

NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES
NOTICE OF PUBLIC HEARING

November 5, 2020
10:00 a.m. Central Time
Nebraska State Office Building – Lower Level A
301 Centennial Mall South, Lincoln, Nebraska
Phone call information: 888-820-1398; Participant code: 3213662#

The purpose of this hearing is to receive comments on proposed changes to Title 181, Chapter 4 of the Nebraska Administrative Code (NAC) – *Special Supplemental Nutrition Program for Women, Infants and Children (WIC Program) and Commodity Supplemental Food Program (CSFP) Fair Hearing Procedures*. The proposed changes update the definitions and program requirements to conform to current federal regulations; remove duplicate statutory and regulatory language from the regulations; correct typographical and spelling errors; and update formatting.

Authority for these regulations is found in Neb. Rev. Stat. § 81-3117(7).

Due to the current public health crisis, the agency will enforce any Directed Health Measure Order on the size of gatherings that is in effect at the time of the hearing. In order to encourage participation in this public hearing, a phone conference line will be set up for any member of the public to call in and provide oral comments.

Interested persons may provide verbal comments by participating via phone conference line by calling 888-820-1398; Participant code: 3213662#.

Interested persons may provide written comments by mail, fax, or email, no later than the day of the hearing to: DHHS Legal Services, PO Box 95026, Lincoln, NE 68509-5026, (402) 742-2382 or dhhs.regulations@nebraska.gov, respectively.

A copy of the proposed changes is available online at <http://www.sos.ne.gov>, or by contacting DHHS at the mailing address or email above, or by phone at (402) 471-8417. The fiscal impact statement for these proposed changes may be obtained at the office of the Secretary of State, Regulations Division, 1201 N Street, Suite 120, Lincoln, NE 68508, or by calling (402) 471-2385.

Auxiliary aids or reasonable accommodations needed to participate in a hearing can be requested by calling (402) 471-8223. Individuals with hearing impairments may call DHHS at (402) 471-9570 (voice and TDD) or the Nebraska Relay System at 711 or (800) 833-7352 TDD at least 2 weeks prior to the hearing.

FISCAL IMPACT STATEMENT

Agency: Department of Health and Human Services	
Title: 181	Prepared by: Sara Morgan
Chapter: 4	Date prepared: 6-14-19
Subject: WIC and CSFP Fair Hearing Procedures	Telephone: 402-471-0196

Type of Fiscal Impact:

	State Agency	Political Sub.	Regulated Public
No Fiscal Impact	(<input checked="" type="checkbox"/>)	(<input checked="" type="checkbox"/>)	(<input checked="" type="checkbox"/>)
Increased Costs	(<input type="checkbox"/>)	(<input type="checkbox"/>)	(<input type="checkbox"/>)
Decreased Costs	(<input type="checkbox"/>)	(<input type="checkbox"/>)	(<input type="checkbox"/>)
Increased Revenue	(<input type="checkbox"/>)	(<input type="checkbox"/>)	(<input type="checkbox"/>)
Decreased Revenue	(<input type="checkbox"/>)	(<input type="checkbox"/>)	(<input type="checkbox"/>)
Indeterminable	(<input type="checkbox"/>)	(<input type="checkbox"/>)	(<input type="checkbox"/>)

Provide an Estimated Cost & Description of Impact:

State Agency: N/A

Political Subdivision: N/A

Regulated Public: N/A

If indeterminable, explain why:

TITLE 181 SPECIAL HEALTH PROGRAMS

CHAPTER 4 SPECIAL SUPPLEMENTAL NUTRITION PROGRAM FOR WOMEN, INFANTS AND CHILDREN (WIC PROGRAM) AND THE COMMODITY SUPPLEMENTAL FOOD PROGRAM (CSFP) FAIR HEARING PROCEDURES

001. SCOPE AND AUTHORITY. These regulations implement Nebraska Revised Statute (Neb. Rev. Stat.) §§ 71-2225 to 71-2230.

002. DEFINITIONS. Definitions in 7 Code of Federal Regulations (CFR) Part 246 and Part 247 and the following definitions apply to this chapter.

002.01 ADVERSE ACTION. Any action by the local agency or the Department which results in a) a claim against the participant for repayments of the cash value of improperly issued benefits, b) the denial of participation in the program to an applicant, or c) the participant's disqualification from the program.

002.02 PROGRAM. The Special Supplemental Nutrition Program for Women, Infants and Children or the Commodity Supplemental Food Program.

002.03 REQUEST FOR HEARING. Any clear expression, either verbal or written, by the applicant or participant, the applicant or participant's parent, caretaker, or other representative that he or she desires an opportunity to present his or her case to the Department or other higher authority.

003. RIGHT OF FAIR HEARING. The Department shall grant the right of fair hearing whenever an applicant or a participant is the subject of an adverse action by a local agency.

003.01 NOTICE OF APPEAL RIGHTS. The local agency taking the adverse action shall inform each applicant or participant in writing of the adverse action and include the information required by 7 CFR 246.9 or 247.33 as applicable. In the event a participant is disqualified or a claim is made for cash repayment, notification of such action shall be given at least (15) days before the effective date of the adverse action. In the event of dual participation in more than one program, the adverse action is effective immediately.

003.02 REQUEST FOR HEARING. The local agency shall not limit or interfere with the applicant or participant's freedom to request a hearing.

003.02(A) REQUEST SUBMISSION. The request for a fair hearing shall be submitted to the local agency and then transmitted to the Department or may be submitted directly to

the Department. The Local Program Director is responsible for sending the request to the Department.

003.02(B) REQUEST FORMAT. The request for hearing shall be signed by the applicant, the participant, or the applicant or participant's parent, caretaker, or other representative, and shall contain sufficient information to identify the applicant or participant and the adverse action regarding for which the request is being made. No particular written form shall be required. The local agency or the Department shall put the request for a hearing in writing, if necessary.

004. NOTIFICATION OF ADVERSE ACTION. The local agency taking the adverse action shall inform each applicant or participant in writing of the adverse action and include the information required by 7 CFR Part 246.9 or 247.33 as applicable.

004.01 INITIAL APPLICATION OR DENIAL. The written notice of adverse action shall include the cause or causes for such action, the effective date of the action, and applicant's appeal rights as set forth in this chapter. Such notification shall be provided by the agency taking the adverse action.

004.02 ADVERSE ACTION. Whenever adverse action is taken against a participant disqualifying him or her from the program, such participant shall be provided with 15 days advance written notice of the adverse action, the cause or causes for such action, the effective date of the action, and the participant's right to request a hearing as described in this chapter. If a claim is pursued against a participant seeking repayment of the cash value of improperly issued benefits, such participant shall be provided with the information stated above and, in addition, the reason(s) for the claim, and the value of the improperly issued benefits which must be paid. Such notification shall be provided by the agency taking the adverse action.

005. TIME LIMIT FOR REQUEST. Adverse actions shall follow appropriate timelines as described below.

005.01 PERIOD FOR REQUESTING A HEARING. An applicant or participant who has been notified of adverse action may request a fair hearing before the Department as provided in 7 CFR Part 246.9 or 247.33 as applicable.

005.02 DENIAL OR DISMISSAL OF REQUEST. The Department shall not deny or dismiss a request for a fair hearing except as provided in 7 CFR Part 246.9 or 247.33 as applicable.

005.03 CONTINUATION OF BENEFITS. A participant who appeals a disqualification notice before the disqualification takes effect shall continue to receive program benefits until the hearing official reaches a decision or the certification period expires, whichever occurs first. A participant whose certification period has expired or who becomes categorically ineligible may not receive benefits after the certification period has ended. An applicant either at initial certification or whose certification has expired or has become categorically ineligible during the certification period may not receive benefits during the hearing process.

005.04 TIMING OF NOTICE AND HEARING. The Department shall set the date, time, and place of the hearing within seven (7) calendar days after it receives a request for a fair hearing.

005.04(A) NOTICE. The Department shall send the notice of hearing to the applicant or participant to ensure receipt no later than ten (10) calendar days before the hearing, using certified or registered mail.

005.04(B) HEARING. A hearing shall be held within twenty-one (21) calendar days of receipt of the request for a fair hearing, unless the appellant requests a continuance or the hearing officer orders a continuance, as provided in this chapter.

006. RESCHEDULING OPPORTUNITY. An applicant or participant shall be provided with one opportunity to reschedule the hearing date upon specific written request submitted to the Department. The hearing date may also be rescheduled at the order of the hearing official or officer. Any continued hearing shall be held within thirty-one (31) calendar days of the request for hearing, unless good cause is demonstrated for not holding the hearing within such period of time.

007. RIGHTS OF APPLICANT OR PARTICIPANT. The Department shall specifically provide the appellant or representative an opportunity to examine the documents and record appeal, prior to and during the hearing. Appellants or representatives shall also have the opportunity to be represented or assisted by a person other than the participant or applicant as follows:

- (A) Be represented by legal counsel, which means any person licensed to practice law in Nebraska;
- (B) Be assisted by other persons, such as a relative or friend, except that such other person may not provide legal advice, serve as an advocate or spokesperson, question witnesses or otherwise assume duties customarily performed by persons engaged in the practice of law;
- (C) Bring witnesses;
- (D) Advance arguments without undue interference;
- (E) Question or refute any testimony or evidence, including an opportunity to confront and cross-examine adverse witnesses; and
- (F) Submit evidence to establish all pertinent facts and circumstances in the case.

008. HEARING DECISIONS. On the basis of the evidence presented at the hearing, the determination to take adverse action shall be affirmed, modified, or set aside. A copy of the decision setting forth the findings of fact and reasons upon which the decision is based shall be sent by either registered or certified mail to the applicant or participant at his or her last address of record within forty-five (45) days of the receipt of the request for a hearing. This decision shall become final thirty (30) days after the copy is mailed unless the applicant or participant appeals within such thirty day period in accordance with the Administrative Procedure Act, Neb. Rev. Stat. §§ 84-901 to 84-920.

009. POST DECISION BENEFITS. Benefits to the applicant or participant shall be handled as follows:

009.01 DECISIONS FOR APPLICANT OR PARTICIPANT. If the decision is in favor of the applicant or participant and benefits were denied or discontinued, benefits shall begin immediately.

009.02 DISQUALIFICATION. If the decision concerns disqualification and is in favor of the agency, the local agency shall terminate continued benefits, as indicated in the decision, as soon as administratively feasible.

009.03 REPAYMENT OF BENEFITS. If the decision regarding repayment of benefits by the participant is in favor of the agency, the local agency or the Department shall resume efforts to collect the claim, even during the pendency of judicial review.

~~TITLE 181—NEBRASKA ADMINISTRATIVE CODE, CHAPTER 4~~

~~NEBRASKA DEPARTMENT OF HEALTH~~

~~FAIR HEARING PROCEDURES FOR APPLICANTS AND PARTICIPANTS IN SPECIAL SUPPLEMENTAL NUTRITION PROGRAM FOR WOMEN, INFANTS AND CHILDREN (WIC PROGRAM) AND THE COMMODITY SUPPLEMENTAL FOOD PROGRAM (CSFP) IN THE STATE OF NEBRASKA~~

NEBRASKA ADMINISTRATIVE CODE

TITLE 181 - NEBRASKA DEPARTMENT OF HEALTH

SPECIAL HEALTH PROGRAMS CHAPTER 4 - FAIR HEARING PROCEDURES FOR APPLICANTS AND PARTICIPANTS IN SPECIAL SUPPLEMENTAL FOOD PROGRAM FOR WOMEN, INFANTS AND CHILDREN (WIC PROGRAM) AND THE COMMODITY SUPPLEMENTAL FOOD PROGRAM (CSFP) IN THE STATE OF NEBRASKA.

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SPECIAL HEALTH PROGRAMS CHAPTER 4 - FAIR HEARING PROCEDURES FOR APPLICANTS AND PARTICIPANTS IN SPECIAL SUPPLEMENTAL FOOD PROGRAM FOR WOMEN, INFANTS AND CHILDREN (WIC PROGRAM) AND THE COMMODITY SUPPLEMENTAL FOOD PROGRAM (CSFP) IN THE STATE OF NEBRASKA.

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~~001 - DEFINITIONS~~

~~001.01~~ As used in these fair hearing procedures, unless the context otherwise requires:

~~001.01A~~ ~~Adverse action~~ shall mean any action by the local or State Agency which results in a) a claim against the participant for repayments of the cash value of improperly issued benefits, b) the denial of participation in the program to an applicant, or c) the participant's disqualification from the program. **Moved to Section 002.01**

~~001.01B~~ ~~Agency~~ shall mean a local agency or the State Agency that administers the Special Supplemental Food Program for Women, Infants and Children (WIC Program) and the Commodity Supplemental Food Program (CSFP) in the State of Nebraska.

~~001.01C~~ ~~Applicant~~ shall mean one who applies to be a participant in the WIC program or a recipient in the CSF program.

~~001.01D~~ ~~CSF Program~~ shall mean the Commodity Supplemental Food Program administered by the United States Department of Agriculture or its successors.

~~002.01E~~ ~~Department~~ shall mean the Department of Health.

~~001.01F~~ ~~Food Instrument~~ shall mean a voucher, check, coupon, or other document used to obtain supplemental foods.

~~001.01G~~ ~~Health services~~ shall mean routine pediatric and

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~~obstetric care which is ongoing, such as infant and child care and prenatal and postpartum examinations, or referral for treatment.~~

~~001.01H Local agency shall mean a public or private nonprofit health or human service agency that has been approved as a local agency by the Department and, by written agreement with the department, provides WIC program services, CSF program services, or both, either directly or through subagreements entered into in accordance with section 71-2209 to 71-2230 and the rules and regulations adopted and promulgated by the department.~~

~~001.01I Participant or recipient shall mean (a) as used in reference to any WIC program established pursuant to sections 71-2209 to 71-2230, an individual who is receiving supplemental foods or food instruments and shall include, but not be limited to, pregnant women, breast-feeding women, postpartum women, infants, and children; and (b) as used in reference to any CSF program established pursuant to sections 71-2209 to 71-2230, an individual who is receiving supplemental foods under such program and shall include, but not be limited to pregnant women, breast-feeding women, postpartum women, infants, children, and elderly persons.~~

~~001.01J Program shall mean the Special Supplemental Food Program for Women, Infants and Children (WIC Program) and/or the Commodity Supplemental Food Program (CSFP), as applicable. Moved to Section 002.02~~

~~001.01K State Agency shall mean the Department of Health of the State of Nebraska.~~

~~001.01L Supplemental foods shall mean (a) foods containing nutrients determined to be beneficial for infants, children, and pregnant, breast-feeding, or postpartum women as prescribed by the United States Department of Agriculture for use in the WIC program and W foods donated by the United States Department of Agriculture for use in the CSF program.~~

~~001.01M WIC program shall mean the Special Supplemental Food Program for Women, Infants, and Children as administered by the United States Department of Agriculture or its successors.~~

002 RIGHT OF FAIR HEARING

002.01 Fair Hearing Basis. The State agency shall grant the right of fair hearing whenever an applicant or a participant is the subject of

an adverse action by the local agency. Moved to Section 003

~~002.02 Written Notice of Appeal Rights.~~ The local agency taking the adverse action shall inform each applicant or participant in writing of the adverse action, the right to a fair hearing, the method by which a fair hearing may be requested, and that any positions or arguments on behalf of the applicant or participant may be presented personally by the applicant or participant or by legal counsel, or that a relative, friend or other person may assist the applicant or participant at the hearing. In the event a participant is disqualified or a claim is made for cash repayment, notification of such action shall be given at least (15) days before the effective date of the adverse action. In the event of dual participation in WIC and CSF programs or in two or more WIC programs, the adverse action is effective immediately.
Moved to Section 003.01

~~002.03 Request for Hearing.~~ A request for hearing is defined as any clear expression, either verbal or written, by the applicant or participant, the applicant or participant's parent, caretaker, or other representative that he or she desires an opportunity to present his or her case to the Department or other higher authority.

~~002.03A~~ The local agency shall not limit or interfere with the applicant or participant's freedom to request a hearing.

~~002.03B~~ The oral or written request for a fair hearing shall be submitted to the local agency and then transmitted to the Department or may be submitted directly to the Department. The Local Program Director will be responsible for sending the request to the State Agency.

~~002.03C~~ The request for hearing shall be signed by the applicant or the participant or the applicant or participant's parent, caretaker, or other representative and shall contain sufficient information to identify the applicant or participant and the adverse action regarding which the appeal is being made. No particular written form shall be required. The local or state agency shall put the request for a hearing in writing, if necessary.
Moved to Section 003.02

003 NOTIFICATION OF ADVERSE ACTION

~~003.01 Written Notice – Initial Application/Denial~~ Whenever adverse action is taken against an applicant making initial application to participate in the Program, such applicant shall be provided with

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~~written notice of the adverse action, the cause or causes for such action the effective date of the action and applicant's appeal rights as set forth in subsection 002.02 above. Such notification shall be provided by the agency taking the adverse action. Moved to Section 004 and 004.01~~

~~003.02 Written Notice – Adverse Action. Whenever adverse action is taken against a participant disqualifying him or her from the Program, such participant shall be provided with 15 days advance written notice of the adverse action, the cause or causes for such action the effective date of the action and participant's appeal rights as described in subsection 002.02 above. If a claim is pursued against a participant seeking repayment of the cash value of improperly issued benefits, such participant shall be provided with the information stated above and, in addition, the reason(s) for the claim, and the value of the improperly issued benefits which must be paid. Such notification shall be provided by the agency taking the adverse action. Moved to Section 004.02~~

~~004 TIME LIMIT FOR REQUEST~~ Moved to Section 005

~~004.01 Appeal period. An applicant or participant against whose adverse action has been taken by a local agency or State Agency action may appeal the action by requesting a fair hearing before the Department within sixty (60) calendar days from the date the agency taking the adverse action sails or gives the applicant or the participant the notice of adverse action. Moved to Section 005.01~~

~~004.02 Denial or Dismissal of Request. The State Agency shall not deny or dismiss a request for a fair bearing unless: Moved to Section 005.02~~

~~004.02A The request is not received within the time limit prescribed in subsection 004.01;~~

~~004.02B The request is withdrawn in writing by the appellant or a representative of the appellant;~~

~~004.02C The appellant or representative fails, without good cause, to appear at the scheduled hearing; or~~

~~004.02D The appellant has been denied participation by a previous bearing and cannot provide evidence that circumstances relevant to Program eligibility have changed in such a way as to justify a hearing.~~

~~004.03 Continuation of Benefits. A participant who appeals a disqualification notice before the disqualification takes effect shall Moved to Section 005.03~~

continue to receive program benefits until the hearing official reaches a decision or the certification period expires whichever occurs first.

~~004.03A~~ Section 004.03 shall not apply to participants whose certification period has expired. **Moved to Section 005.03**

~~004.03B~~ Applicants who are denied benefits at initial certification or because of the expiration of their certification may appeal the denial, but shall not receive benefits while awaiting the hearing. **Moved to Section 005.03**

005 NOTICE OF HEARING

~~005.01 Contents of Notice.~~ The Department shall prepare an official notice of hearing when a hearing is requested by an applicant or participant under 002 of these regulations. The notice shall include:

~~005.01A~~ The time, date, and place of the hearing;

~~005.01B~~ The name of the hearing officer, if known;

~~005.01C~~ A statement that the applicant or participant has the right to be present, to offer evidence, to examine the case record prior to the hearing, to be represented or assisted by an attorney or other persons, and to make one request for a rescheduled bearing date according to the provisions of 006 of these regulations; and

~~005.01D~~ A statement that an explanation of the hearing procedure is enclosed with the notice.

~~005.02 Timing of Notice and Hearing.~~ The Department shall set the date, time and place of the hearing within seven (7) calendar days after it receives a request for a fair hearing. **Moved to Section 005.04**

~~005.02A~~ The Department shall send the notice of hearing to the applicant or participant to ensure receipt no later than ten (10) calendar days before the bearing, using certified or registered mail. **Moved to Section 005.04(A)**

~~005.02B~~ A bearing shall be held within twenty-one (21) calendar days of receipt of the request for a fair hearing, unless the appellant requests a continuance or the hearing officer orders a continuance, as provided in 006 of these regulations. **Moved to Section 005.04(B)**

006 CONTINUANCES

006.01 Rescheduling Opportunity. An applicant or participant shall be provided with one opportunity to reschedule the hearing date upon specific written request submitted to the Department. The hearing date may also be rescheduled at the order of the hearing official or officer. Any continued hearing shall be hold within thirty one (31) calendar days of the request for hearing, unless good cause is demonstrated for not holding the hearing within such period of time. **Moved to Section 006**

007 HEARINGS

007.01 Finality. The decision by the Department or the local agency to take adverse action against an applicant or a participant shall become final sixty (60) days after the mailing of the notice required by section 003 of these regulations unless the applicant or participant, within such sixty day period, shall request a hearing under section 002.03 of these regulations.

007.02 Conduct of Hearings. Hearings shall be conducted in accordance with the Rules of Practice and Procedure of the Department of Health, 184 NAC 1, sections 009 and 010, except where these regulations otherwise provide. A copy of 284 NAC 1 is attached as Attachment 1 and incorporated by reference in these regulations.

007.03 Rights of Applicant or Participant. The Department shall specifically provide the appellant or representative an opportunity to: **Moved to Section 007**

007.03A Examine, prior to and during the hearing, the documents and record appeal; **Moved to Section 007**

007.03B Be represented or assisted by a person other than the participant or applicant as follows: **Moved to Section 007**

007.03B1 Be represented by legal counsel. Legal counsel shall mean any person licensed to practice law in the State of Nebraska. **Moved to Section 007**

007.03B2 Be assisted by other persons, such as a relative or friend, except that such other person may not provide legal advice, serve as an advocate or spokesperson, question witnesses or otherwise assume duties customarily performed by persons engaged in the practice of law. **Moved to Section 007**

007.03C Bring witnesses; **Moved to Section 007**

~~007.03D~~ Advance arguments without undue interference; Moved to Section 007

~~007.03E~~ Question or refute any testimony or evidence, including an opportunity to confront and cross-examine adverse witnesses; and Moved to Section 007

~~007.03F~~ Submit evidence to establish all pertinent facts and circumstances in the case. Moved to Section 007

~~008.01 Fair Hearing Decisions.~~ On the basis of the evidence presented at the hearing, the determination to take adverse action shall be affirmed, modified, or set aside. A copy of the decision setting forth the findings of fact and reasons upon which the decision is based shall be sent by either registered or certified mail to the applicant or participant at his or her last address of record within forty-five (45) days of the receipt of the request for a hearing. This decision shall become final thirty (30) days after the copy is mailed unless the applicant or participant appeals within such thirty day period in accordance with the Administrative Procedure Act, §§84-901 to 84-920. Moved to Section 008

~~008.02 Records.~~ The Department shall retain hearing records for a minimum of three (3) years following the date of submission of the final expenditure report for the period to which the report pertains.

~~008.03 Open Records.~~ Hearing records and decisions shall be available for public inspection and copying; however, names and addresses of participants and other members of the public shall be kept confidential.

009 POST DECISION BENEFITS.

~~009.01 Decisions for Applicant or Participant.~~ If the decision is in favor of the applicant or participant and benefits were denied or discontinued, benefits shall begin immediately. Moved to Section 009.01

~~009.02 Disqualification.~~ If the decision concerns disqualification and is in favor of the agency, the local agency shall terminate continued benefits, as indicated in the decision, as soon as administratively feasible. Moved to Section 009.02

~~009.03 Repayment of benefits.~~ If the decision regarding repayment of benefits by the participant is in favor of the agency, the state or local agency shall resume efforts to collect the claim, even dependency of judicial review. Moved to Section 009.03