**CALIFORNIA DEPARTMENT OF EDUCATION**

TONY THURMOND

State Superintendent of Public Instruction

 **CALIFORNIA STATE BOARD OF**

 **EDUCATION**

 LINDA DARLING-HAMMOND

 President

ofab-nsd-mar24item01a01

# NOTICE OF PROPOSED RULEMAKING

## AMENDMENT TO CALIFORNIA CODE OF REGULATIONS, TITLE 5, REGARDING

SCHOOL NUTRITION PROGRAMS

Notice published April 12, 2024

**NOTICE IS HEREBY GIVEN** that the State Board of Education (SBE) proposes to adopt the regulations described below after considering all comments, objections, or recommendations regarding the proposed action.

The SBE invites interested persons to present statements or arguments with respect to alternatives to the proposed regulations at the scheduled hearing or during the written comment period.

### PUBLIC HEARING

California Department of Education (CDE) staff, on behalf of the SBE, will hold a virtual meeting at 9:00 a.m. on May 28, 2024.

Any interested person may participate in the public hearing via Zoom by logging in per the following instructions:

* Click the following link or paste the link to the browser to join the meeting and enter the password:

<https://us02web.zoom.us/j/85005454181>

Meeting ID: 850 0545 4181

Passcode: 468855

* To connect with audio only and no video, call one of the following telephone numbers and enter the meeting ID and password:

213 338 8477

669 219 2599

669 900 6833

Meeting ID: 850 0545 4181

Passcode: 468855

For persons intending to attend the Zoom meeting, those persons may check their computers by:

* Clicking on the test link: <https://zoom.us/test>.
* For any issues regarding connecting with Zoom, go to <https://support.zoom.us/hc/en-us> for assistance.

During the meeting, any person may present statements or arguments, orally or in writing, relevant to the proposed action described in the Informative Digest. The SBE requests, but does not require, that persons who make oral comments at the public hearing also submit a written summary of their statements. No oral statements will be accepted subsequent to this public meeting.

### ACCOMMODATION FOR ANY INDIVIDUAL WITH A DISABILITY

Pursuant to the *Rehabilitation Act of 1973,* the *Americans with Disabilities Act of 1990,* and the *Unruh Civil Rights Act,* any individual with a disability who requires reasonable accommodation to participate in a public meeting on proposed regulations, may request assistance by contacting Frances Swann of the Nutrition Services Division, 1430 N Street, Suite 4503, Sacramento, CA, 95814, telephone, 916-445-0850. It is recommended assistance be requested at least two weeks before the hearing. Please note that Live Captioning will be available during the online meeting.

### WRITTEN COMMENT PERIOD

Any interested person, or his or her authorized representative, may submit written comments relevant to the proposed regulatory action to:

Lorie Adame, Regulations Coordinator

Administrative Support and Regulations Adoption Unit

California Department of Education

1430 N Street, Room 5319

Sacramento, CA 95814

Comments may also be submitted by facsimile (FAX) at 916-322-2549 or by email to regcomments@cde.ca.gov.

Comments must be received by the Regulations Coordinator prior to or on May 28, 2024. All written comments received by CDE staff during the public comment period are subject to disclosure under the Public Records Act.

### AUTHORITY AND REFERENCE

Authority: Sections 221.1, 222, 8235.5, 8261, 32289,33031, 33315, 46015, 48645.7, 48853, 48853.5, 49069.5, 49431, 49431.2, 49431.5, 49492, 49531, 49536, 49551, 49559, 51223, 51225.1, 51225.2, 51228.3, 52075, 54445, 52355, 52451, and 56100, Education Code.

References: Sections 200, 220, 234.1, 260, 8235.5, 33315, 35186, 49013, 49430, 49431, 49431.2, 49431.5 and 49556, Education Code; Sections 38181, 38191 and 38211, Food and Agricultural Code; Section 11135, Government Code; 42 United States Code Section 1758, 7 Code of Federal Regulation Sections, 210.2, 210.4, 210.7, 210.8, 210.10, 210.11, 220.2, 220.4, 220.8, 220.11, 220.12, 220.23 and 225.16; 21 Code of Federal Regulations, Section101.9; and 34 Code of Federal Regulations, Sections 106.1-106.8 and 299.10-299.11.

### INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

In 1976, the SBE adopted articles 2, 3 and 4 found in the California Code of Regulation (CCR), title 5 (5 CCR), division 1, chapter 15, subchapter 1. Article 2 included section 15510, which provided definitions for mandatory meals for needy pupils and sections 15530, 15531, 15532, 15533, 15534 and 15535 in article 3 specified the scope, eligibility, procedures and criteria for filing and approving applications, procedure for funding, and procedure for project management of Nutrition Education Program grants. Article 4 sections 15551, 15556, 15562, 15563, 15564 and 15565 contained definitions, payment of reimbursement claims, kind of meals eligible for reimbursement, meal requirements for needy students, claim reimbursement procedures and notification of changes in reimbursement rates for school lunches and breakfasts. In 2008, the SBE adopted article 6, which included sections 15575, 15576, 15577 and 15578. These sections provided definitions for foods and beverages, and food and beverages restrictions.

Articles 2, and 4 of 5 CCR have not been updated since their adoption in 1976. Article 6 of 5 CCR has not been updated since its adoption in 2008. Therefore, upon review of these regulations in 5 CCR, the SBE determined that amendments were necessary to bring these regulations into alignment with the related Code of Federal Regulations (C.F.R.) and to be consistent with current practices for the school nutrition programs administered by the CDE. The CDE also determined that a need for a definition of fluid milk substitutes, as the National School Lunch and School Breakfast Programs allow for the provision and reimbursement of fluid milk substitutes served to students who require this type of beverage due to a disability or medical need.

The CDE also determined that article 3 should be repealed. These 6 CCR sections are related to the Nutrition Education and Training (NET) program, which was established under the Child Nutrition Act of 1966 (Child Nutrition Act), Public Law 89-642. Under 42 U.S.C. section 1787, effective January 4, 1995, funds were authorized to make grants to all states for a nutrition education program that targets school children, teachers, parents, and food service workers. Between its inception in 1977 and 1994, the NET program had time-limited authorization and funding (averaging $5 million per year), which was provided via annual appropriations. In 1994, the Child Nutrition Act was amended by Public Law 103-448 to make NET permanent and funding of $10 million annually was mandated for the program. However, on August 22, 1996, the Child Nutrition Act was amended by Public Law 104-193, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, and repealed 42 U.S.C. section 1787, restored NET to temporary status, and again made funding for it subject to appropriations. The Personal Responsibility and Work Opportunity Act categorized NET as a discretionary spending program.

Since mandatory funds cannot be used to fund a discretionary program, NET has been without a funding source since Federal Fiscal Year (FFY) 1996-1997. Due to the lack of a federal funding source since FFY 1996-1997, and the fact that NET has not been funded since FFY 1997-1998, the relevant 5 CCR sections 15530, 15531, 15532, 15533, 15534 and 15535 are proposed to be deleted.

In 1991, the SBE adopted 5 CCR, section 4610. This section provides the purpose and scope of the Uniform Complaint Procedures for the child nutrition programs administered by the CDE. In 2020, the SBE adopted article 7 of 5 CCR, which included sections 15580, 15581, 15582, 15583 and 15584. These sections define the scope of the article 7, describe the process for filing a complaint, state the requirement to refer complaints to the U.S. Department of Agriculture (USDA), and define the local education agency investigation procedures and complainant appeal rights to the CDE as well as the CDE investigation and appeal procedures. Article 7 was adopted to implement Education Code section 33315(a)(2) regarding complaints relating to child nutrition programs established pursuant to Education Code sections 49490 through 49570. In 2020, the Early Childhood Development Act of 2020 (Sen. Bill No. 98, ch.24, Stats 2020) authorized the transfer of childcare and development programs, including the Child and Adult Care Food Program, administered by the CDE to the California Department of Social Services effective July 1, 2021. Therefore, upon review of this regulation in 5 CCR, the SBE determined that an amendment is necessary to bring section 4610 in 5 CCR into alignment with current state law and Education Code.

#### *Policy Statement Overview*

Articles 2, 3 and 4 of 5 CCR have not been updated since their adoption in 1976. Article 6 of 5 CCR has not been updated since its adoption in 2008. Amendments are necessary to bring these regulations into alignment with the related C.F.R. and to be consistent with current practices for the school nutrition programs administered by the CDE.

#### *Anticipated Benefits of the Proposed Regulation*

The anticipated benefits from updating the regulations are:(1) effective and consistent implementation of school nutrition program requirements statewide; (2) alignment with CDE nutrition program procedures, federal regulations, and state statutes; (3) consistency between federal and state regulations and statutes and (4) repealing state regulations pertaining to federal programs that are no longer receiving funding.

#### *Evaluation of Inconsistency/Incompatibility with Existing State Regulations*

The CDE reviewed all state regulations relating to the school nutrition programs and found that the proposed amended regulations are not inconsistent/incompatible with existing regulations, pursuant to Government section 11346.5(a)(3)(D).

### INCORPORATION BY REFERENCE

The U.S. Department of Agriculture’s Food Buying Guide for Child Nutrition Programs, sections 1, 2, and 3, dated February 28, 2020, and section 4, dated on May 31, 2022, are hereby incorporated by reference and can be found on the USDA Food Buying Guide web page at https://www.fns.usda.gov/tn/food-buying-guide or by requesting a copy from the Regulations Coordinator.

### DISCLOSURES REGARDING THE PROPOSED ACTION/ FISCAL IMPACT

The SBE has made the following initial determinations:

There are no other matters as are prescribed by statute applicable to the specific state agency or to any specific regulations or class of regulations.

*Mandate on local agencies and school districts*: None

*Costs to any local agencies or school districts for which reimbursement would be required* *pursuant to Part 7 (**commencing with section 17500) of division 4 of the Government Code*: None

*Cost or savings to any state agency*: None

*Other non-discretionary costs or savings imposed on local agencies, including local educational agencies*: None

*Costs or savings in federal funding to the state*: None

*Effect on housing costs*: None

*Significant, statewide adverse economic impact directly affecting business including the ability of California businesses to compete with businesses in other states*: None

*Cost impacts on a representative private person or business*: The SBE is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

*Report required*: The proposed regulations do not require a report to be made.

*Effect on small businesses*: The amended and proposed regulations would not have an effect on any small business *because they are designed to update and clarify current school nutrition program requirements and procedures and will not result in the expansion or the elimination of small businesses currently doing business within the State of California.*

### RESULTS OF THE ECONOMIC IMPACT ANALYSIS/ASSESSMENT

***Benefits of the Regulations to the Health and Welfare of California Residents, Worker Safety, and the State’s Environment – Gov. Code Section 11346.5(a)(10):***

The SBE concludes that it is unlikely that these proposed regulations will: 1) create or eliminate jobs within California; 2) create new businesses or eliminate existing businesses within California; or 3) affect the expansion of businesses currently doing business within California.

Benefits of the Proposed Action: The amended and proposed regulations will have no adverse effect nor benefit on the health and welfare of California residents, worker safety, or the State’s environment.

### CONSIDERATION OF ALTERNATIVES

In accordance with Government Code section 11346.5(a)(13), the SBE must determine that no reasonable alternative it considered or that has otherwise been identified and brought to the attention of the SBE, would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

The SBE invites interested persons to present statements or arguments with respect to alternatives to the proposed regulations during the written comment period.

### CONTACT PERSONS

Inquiries concerning the content of these proposed regulations should be directed to:

David Jang, Nutrition Services Division

California Department of Education

1430 N Street, Room

Sacramento, CA 95814

Telephone: 916-327-3952

Email: djang@cde.ca.gov

Inquiries concerning the regulatory process may be directed to Lorie Adame, Regulations Coordinator, or the backup contact person, Gerri White, Analyst. The Regulations Coordinator and the Regulations Analyst may be reached by email at regulations@cde.ca.gov or by telephone at 916-319-0860.

### AVAILABILITY OF INITIAL STATEMENT OF REASONS, TEXT OF PROPOSED REGULATIONS AND INFORMATION

As of the date this notice is published in the Notice Register, the rulemaking file consists of this Notice, the proposed text of the regulations, the Initial Statement of Reasons (ISOR), the agenda and a recording of the SBE meeting where the SBE approved commencement of this rulemaking activity, and Fiscal and Economic Impact Statement (STD. 399). These documents on which the proposed action is based may be obtained from the Regulations Coordinator. In addition, this Notice, the text of the proposed regulations and the ISOR may also be viewed on CDE’s website at <http://www.cde.ca.gov/re/lr/rr/>.

### AVAILABILITY OF CHANGED OR MODIFIED TEXT

Following the public hearing and considering all timely and relevant comments received, the SBE may adopt the proposed regulations substantially as described in this Notice

or may modify the proposed regulations if the modifications are sufficiently related to the original text. With the exception of technical or grammatical changes, the full text of any modified regulation will be available to the public for at least 15 days prior to its adoption from the Regulations Coordinator and will be mailed to those persons who submit written comments related to this regulation, or who provide oral testimony at the public hearing, or who have requested notification of any changes to the proposed regulations. The SBE will accept written comments on the modified regulations for 15 days after the date on which they are made available.

### AVAILABILITY AND LOCATION OF THE FINAL STATEMENT OF REASONS AND RULEMAKING FILE

You may obtain a copy of the Final Statement of Reasons, once it has been finalized, by making a written request to the Regulations Coordinator.

All the information on which the proposed regulations are based is in the rulemaking file available for public inspection by contacting the Regulations Coordinator.

### AVAILABILITY OF DOCUMENTS ON THE INTERNET

Copies of the Notice of Proposed Action, the Initial Statement of Reasons, and the text of the regulations with modifications highlighted, as well as the Final Statement of Reasons, when completed, and modified text, if any, can be accessed via CDE’s website at http://www.cde.ca.gov/re/lr/rr/.

10-10-2023 [California Department of Education]