.

~~2.(ii)~~ Actions not subject to administrative reviews. ~~The State agency~~ Department may not provide administrative reviews pursuant to this section to local agencies that appeal the following actions:

~~(i I)~~ expiration of the local agency's agreement;
and

~~(ii II)~~ denial of a local agency's application if the ~~State agency's~~ Department's local agency selection is subject to the procurement procedures applicable to the ~~State agency~~ Department.

~~3.(iii)~~ Effective date of adverse actions against local agencies. The ~~State agency must~~ Department shall make denials of local agency applications effective immediately. The ~~State agency must~~ Department shall make all other adverse actions effective no earlier than 60 days after the date of the notice of the adverse action and no later than 90 days after the date of the notice of adverse action or, in the case of an adverse action that is subject to administrative review, no later than the date the local agency receives the review decision.

~~(2b)~~ Full administrative review procedures. ~~The State agency must provided the aggrieved vendor or local agency an opportunity for a full administrative review of the program's adverse action. The State WIC program's~~ Department's administrative review procedures ~~shall~~ provide for the following:

~~(a)1-~~ Written notification of the adverse action.

~~1.(i)~~ The ~~WIC program~~ Department shall give written notification of a proposed adverse action, the cause(s) for the action, and the effective date of the proposed adverse action. The notification ~~shall~~ must also advise the vendor or local agency of its right to a full administrative review, the opportunity to present the case, the opportunity to confront and cross-examine witnesses, the opportunity to be represented by counsel, and the opportunity to examine evidence prior to the full administrative review hearing. The time period for requests for appeal must be given in the notification. ~~Notification will also include the option of an informal review conference before the State WIC director.~~

~~2.(ii)~~ When a vendor is disqualified due in whole or in part to violations in §246.12(1)(1), such notification must include the following statement: "This disqualification from WIC may result in disqualification as a retailer in the ~~Food Stamp Program~~ Supplemental Nutrition Assistance Program. Such disqualification is not subject to administrative or judicial review under the ~~Food Stamp Program~~ Supplemental Nutrition Assistance Program."

~~3.(iii)~~ ~~Vendors must be given fifteen~~ Except for denials of authorization and disqualifications imposed under 7 CFR §246.12(1)(1)(i), the Department shall provide

vendors with ~~+15+~~ days advance notice before the effective date of the adverse action.

~~4. (iv) Local agencies shall be given sixty (60)~~
Except for denials of local agency applications, the Department shall provide local agencies with 60 days advance notice of before disqualification or thirty (30) 30 days before termination.

~~2. Vendor have a right to examine and copy, prior to and during the full administrative review hearing, the documents and records which support the WIC program's adverse action.~~

~~(b) 3- Vendors must~~ An aggrieved vendor or local agency shall request a full administrative review hearing within 15 days of receipt of a notice of adverse action. Failure to submit a specific, written request within 15 days constitutes a waiver of the vendor or local agency's right to a full administrative review.

~~(c) 4- Requests~~ An aggrieved vendor or local agency shall submit a written request for a full administrative review hearing must be submitted in writing to: Alabama Department of Public Health; Bureau of Family Health Services; Division of WIC; 201 Monroe Street, The RSA Tower, Suite 1300; P.O. Box 303017; Montgomery, AL 36104 36130-3017.

~~(d) 5- The WIC program Department shall give an aggrieved vendor or local agency at least 10 days advance written notice of the time, place, and date of the full administrative review hearing. A hearing must be scheduled within 30 days from the date the request is received by the WIC program.~~

~~(e) 6- An aggrieved vendor shall have the opportunity to present its case and at least or local agency has one opportunity to reschedule the administrative review date upon specific written request.~~

~~(f) 7- An aggrieved vendor shall have the opportunity or local agency has the right to cross-examine adverse witnesses. When If necessary to protect the identity of WIC program Department investigators, such examination may be conducted behind a protective screen or other device (also referred to as an "in camera" examination).~~

~~8. The opportunity to be represented by counsel at the full administrative review hearing.~~

~~9. The opportunity to examine prior to the full administrative review hearing the evidence upon which the State agency's action is based.~~

~~(g)10. An aggrieved vendor or local agency has the right to an impartial decision-maker, whose determination is based solely on whether the State agency Department has correctly applied Federal federal and State state statutes, regulations, policies, and procedures governing the program WIC Program, according to the evidence presented at the review.~~

~~(h)11. Written The Department shall provide written notification of the review decision, including the basis for the decision, within 90 days from the date of receipt of a vendor's request for an administrative review or within 60 days from the date of receipt of a local agency's request for an administrative review. This time-frame is only an These time frames are only administrative requirements for the State agency Department and does do not provide a basis for overturning the State agency's Department's adverse action if a decision is not made within the specified time frame.~~

~~(3e) Abbreviated Review Hearings.— The State-WIC Program Department provides full administrative reviews in all adverse actions referenced in 7 CFR §246.18(a)(1)(ii). Therefore, pursuant to 7 CFR §246.18(A)(1)(ii) and 7 CFR §246.18(c), abbreviated reviews are not offered available to aggrieved parties.~~

~~(d) Informal Conferences.— The purpose of informal conferences is to review the evidence supporting the adverse action, to answer questions by the vendor or his/her representatives and to verify appropriateness of the adverse action. At his/her discretion, the aggrieved vendor may choose not to have an informal conference. A request for an informal conference shall not be considered a request for a formal hearing; however, the aggrieved vendor may request both an informal conference and a hearing after notification of the adverse action. If the adverse action is resolved at the informal conference, the request for a hearing may be withdrawn by the aggrieved vendor. If the adverse action is not resolved through the~~

~~informal conference, all testimony and evidence disclosed at the informal conference may be introduced at any subsequent full administrative review hearing. The informal conference is not considered part of the formal appeal process.~~

(4e) The hearing official and WIC director have the authority to impose a civil monetary penalty or fine in lieu of disqualification if inadequate participant access exists. The calculations used to compute the amount(s) is found in 7 CFR, ~~Part~~ §246.12 and §22-12C-5, Code of Ala. 1975. Civil monetary penalties may not be imposed in lieu of disqualification for third or subsequent sanctions for violations listed in the Vendor Sanctions, Category VII, Category VI, and Category V. A civil monetary penalty or fine ~~shall~~ may not exceed \$11,000.00 for each violation. The total amount of civil monetary penalty imposed for violations investigated as part of a single investigation ~~shall~~ may not exceed \$49,000.00.

(5~~f~~) Continuing responsibilities. Appealing an action does not relieve a vendor or local agency that is permitted to continue program operations while its appeal is in process from the responsibility of continued compliance with the terms of any written agreement with the ~~State agency~~ Department. The WIC ~~Program Director~~ director shall allow a vendor to continue in the ~~program~~ WIC Program while an administrative review is in process, except for a vendor disqualified due to trafficking conviction and a vendor disqualified based upon a ~~food-stamp program~~ SNAP disqualification, which ~~shall~~ is not be subject to an administrative or judicial review under the program.

Author: James M. Richard; Carolyn Battle; Stacey Neumann
Statutory Authority: Code of Ala. 1975, §§22-2-2(6), 22-12c-2 and 3.

History: ~~History:~~ **New Rule:** Filed October 24, 1995; effective November 28, 1995. **Repealed and New Rule:** Filed October 20, 1999; effective November 24, 1999. **Amended:** Filed May 16, 2002; effective June 20, 2002. **Repealed and New Rule:** Filed November 20, 2003; effective December 25, 2003. **Repealed and New Rule:** Filed August 20, 2004; effective September 24, 2004. **Amended:** Filed November 8, 2006; effective December 13, 2006. **Amended:** Filed April 16, 2012; effective May 12, 2012.

420-10-2-.07 Appeal Procedures For Participants.

(1a) Availability of hearings. The ~~State agency~~ Department shall provide a hearing procedure through which any individual may appeal a ~~State state~~ or local agency action ~~which that~~ results in a claim against the individual for repayment of the cash value of improperly issued benefits or results in the individual's denial of participation or disqualification from the WIC Program.

~~(b) Hearing system. The State agency shall provide for a hearing at the State level which permits the individual an administrative appeal of an adverse decision by the state WIC program.~~

(2e) Informal resolution of adverse action. ~~the~~ The aggrieved party should discuss his or her problem with a staff member of the county health department, WIC clinic, area office, or State WIC Program prior to requesting a formal hearing. Staff members at the local clinic, area office or State WIC ~~program will in no way~~ Program may not limit or interfere with a person's right to request an appeal hearing.

(3e) Notification of appeal rights. At the time of a claim against an individual for improperly issued benefits or at the time of participation denial or of disqualification from the WIC Program, the ~~State WIC program~~ Department shall inform each individual in writing of the right to a fair hearing, of the method by which a hearing may be requested, and that any positions or arguments on behalf of the individual may be presented personally or by a representative such as a relative, friend, legal counsel, or other spokesperson. Such notification is not required at the expiration of a certification period. Notification ~~shall be made is~~ required at:

~~(a)1-~~ Time of Application, Income. When ~~assessing a client's income and it is determined that the income~~ exceeds the maximum allowed for the ~~program~~ WIC Program, the client must be informed of his ineligibility and how an appeal may be requested using the WIC Notification Form, ADPH-WIC-119.

~~(b)2-~~ Time of Application, Medical Assessment. If after screening, the client does not meet the medical requirements for participation in the ~~WIC program~~ Program, the client must be informed of his ineligibility and how an

appeal may be requested using the WIC Notification Form, ADPH-WIC-119.

~~(c)3-~~ Termination from a Program. When terminating a client from the WIC ~~program~~ Program, the client must be ~~made aware~~ informed of how to request an appeal. Use the WIC Notification Form, ADPH-WIC-119, when removing a participant between certification or a time of categorical ineligibility. The Except for a client who will be disqualified for not picking up cash-value vouchers, supplemental foods, or food instruments in accordance with 7 CFR §246.7(h)(3)(i), the client must be ~~given~~ receive 15 days advance notice of this adverse action.

~~(d)4-~~ Suspension from the Program. Suspension shall be done through formal written notification. ~~The State WIC program will not be responsible for any expenses incurred in the employment of such representative or for any costs incurred by the aggrieved party related to the appeal.~~ The Except for a client who will be disqualified for not picking up cash-value vouchers, supplemental foods, or food instruments in accordance with 7 CFR §246.7(h)(3)(i), the client must be ~~given~~ receive 15 days advance notice of this adverse action.

~~(e)5-~~ Denial of Participation. Use the WIC Notification Form ADPH-WIC-119 at certification attempt to inform the client why he or she is not being allowed to participate and how an appeal may be requested.

~~(4e)~~ Request for hearing. A person may request an appeal hearing by contacting any staff member in the county health department, WIC clinic, or area office or the ~~WIC Program Director~~ director. A request may be made by any clear verbal or written expression. If the request is made verbally, a staff member will assist in reducing the request to writing so that a record is available. Written appeal hearing requests ~~shall~~ must be sent to the following address: Alabama Department of Public Health; Bureau of Family Health Services; Division of WIC; 201 Monroe Street, The RSA Tower, Suite 1300; P.O. Box 303017; Montgomery, AL 36104 36130-3017.

~~(5f)~~ Time limit for request. A request for a hearing must be made within 60 days from the date of the receipt of the notification of the adverse action.

(6g) Acknowledgment of request. The Division of WIC shall provide written acknowledgment of the receipt of the request for an appeal hearing within ~~(10)~~ ten days from the date the request is received.

(7h) The person requesting an appeal hearing ~~will be provided~~ must receive at least ~~ten (10)~~ ten days advance written notice of the time and place of the formal hearing.

(8i) ~~A hearing shall be held within twenty-one (21) calendar~~ The Department shall hold a hearing within 21 calendar days from the date the request is first received, unless that time period is waived by the aggrieved party. The place of the hearing ~~shall~~ must be accessible to the appellant.

(9j) Within 45 days of the receipt of the request for the hearing, unless this time period is waived by appellant, the ~~State WIC program~~ Department shall notify the appellant or representative in writing of the decision and the reasons for the decision. If the decision is in favor of the appellant and benefits were denied or discontinued, benefits ~~shall~~ must begin immediately. If the decision concerns disqualification and is in favor of the ~~State WIC program~~ Department, as soon as administratively feasible, the continued benefits ~~shall be terminated~~ terminate, as decided by the hearing official. If the decision regarding repayment of benefits by the appellant is in favor of the ~~State WIC program~~ Department, the ~~State WIC program~~ Department shall resume its efforts to collect the claim. Time frames established for issuing review decisions are only administrative requirements and do not provide a basis for overturning the adverse action if a decision is not rendered within the specified time period. The decision of the hearing official is the final state agency action.

(10k) Denial or dismissal of request. The State may deny or dismiss a request for a hearing if:—

(a)1- The request is not received within the time limit set by the ~~State agency~~ Department;

(b)2- ~~The request is withdrawn in writing by the appellant or a representative of the appellant~~ withdraws the request in writing;

~~(c)3-~~ The appellant or representative fails, without good cause, to appear at the scheduled hearing; or

~~(d)4-~~ The appellant has been denied participation by a previous hearing and cannot provide evidence that circumstances relevant to WIC Program eligibility have changed in such a way as to justify a hearing.

~~(11)~~ Continuation of benefits. Except for participants whose certification period has expired, participants who appeal the termination of benefits within the 15 days advance adverse notice period provided by 7 CFR §246.7(j)(6) ~~shall~~ must continue to receive WIC Program benefits until the hearing official reaches a decision or the certification period expires, whichever occurs first. Applicants who are denied benefits at initial certification or because of the expiration of their certification may appeal the denial, but ~~shall~~ may not receive benefits while awaiting the hearing.

Author: James M. Richard; Carolyn Battle; Stacey Neumann
Statutory Authority: Code of Ala. 1975, §§22-2-2(6), 22-12c-2 and 3.

History: **New Rule:** Filed October 24, 1995; effective November 28, 1995. **Repealed and New Rule:** Filed October 20, 1999; effective November 24, 1999. **Repealed and New Rule:** Filed November 20, 2003; effective December 25, 2003. **Repealed and New Rule:** Filed August 20, 2004; effective September 24, 2004.

420-10-2-.08 **Hearing Procedures.** ~~The following hearing procedures apply to the formal administrative hearings regarding adverse actions taken against WIC vendors, local agencies, or and participants must adhere to the Hearing of Contested Cases rules found in Chapter 420-1-3 of the Alabama Administrative Code unless those rules are contrary to this Chapter or Part 246, Title 7 of the Code of Federal Regulations.~~

~~(a) Rules of procedure. The State WIC program shall process each request for a hearing under uniform rules of procedure referenced herein and shall makes these rules of procedure available for public inspection and copying.~~

~~(ab) Hearing official. Hearings shall be conducted by an An impartial official who does not have any personal stake or involvement in the decision and who was~~

not directly involved in the initial determination of the action being contested shall conduct the hearings. A hearing official appointed by the State Health Officer shall preside over all formal administrative hearings. The hearing officer shall serve as trier of fact. Findings of fact shall be based solely on the evidence in the record and on matters officially noticed in the record. The For participant hearings, the hearing official shall-

1. ~~Open the record and receive appearances;~~
2. ~~Administer oaths or affirmations if required by the State;~~
3. ~~Ensure that all relevant issues are considered;~~
4. ~~Request, receive and make part of the hearing record all evidence determined necessary to decide the issues being raised;~~
5. ~~Regulate the conduct and course of the hearing consistent with due process to ensure an orderly hearing;~~
6. ~~Interrogate witnesses, if deemed necessary;~~
7. ~~Rule on motions and objections;~~
8. ~~Require oral arguments and submission of briefs and other authority when necessary;~~
9. ~~Order order, where relevant and necessary, an independent medical assessment or professional evaluation from a source mutually satisfactory to the appellant and the Department. State agency (participant hearings only); and~~
10. ~~Render a hearing decision which will resolve the dispute.~~

(b e) Conduct of the hearing. The ~~State WIC program~~ Department shall also provide the appellant or representative an opportunity to:-

1. Examine, prior to and during the hearing, the documents and records presented to support the decision under appeal;

2. Be assisted or represented by an attorney or other persons at the appellant's expense;
3. Bring witnesses;
4. Advance arguments without undue interference;
5. Question or refute any testimony or evidence, including an opportunity to confront and cross-examine adverse witnesses; and
6. Submit evidence to establish all pertinent facts and circumstances in the case.

~~(d) Evidence in formal administrative hearings. The only evidence that the Hearing Officer shall consider in rendering a decision shall be sworn testimony and exhibits accepted in the hearing or as otherwise agreed upon among the parties.~~

~~1. Hearsay evidence. Hearsay testimony shall be allowed in any hearing so long as it has probative value as justice requires in the opinion of the hearing officer.~~

~~2. Affidavits and other written evidence.~~

~~(i) Affidavits shall be admissible in any hearing so long as they have probative value and the affiant, for reasons of impossibility or impracticality, cannot be present for testimony at the hearing. The burden of impossibility or impracticality shall be upon the party offering the affidavit.~~

~~(ii) Signed letters from physicians on the physician's letterhead shall be considered an affidavit.~~

~~(c)3. Depositions. A deposition where for which all parties have been given received notice of the taking of the deposition shall be admitted is admissible into evidence, if any party so requests, subject to evidentiary objections properly preserved during the deposition.~~

~~4. Official Notice. All statutes of the United States and of the State of Alabama and all published rules and regulations of federal agencies, the State Board~~

~~of Health or of other Alabama administrative agencies shall be deemed admissible by mere identification of the statute or regulation.~~

~~5. Admissibility. All evidence, whether documentary or ore tenus, to be admissible, shall be germane, material and relevant to the issues brought out by the notice of adverse action, complaint, answer or notice of hearing. Evidence that might otherwise be germane, material or relevant, if found to be repetitious, may at the discretion of the hearing officer, be disallowed.~~

~~6. Documentary evidence. Any document or legible copy of said document shall be admissible if the document or copy shall be proven to be part of the business records of any party, person, company or other legal entity.~~

~~7. Witnesses. The hearing officer shall upon request of a party issue subpoenas to compel any person to testify under oath at any hearing in the same manner as in the civil courts. Employees of the Alabama Department of Public Health shall be made available for testimony upon timely request of a party.~~

~~8. The rules of evidence found in §41-22-13(1)-(4), Code of Ala. 1975, shall apply to formal administrative hearings of WIC cases.~~

~~(e) The burden of going forward with the evidence shall be on the party initiating the adverse action who may open and close the evidentiary portion of the proceedings. The burden of proof rests with the Department of Public Health, WIC Division.~~

~~(f) The proceedings of the formal evidentiary hearing shall be recorded and transcribed by a certified court reporter. Such record shall be submitted by the hearing officer to the State WIC Program Director as a part of the record of the hearing.~~

(dg) Expenses of appeal.— Any expenses incurred in retaining representation for an appeal shall be borne by are the sole responsibility of the person requesting the hearing. Neither the State of Alabama, its political subdivisions, local clinic, area office, nor the Division of WIC ~~can~~ may pay or reimburse for representation, travel, or other expenses incurred by the appellant.

(eh) Fair hearing decisions.

1. ~~Decisions of the~~ The hearing official shall be based ~~base decisions~~ upon the application of appropriate ~~Federal federal~~ law, regulations, and policy as related to the facts of the case as established in the hearing record. The verbatim transcript or recording of testimony and exhibits, or an official report containing the substance of what transpired at the hearing, together with all papers and requests filed in the proceeding, constitute the exclusive record for a final decision by the hearing official.

2. ~~The~~ In the decision, ~~by~~ the hearing official shall summarize the facts of the case, specify the reasons for the decision, and identify the supporting evidence and the pertinent regulations or policy. The decision ~~shall~~ must become a part of the record.

3. ~~The State WIC program~~ Department shall make all hearing records and decisions available for public inspection and copying; however, the names and addresses of participants and other members of the public ~~shall be kept~~ are confidential.

4. Finality and effective date of decisions. In a participant's formal administrative appeal, the hearing officer's decision is the final State state agency action. In a vendor or local agency's formal administrative appeal, the State Health Officer's decision is the final state agency action. If the adverse action under review has not already taken effect, the ~~WIC program~~ Department shall make the action effective on the date of receipt of the review decision ~~by the vendor.~~ The decision of the hearing official will be binding on the Division of WIC, the local clinic and area office.

~~(i) Application for rehearing. Any party aggrieved by a decision of a hearing officer who desires to have the same modified or set aside may, within 15 days after the entry of the order, file an application for rehearing, which shall specify in detail the grounds for relief sought therein and the authorities in support thereof.~~

~~1. The filing of such an application for rehearing shall not extend, modify, suspend or delay the~~

~~effective date of the adverse action. The adverse action shall take effect as stated in these rules unless and until said application shall be granted or until said order shall be superseded, modified, or set aside in a manner provided by law.~~

~~2. Such application for rehearing will lie only if the hearing officer's decision, the final decision of the agency, is:~~

~~(i) In violation of constitutional or statutory provisions;~~

~~(ii) In excess of the statutory authority of the State Board of Health;~~

~~(iii) Made upon unlawful procedure;~~

~~(iv) Affected by other error of law;~~

~~(v) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or~~

~~(vi) Unreasonable, arbitrary or capricious or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion.~~

~~3. Copies of such application for rehearing shall be served on all parties of record, who may file replies thereto.~~

~~4. Within 30 days from the filing of an application, the State WIC program may in its discretion issue an order:~~

~~(i) Setting a hearing on the application for a rehearing which shall be heard as soon as practicable; or~~

~~(ii) With reference to the application without a hearing; or~~

~~(iii) Granting or denying the application.~~

~~5. If the State WIC program director enters no order whatsoever regarding the application within the 30-day period, the application shall be deemed to have been denied as of the expiration of the 30-day period.~~

~~6. In no event shall a party be required to file an application for rehearing as a condition of applying for judicial review.~~

~~(j) Service on aggrieved party.~~

~~1. Service of any document required to be served on an adverse party, may be made by any of the following methods unless a specified method is required by law:~~

~~(i) by certified mail, return receipt requested; or~~

~~(ii) by any sheriff or another person authorized to make service of process in civil proceedings; or~~

~~(iii) by any representative of the Alabama Department of Public Health, or~~

~~(iv) by any other method allowable under the Alabama Rules of Civil Procedure as such may be amended.~~

~~2. If service of process is refused or unclaimed, and the certified mail receipt or the return of the person serving the process so indicates, the State WIC Program may serve the document by first class mail addressed to the adverse party at his last known address as shown in the State WIC Program records. Service will be deemed complete three (3) days after the depositing of the same in the United States Mail.~~

~~3. Where the rule does not require "service," documents may be mailed by first class mail or hand-delivered.~~

~~(fk) Judicial review.— If additional administrative appeals are either unavailable or have been exhausted, the State WIC program Department shall explain the right to pursue judicial review of the decision.~~

~~1. A judicial review of an adverse action may be sought pursuant to §41-22-20, Code of Ala 1975.~~

~~2. All proceedings for review may be instituted by filing a notice of appeal or review and a cost bond with the agency to cover the reasonable costs of preparing the transcript of the proceeding under review,~~

~~unless waived by the agency or the court on a showing of substantial hardship.~~

~~3. A petition shall be filed either in the Circuit Court of Montgomery County or in the circuit court of the county in which the agency maintains its headquarters, or unless otherwise specifically provided by statute, in the circuit court~~

~~of the county where a party other than an intervener resides, or if a party, other than an intervener, is a corporation, domestic or foreign, having a registered office or other business office in this state, then in the county of the registered office or principal place of business within this state.~~

~~4. The notice of appeal or review shall be filed within 30 days after receipt of the notice of or other service of the final decision of the State WIC Program upon the aggrieved party/appellant or, if a rehearing is requested, within 30 days after the receipt of the notice of or other service of the decision of the agency thereon. The petition for judicial review in the circuit court shall be filed within 30 days after the filing of the notice of appeal or review.~~

~~(1) The official record. The official record in a formal administrative hearing shall include:~~

~~1. All pleadings, motions, and intermediate rulings;~~

~~2. All evidence received or considered and all other submissions; provided, in the event that evidence in any proceeding may contain proprietary and confidential information, steps shall be taken to prevent public disclosure of that information;~~

~~3. A statement of all matters officially noticed;~~

~~4. All questions and offers of proof, objections, and rulings thereon;~~

~~5. Any decision, opinion, or report by the hearing officer at the hearing; and~~

~~6. All staff memoranda or data submitted to~~

~~the hearing officer in connection with his consideration of the case unless such memoranda or data contains information of a proprietary and confidential nature, it shall be protected by the agency from public disclosure.~~

~~(m) Appeal of final judgment of circuit court. Pursuant to §41-22-21, Code of Ala. 1975, an aggrieved party may obtain a review of any final judgment of the circuit court under Section 41-22-20, Code of Ala. 1975, by appeal to the appropriate court to which appeal or review lies. The appeal shall be taken within 42 days of the date of the entry of the judgment or order appealed from as in other civil cases.~~

~~(g~~n~~) Records Retention. Records~~ The Department shall retain records of adverse actions and official records of an administrative hearing shall be retained for a period of five (5) years by the Division of WIC.
Author: James M. Richard; Carolyn Battle; Stacey Neumann
Statutory Authority: Code of Ala. 1975, §§22-2-2(6), 22-12c-2 and 3.

History: **New Rule:** Filed October 24, 1995; effective November 28, 1995. **Repealed and New Rule:** Filed October 20, 1999; effective November 24, 1999. **Repealed and New Rule:** Filed November 20, 2003; effective December 25, 2003. **Repealed and New Rule:** Filed August 20, 2004; effective September 24, 2004.

420-10-2-.09 Affirmative Action.

(1) Alabama WIC agencies are providing services in all of the ~~sixty seven~~ 67 counties ~~which that~~ are administered through the local clinics. The Affirmative Action Plan will be used as a method to reallocate existing funds, expand the WIC Program if additional funds are received, and target benefits to priorities of participants highest in need. The reallocations and expenses will be to the neediest one-third. All of these efforts have been made ~~in order~~ to increase the access points in geographically strategic areas of the ~~State~~ state.

(2) Selection criterion for local agencies is based on the availability of health and administrative services. Selection is made on the priorities listed in ~~the Federal Register, 7 CFR, Part 246, Section 246.5(d)~~ 7 CFR §246.5(d). Private agencies will be reviewed for civil rights compliance.

Author: James M. Richard; Carolyn Battle; Stacey Neumann

Statutory Authority: Code of Ala. 1975, §§22-2-2(6), 22-12c-2 and 3.

History: **New Rule:** Filed October 24, 1995; effective November 28, 1995. **Repealed and New Rule:** Filed October 20, 1999; effective November 24, 1999. **Repealed and New Rule:** Filed November 20, 2003; effective December 25, 2003. **Repealed and New Rule:** Filed August 20, 2004; effective September 24, 2004.

420-10-2-.10 Audits.

(1) **Private Non-Profit Agencies.**— The Alabama Department of Public Health, WIC Division, will coordinate and perform internal reviews to ~~assure~~ ensure proper administration of WIC Program funds on an annual basis, and in accordance with existing contracts.

(a) A summary of audit findings and recommended corrective actions will be reviewed with the WIC ~~Program Director~~ director and given to the specified agency administrator.

(b) A written response will be requested from the agency within a specified time frame. The agency response must state the corrective action taken or if planned, submitted with a reasonable time period for completion.

(c) The WIC Division staff will be responsible for follow-up to ensure that appropriate corrective actions are in place and operating as planned. This follow-up will be conducted during regular monitoring visits.

(d) The WIC Division will provide technical assistance and training as needed to correct audit deficiencies.

Author: James M. Richard; Carolyn Battle; Stacey Neumann

Statutory Authority: Code of Ala. 1975, §§22-2-2(6), 22-12c-2 and 3.

History: **New Rule:** Filed October 24, 1995; effective November 28, 1995. **Repealed and New Rule:** Filed October 20, 1999; effective November 24, 1999. **Repealed and New Rule:** Filed November 20, 2003; effective December 25, 2003. **Repealed and New Rule:** Filed August 20, 2004; effective September 24, 2004.

420-10-2-.11 **Severability**. The parts, sections, paragraphs, and provisions of this chapter are severable. Should any portion thereof be ruled unconstitutional or unenforceable by any court, the said ruling shall not ~~effect~~ affect any other provisions of this chapter not ruled upon.

Author: James M. Richard; Carolyn Battle; Stacey Neumann

Statutory Authority: Code of Ala. 1975, §§22-2-2(6), 22-12c-2 and 3.

History: **New Rule:** Filed August 20, 2004; effective September 24, 2004.

420-10-2-.12 **Conflicts Of Regulations**. To the extent that these regulations conflict with the Code of Federal Regulations as adopted herein, the provisions of the Code of Federal Regulations shall prevail.

Author: Wendy Blackmon; Carolyn Battle; Stacey Neumann

Statutory Authority: Code of Ala. 1975, §§22-2-2(6), 22-12c-2 and 3.

History: **New Rule:** Filed August 20, 2004; effective September 24, 2004.

420-10-2-.13 **Repealer**. All rules promulgated and adopted by the Board which are in conflict with this Chapter or any provisions thereof are hereby expressly repealed.

Author: Wendy Blackmon

Statutory Authority: Code of Ala. 1975, §§22-2-2(6), 22-12c-2 and 3.

History: **New Rule:** Filed August 20, 2004; effective September 24, 2004.

CHAPTER 420-10-2
APPENDIX A

Data Sources and Methodologies for Determining if a Vendor is Expected to Meet the More Than 50 Percent Criterion

Indicator	Data Sources and Methodologies
<p>The vendor applicant currently has one or more WIC-authorized stores where WIC food sales are more than 50 percent of total annual food sales.</p>	<ol style="list-style-type: none"> 1) Compare WIC redemptions and food sales in existing stores owned by applicant vendor as reported by applicant, documented in tax records or other verifiable source. 2) Compare WIC redemptions to Food Stamp Program (FSP) <u>Supplemental Nutrition Assistance Program (SNAP)</u> redemptions in existing stores owned by applicant vendor. If WIC redemptions are greater than FSP <u>SNAP</u> redemptions, WIC revenue may exceed the more than 50 percent criterion. In this case, the State <u>state</u> agency must consider documentation that shows the amount of revenue that the vendor obtained from other sources (e.g., cash and credit sales). 3) If vendor applicant is currently authorized in another State <u>state</u>, contact State <u>state</u> to determine if vendor applicant meets the more than 50 percent criterion in that State <u>state</u>.
<p>The vendor applicant is expected to accept WIC as the primary form of payment for the sale of supplemental food items.</p>	<ol style="list-style-type: none"> 1) Request percentage of anticipated food sales by type of payment, i.e., cash, FSP <u>SNAP</u>, WIC, credit/debit, etc. 2) To the extent possible, validate information against other data sources.
<p>The vendor applicant is expected to or currently offers for sale primarily WIC-authorized food items (i.e., does not offer a variety of foods in the staple food groups—meat, poultry, or fish; bread or cereal; vegetables or fruits; and dairy).</p>	<ol style="list-style-type: none"> 1) Request inventory invoices to substantiate foods that have been purchased for sale. 2) Determine if a variety of foods in each of the following staple food groups will be or are currently offered for sale on a continuous basis: meat, poultry or fish; bread or cereal; vegetables or fruits; and dairy. (Continuous basis means that on any given day of operation, a store must offer for sale and normally display in a public area, qualifying staple food items, with no fewer than three different varieties of food items in each of the four staple food categories.) 3) Request percentage of foods intended to be offered for sale in each category, i.e., 40% <u>40 percent</u> dairy, 2% <u>2 percent</u> meat, poultry or fish, etc.
<p>The vendor applicant is dependent upon WIC authorization before the store can open for business.</p>	<p>Request date the store will open for continuous business on vendor application.</p>

Author: James M. Richard; Wendy Blackmon; ~~Diane~~
Dana Driscoll ; Carolyn Battle; Stacey Neumann
Statutory Authority: Code of Ala. 1975, §§22-2-2(6), 22-
12C-2 and 3; 7 CFR §§246.12, 246.18.
History: New Rule: Filed September 21, 2005; effective
October 26, 2005.