

California Department of Education

Executive Office

SBE-003 (REV. 11/2017)

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# California State Board of EducationMarch 2019 AgendaItem #13

## Subject

Nutrition Guidelines for School Breakfast and Lunch—Approval of the Commencement of a 45-Day Public Comment Period for Proposed Amendments to the California Code of Regulations, Title 5 (5 *CCR*), Division 1, Chapter 15, Subchapter 1, Article 4, sections 15551, 15558, 15559, and 15560.

## Type of Action

Action, Information

## Summary of the Issue(s)

The California Department of Education (CDE) is submitting proposed amended regulations on the nutrition guidelines for school breakfast and lunch, to align 5 *CCR*, Article 4 with current California *Education Code* (*EC*) sections 49531 and 49531.1, and Title 7, Code of Federal Regulations (7 *CFR*), sections 210.10 and 220.8. Assembly Bill 3043 (Berman) was signed into law on September 20, 2018 which amended *EC* sections 49531 and 49531.1. The U.S. Department of Agriculture (USDA) published a Final Rule titled *Child Nutrition Programs: Flexibilities for Milk, Whole Grains, and Sodium* on December 12, 2018, which amends requirements for milk, whole grains, and sodium in the school nutrition programs under 7 CFR, sections 210.10 and 220.8. Article 4 in 5 *CCR*, specifically sections 15558 and 15559, required additional changes due to the amended *EC* sections 49531 and 49531.1, and amended USDA regulations.

## Recommendation

The CDE recommends the State Board of Education (SBE) take the following actions:

* Approve the proposed changes to the proposed regulations.
* Direct that the proposed changes be circulated for a 45-day public comment period in accordance with the Administrative Procedure Act.
* If no relevant comments to the proposed changes are received during the 45-day public comment period, the proposed regulations with changes are deemed adopted, and the CDE is directed to complete the rulemaking package and submit it to the Office of Administrative Law (OAL) for approval.
* If any relevant comments to the proposed changes are received during the
45-day public comment period, the CDE is directed to place the proposed regulations on the SBE July 2019 agenda for action.
* Authorize the CDE to take any necessary ministerial action to respond to any direction or concern expressed by the OAL during its review of the rulemaking file.

## Brief History of Key Issues

In 1976, the SBE adopted Article 4 found in the 5 *CCR*, Division 1, Chapter 15, Subchapter 1. Article 4 created sections 15550–15565. Specifically, sections 15551, 15558, 15559, and 15560 provided definitions, nutrition guidelines, and meal pattern requirements for school lunches and breakfasts. Since 1976 and the adoption of Article 4, the following changes have occurred that affect Article 4 sections 15550–15565.

1. In 1976, Section 49531 was added to the *EC*. *EC* Section 49531 requires a child nutrition entity that receives federal and state funds to provide a nutritionally adequate breakfast or lunch, or both, in accordance with state and federal requirements. In addition, this *EC* section specified that lunch should meet one third of the Recommended Dietary Allowances (RDA) established by the National Research Council. This *EC* section was amended in 1997 to include the clarification that a breakfast meal should provide, at a minimum, one fourth of the current RDAs and for both breakfast and lunch, to incorporate the current Dietary Guidelines for Americans (DGA).
2. In 1989, Section 49531.1 was added to the *EC*. *EC* Section 49531.1 required the CDE to develop and maintain nutrition guidelines for school lunches and breakfasts, and for all food and beverages sold on public school campuses. This *EC* section also specified that these nutrition guidelines shall consider current recommendations for children from the *California Food Guide: Fulfilling the Dietary Guidelines for Americans* (previously known as the *California Daily Food Guide*) published by the State Department of Health Services. Note that the *California Food Guide* was last revised in 2008 and does not reflect the most current DGA. The most current DGA is the 2015–20 version. When reviewing and amending the regulations, the CDE considered the *California Food Guide: Fulfilling the Dietary Guidelines for Americans* as required by *EC* Section 49531.1. The CDE did not adopt any recommendations from it because it is outdated.
3. In developing nutrition guidelines for school lunches and breakfasts, the CDE followed the most current USDA meal pattern requirements under 7 *CFR*, sections 210.10 and 220.8. In 2010, the Healthy, Hunger-Free Kids Act (HHFKA) was signed into federal law. This bill was part of the reauthorization of funding for Child Nutrition Programs and requires the USDA to set new nutrition standards for schools. The HHFKA allowed the USDA, for the first time in 30 years, the opportunity to reform the school lunch and breakfast programs. The new law requires updates to the meal patterns and nutrition standards for the National School Lunch Program (NSLP) and the School Breakfast Program (SBP) and aligns them with the most current DGA*.* The nutrition standards in the NSLP and SBP final rule went into effect July 2012. The final rule requires most schools to increase the availability of fruits, vegetables, whole grains, and fat-free and low-fat fluid milk; reduce the levels of sodium, saturated fat, and trans fat in meals; and to meet the nutrition needs of school children within a specified calorie range. The improvements to the school meal programs were largely based on recommendations made by the Institute of Medicine of the National Academies, and were to enhance the diet and health of school children, and help mitigate the childhood obesity trend. As stated above in item 2, the CDE considered but did not adopt recommendations from the *California Food Guide: Fulfilling the Dietary Guidelines for Americans* because it is outdated.
4. On September 20, 2018, AB 3043 was signed into law. AB 3043 amends *EC* sections 49531 and 49531.1. The amended *EC* Section 49531(b) now specifies that a breakfast must only meet the most current meal pattern for the federal SBP as defined in 7 *CFR,* Section 220.8*,* and a lunch must only meet the most current meal pattern for the federal NSLP as defined in 7 *CFR*, Section 210.10*.* *EC* Section 49531 no longer specifies that breakfast meet one fourth or lunch meet one third of the current RDA. The amended *EC* Section 49531.1 no longer requires the nutrition guidelines for school breakfasts and lunches developed and maintained by the CDE to consider recommendations from the *California Food Guide*. *EC* Section 49531.1 now states that the nutrition guidelines developed and maintained by the CDE be consistent with the requirements of nutritionally adequate breakfasts and nutritionally adequate lunches, as defined in subdivision (b) of *EC* Section 49531.
5. As a result of AB 3043, the proposed regulations that were approved for the commencement of rulemaking by the SBE at its September 2018 meeting required changes to align with the amended *EC* sections 49531 and 49531.1.
6. As a result of the USDA Final Rule, the proposed regulations that were approved for the commencement of rulemaking by the SBE at its September 2018 meeting required changes to align with the amended 7 *CFR*, sections 210.10 and 220.8. Additionally, the CDE received suggestions during the 45-day public comment period (September 21-November 5, 2018) that resulted in changes to the proposed regulations. Therefore, the CDE is requesting the SBE to approve a 45-day public comment period for these amendments to
5 *CCR* sections 15551, 15558, 15559, and 15560.

In summary, the original regulations found in Article 4 were created prior to the recent amendments to *EC* sections 49531 and 49531.1, and 7 *CFR* 210.10 and 220.8. The proposed amended regulations implement changes consistent with the objectives of *EC* sections 49531 and 49531.1, amended through AB 3043 and with the amended nutrition standards in the USDA NSLP and SBP Final Rule. (The final rule is on the Federal Register Child Nutrition Programs Flexibilities for Milk, Whole Grains, and Sodium Requirements web page at <https://www.federalregister.gov/documents/2018/12/12/2018-26762/child-nutrition-programs-flexibilities-for-milk-whole-grains-and-sodium-requirements>).

Subsequently, the CDE decided that the above changes to the regulations were sufficiently related to the proposed regulations in the notice published by OAL on September 21, 2018. The CDE is providing a 45-day comment period from March 15, 2019, through April 29, 2019, so that the public is adequately placed on notice of the changes prior to the SBE’s adoption of the proposed regulations.

## Summary of Previous State Board of Education Discussion and Action

At its September 2018 meeting, the SBE approved the commencement of the rulemaking process for the proposed nutrition regulations which can be found under Item 14 of the SBE September 2018 Agenda. This item can be found on the SBE September 2018 Agenda web page <https://www.cde.ca.gov/be/ag/ag/yr18/agenda201809.asp>.

## Fiscal Analysis

An Economic and Fiscal Impact Statement is provided as Attachment 6.

## Attachment(s)

Attachment 1: 45-Day Notice of Modifications (3 pages)

Attachment 2: Proposed Regulations (10 pages)

Attachment 3: Final Statement of Reasons (5 pages)

Attachment 4: Summary of Public Comments (5 pages)

Attachment 5:Appendix of Public Comment Received During 45-day Public Comment Period from September 21, 2018 through November 5, 2018 (1 page)

Attachment 6: Economic and Fiscal Impact Statement (STD 399) (5 pages)