

Original: 2030

Mizner

cc: Tyrrell

Harris

Sandusky

Legal

DEPARTMENT OF HEALTH
...in pursuit of good health

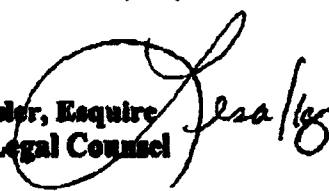
FAX

TO: Chuck Tyrrell, Jr.
Independent Regulatory Review Commission

Phone Number: (717) 772-3455

Fax Number: (717) 783-2664

FROM: Lesa Tressler, Esquire
Office of Legal Counsel



Phone Number: (717) 783-2500

Fax Number: (717) 783-3794

RECEIVED
MAY 17 PM 3:50
INDEPENDENT REGULATORY REVIEW COMMISSION

DATE and TIME: May 17, 1999 3:30 p.m.

NUMBER OF PAGES (including this page): 4 pages

MESSAGE:

The information contained in this facsimile message is intended only for the personal and confidential use of the designated recipient(s) named above. This message may be an attorney-client communication, and as such, is privileged and confidential. If the reader of this message is not the intended recipient or an agent responsible for delivering it to the intended recipient, you are hereby notified that you have received this document in error, and that any review, dissemination, distribution, or copying of this message is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone and return the original message to us by mail. Thank you.

COUNTY WIC STATISTICS

COUNTY	LOCAL AGENCY	AUTHORIZED STORE SLOTS	STORE SLOTS FILLED	STORES ON WAITING LIST
Adams	South Central Community Action Program	12	9	1
Allegheny	Allegheny County Health Department	182	83	27
Armstrong	Family Health Council, Inc.	18	14	2
Beaver	Family Health Council, Inc.	23	19	2
Bedford	Broad Top Medical Center	8	7	0
Berks	Maternal Family Health Services	42	33	14
Blair	Home Nursing Agency of Blair	27	21	1
Bradford	Maternal Family Health Services	15	11	1
Bucks	Bucks County Health Department	40	40	5
Butler	Family Health Council, Inc.	23	18	2
Cambria	Cambria County Community Action Program	28	28	0
Cameron	North Central PA Regional Planning & Dev. Corp.	1	2	0
Carbon	Maternal Family Health Services	7	4	1
Centre	Family Health Council, Inc.	17	13	4
Chester	Chester County Health Department	28	28	0
Clarion	Human Support Services	9	9	0
Clearfield	North Central PA Regional Planning & Dev. Corp.	18	12	0
Clinton	Bi-County WIC	9	6	0
Columbia	Family Health Council of Central PA	8	8	0
Crawford	Human Support Services	13	12	0
Cumberland	Family Health Council of Central PA	19	18	0
Dauphin	Hamilton Health Center	38	34	8
Delaware	Crozer-Chester	52	38	0
Elk	North Central PA Regional Planning & Dev. Corp.	8	5	0
Erie	United Neighborhood Facilities Health Care Corp.	31	23	0
Fayette	Fayette County Community Action Agency	38	28	0
Forest	Shenango Valley Urban League	3	3	0
Franklin	South Central Community Action Program	18	15	1
Fulton	Broad Top Medical Center	3	2	0
Green	Community Action Southwest	13	10	0
Huntingdon	Broad Top Medical Center	9	7	2
Indiana	Family Health Council, Inc.	14	12	0
Jefferson	North Central PA Regional Planning & Dev. Corp.	8	7	0
Juniata	Family Health Council of Central PA	4	3	0
Lackawanna	Maternal Family Health Services	34	21	
Lancaster	Community Action Program of Lancaster	51	48	7
Lawrence	Family Health Council, Inc.	14	9	1
Lebanon	Family Health Council of Central PA	12	11	0
Lehigh	Maternal Family Health Services	42	39	22
Luzerne	Maternal Family Health Services	52	36	6
Lycoming	Bi-County WIC	22	17	0
McKean	Bradford Hospital	10	10	0
Mercer	Shenango Valley Urban League	18	18	2
Mifflin	Family Health Council of Central PA	7	8	0
Monroe	Maternal Family Health Services	18	12	0

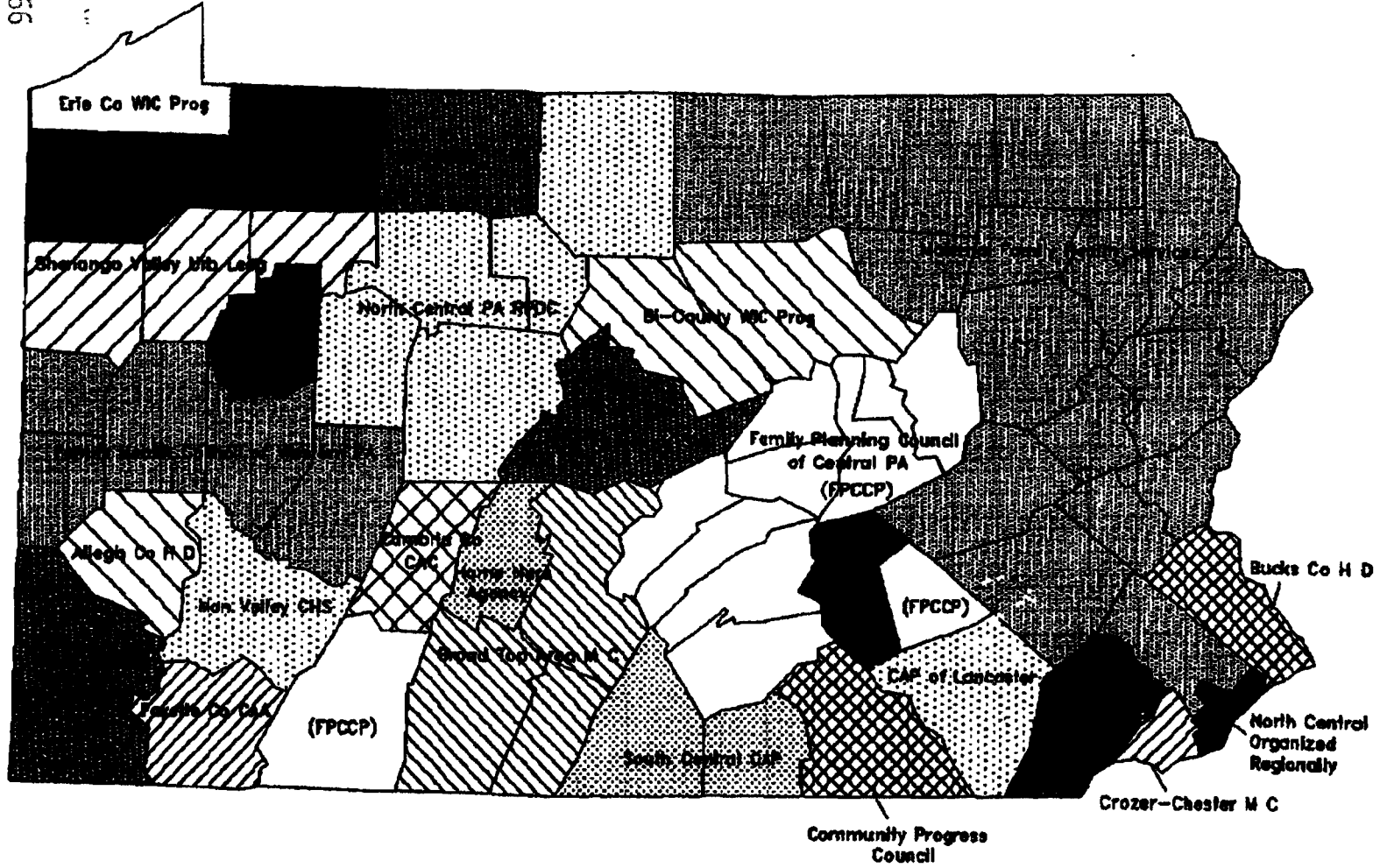
COUNTY WIC STATISTICS

COUNTY	LOCAL AGENCY	AUTHORIZED STORE SLOTS	STORE SLOTS FILLED	STORES ON WAITING LIST
Montgomery	Maternal Family Health Services	51	53	18
Montour	Family Health Council of Central PA	3	2	0
Northampton	Maternal Family Health Services	27	25	5
Northumberland	Family Health Council of Central PA	13	12	2
Perry	Family Health Council of Central PA	8	5	0
Philadelphia	NORTH, Inc.	210	190	104
Pike	Maternal Family Health Services	4	4	0
Potter	North Central PA Regional Planning & Dev. Corp.	4	9	1
Schuylkill	Maternal Family Health Services	20	18	0
Snyder	Family Health Council of Central PA	5	4	0
Somerset	Family Health Council of Central PA	13	11	0
Sullivan	Maternal Family Health Services	2	1	0
Susquehanna	Maternal Family Health Services	11	9	3
Tioga	Maternal Family Health Services	11	8	2
Union	Family Health Council of Central PA	4	3	0
Venango	Shenango Valley Urban League	9	9	0
Warren	Human Support Services	8	7	0
Washington	Community Action Southwest	26	20	0
Wayne	Maternal Family Health Services	9	8	2
Westmoreland	Mon Valley Community Health Services	54	46	8
Wyoming	Maternal Family Health Services	7	7	2
York	Community Progress Council Inc	43	43	6
SUM		1579	1289	268

99 MAY 17 PM 3:50

REVIEW OF MISSION

LOCAL WIC AGENCIES IN PENNSYLVANIA





FACTS ABOUT THE PENNSYLVANIA WOMEN, INFANTS AND CHILDREN (WIC) PROGRAM

The **WIC Program is a health and nutrition program** for pregnant women, breastfeeding women up to 12 months postpartum, nonbreastfeeding women up to six month postpartum, and children up to five years of age (60 months) who are determined by a health professional to have a medical or nutritional risk. WIC provides women and children with a nutritionally valuable food package to supplement their dietary intake during critical stages of growth and development in order to prevent health and nutrition problems.

Funding and Administration

The WIC Program is funded by the United States Department of Agriculture (USDA). The Program is administered by the Pennsylvania Department of Health and is operated through contracts with 25 local agencies across the state. The Program is available in all 67 counties.

Criteria for Participation

To qualify for WIC services, individuals must meet all of the following requirements: (1) reside in Pennsylvania, (2) have a medical or nutritional risk, and (3) meet income guidelines. Many working families qualify for WIC, and enrollment in WIC will not affect benefits received from other programs.

Program Services

- **Supplemental Foods:** Supplemental foods available through the Program provide nutrients which are frequently lacking in the diets of women and children at nutritional risk. These foods include milk, eggs, cheese, juice, cereal, peanut butter and dried beans and peas. Recognizing that breast milk is the ideal food for infants, WIC strongly encourages breastfeeding. For women who are unable to breastfeed, WIC provides an iron-fortified formula for their infants during the first year of life. An enhanced food package, including tuna and carrots, is available for breastfeeding women who receive no infant formula from WIC. The WIC food package is not intended to be a complete diet, but to supplement other food available to the individual. The types and amount of food purchased each month are printed on a set of food vouchers. The food vouchers are then redeemed at a WIC participating retail store.
- **Nutrition Services:** Nutrition information is provided to all participants to ensure that foods will be properly used, and will therefore improve the dietary and health habits of the entire family. Each WIC agency has at least one qualified nutritionist on its staff.

Beyond offering nutrition education, the WIC Program is deeply involved in addressing other areas of maternal and child health, such as educating participants about the dangers of drugs, alcohol and tobacco use, the importance of childhood immunizations and the benefits of breastfeeding.

- **Referrals:** WIC provides referrals to health and social service organizations. Participants not receiving medical services are encouraged to seek and maintain appropriate care. In turn, many health care and social service agencies refer their clients to WIC.
- **Program Benefits:** Many studies have been done which show the effectiveness of the WIC Program.

Every dollar spent on WIC saves three dollars in medical expenses for infants who may have been born premature or would have had other medical problems had they not received WIC.

WIC brings participants into a health care setting, prevents health problems, and improves their health and nutritional status.

WIC helps prepare children for school. Children who receive WIC services demonstrate improved cognitive development.

The incidence of low birth weight babies and infant mortality rates are greatly reduced among WIC participants.

WIC decreases the incidence of iron deficiency anemia in children.

For additional information regarding the Pennsylvania WIC Program contact:

Frank Maisano, Director
Division of Women, Infants and Children (WIC)
Pennsylvania Department of Health
P.O. Box 90
Harrisburg, PA 17108
(717) 783-1289

USDA prohibits discrimination in the administration of its programs.

December 1997

WOMEN, INFANTS AND CHILDREN (WIC) INCOME GUIDELINES

FAMILY SIZE	WEEKLY	MONTHLY	ANNUALLY
1	\$287.00	\$1,242.00	\$14,893.00
2	\$387.00	\$1,673.00	\$20,073.00
3	\$486.00	\$2,105.00	\$25,253.00
4	\$586.00	\$2,537.00	\$30,433.00
5	\$685.00	\$2,968.00	\$35,613.00
6	\$785.00	\$3,400.00	\$40,793.00
7	\$885.00	\$3,832.00	\$45,973.00
8	\$984.00	\$4,263.00	\$51,153.00
FOR EACH ADDITIONAL FAMILY MEMBER ADD:			
	\$100.00	\$432.00	\$5,180.00

*Pregnant women are counted as two persons.

Effective Date: May 1, 1998

CURRENT RESEARCH FINDINGS

Department of Health
Division of Women, Infants and Children

Many studies have been conducted to evaluate the effectiveness of the WIC Program. They demonstrate that WIC has a positive impact on the health of women, infants and children who participate. This results in sizable savings for Medicaid service providers

1. \$296 million spent on prenatal WIC benefits averted \$853 million in health expenditures during the first year of life. On this initial investment, total savings in health and education related expenditures over a child's 18 years of life amounted to more than \$1 billion.

Federal Investments Like WIC Can Produce Savings, General Accounting Office, 1992

2. Every WIC dollar spent on pregnant women saved between \$1.92 and \$4.21 on Medicaid for newborns and their mothers.

The Savings in Medicaid Costs for Newborns and Their Mothers Resulting From Prenatal Participation in the WIC Program, Mathematica Policy Research, Inc., 1992

3. WIC participation results in an increase in prenatal weight gain and longer gestations, vital to healthy birth outcomes. The National WIC evaluation, USDA, 1986, Federal Investments Like WIC Can Produce Savings, General Accounting Office, 1992, & Examination of Low Birth Weight for Pennsylvania Resident Births and for Infants Born to Mothers Who Were Enrolled in WIC Prior to Delivery, PA Department of Health WIC Program, 1991

4. Women receiving prenatal WIC services had substantially lower rates of low and very low birth weight infants than women receiving Medicaid alone.

Federal Investments Like WIC Can Produce Savings, General Accounting Office, 1992

5. Average savings in Medicaid costs associated with WIC ranged from \$12,083 to \$15,385 for each very low birth weight prevented.

Very Low Birthweight Among Medicaid Newborns in Five States: The Effects of Prenatal Participation, Mathematica Policy Research, Inc., 1992

6. WIC is responsible for lowering infant mortality by 25% to 66% among women receiving Medicaid and WIC.

Infant Mortality Among Medicaid Newborns in Five States: The Effects of Prenatal Participation, Mathematica Policy Research, Inc., 1993

7. Breastfeeding rates among WIC mothers have increased 10% to 25% in recent years.

WIC's Efforts to Promote Breastfeeding Have Increased, General Accounting Office, 1993

8. WIC significantly improves the dietary intake of pregnant and postpartum women and children.

The National WIC evaluation, USDA, 1986

9. Four and five year olds who participated in WIC have better vocabularies and digit memory scores than comparable non-WIC participants.

The National WIC Evaluation, USDA, 1986

10. WIC has a major impact on reducing anemia among children.

Yip, Ray, M.D., Journal of the American Medical Association, 258 (12), 1987

11. WIC participation leads to higher rates of immunization.

The National WIC Evaluation, USDA, 1986 & Bennet Tri-County Health Department, Co, 1994

LOCAL WIC AGENCIES IN PENNSYLVANIA

Allegheny County Health Department
Investment Building
239 Fourth Avenue
Pittsburgh, PA 15222-1712
(412) 350-5800
County: Allegheny

Bi-County WIC Program
612 West 4th Street
Williamsport, PA 17701-2015
(717) 322-7656
Counties: Clinton, Lycoming

Bradford Hospital WIC Program
Medical Arts Building
199 Pleasant St. Suite 23
Bradford, PA 16701-1338
(814) 362-4346
County: McKean

Broad Top Area Medical Center
Box 127 Highway 913
Broad Top City, PA 16621-0127
(814) 635-3942
Counties: Bedford, Huntingdon, Fulton

Bucks County Health Department
Neshaminy Manor Center
Route 611 & Alms House Road
Doylestown, PA 18901-5046
(215) 345-3494
County: Bucks

Cambria County Community Action Council, Inc
516 Main Street, 5th Floor
Johnstown, PA 15901
(814) 536-9031
County: Cambria

Chester County Health Department
601 Westtown Road, Suite 180
West Chester, PA 19382-4532
(610) 344-6798
County: Chester

Community Action Program of Lancaster County, Inc.
630 Rockland Street
P.O. Box 599
Lancaster, PA 17608-0599
(717) 299-7388
County: Lancaster

Community Action Southwest
315 East Hallam Avenue
Washington, PA 15301-3407
(412) 225-8980
County: Washington, Green

Community Progress Council, Inc.
20 West Market Street, 3rd Floor
York, PA 17401-1203
(717) 846-4600
County: York

Crozer-Chester Medical Center
1 Medical Center Boulevard
Upland, PA 19013-3988
(610) 497-7660
County: Delaware

Family Health Council, Inc.
WIC Program Convention Towers
960 Penn Avenue Suite 600
Pittsburgh, PA 15222-1417
(412) 288-2130
Counties: Armstrong, Beaver, Butler,
Indiana, Lawrence

Family Health Services, Inc.
211 North Decatur Lane
Bellefonte, PA 16823-1859
(814) 355-0501
County: Centre

Family Health Council of Central PA, Inc.
3461 Market Street Suite 200
Camp Hill, PA 17011-4441
(717) 761-7380
Counties: Columbia, Cumberland, Juniata,
Lebanon, Mifflin, Montour,
Northumberland, Perry, Snyder,
Somerset, Union

Fayette County Community Action Agency, Inc
137 N. Beeson Avenue
Uniontown, PA 15401
(412) 437-6050
County: Fayette

Hamilton Health Center
P.O. Box 5098
Harrisburg, PA 17110-5098
(717) 230-3975
County: Dauphin

Home Nursing Agency
P.O. Box 352
Altoona, PA 16603-0352
(814) 943-0481
County: Blair

Human Support Services, Inc.
747 Terrace Street
Meadville, PA 16335-1737
(814) 333-7067
Counties: Clarion, Crawford, Warren

Maternal and Family Health Services, Inc.
37 North River Street
Wilkes-Barre, PA 18702-2496
1-800-367-6347
Counties: Berks, Bradford, Carbon, Lackawanna,

Lehigh, Luzerne, Monroe, Montgomery,
Northampton, Pike, Schuylkill, Sullivan,
Susquehanna, Tioga, Wayne, Wyoming

Mon Valley Community Health Services, Inc.
Mon Valley Health Center
Eastgate 8
Monacaen, PA 15062
(412) 684-9000
County: Westmoreland

North Central Organized Regionally for Total Health (NORTH, Inc.)
642 North Broad Street
Suite 101
Philadelphia, PA 19130-3409
(215) 978-6100
County: Philadelphia

North Central PA Regional Planning and Development Commission
651 Montmorenci Avenue
Ridgway, PA 15853-9708
(814) 773-3162
Counties: Cameron, Clearfield,
Elk, Jefferson, Potter

Shenango Valley Urban League, Inc.
Health and Welfare Dept.
601 Indiana Avenue
Farrell, PA 16121
(412) 981-6154
Counties: Forest, Mercer,
Venango

South Central Community Action Program, Inc.
518B Cleveland Avenue
Chamberburg, PA 17201
(717) 263-0802
Counties: Adams, Franklin

United Neighborhood Facilities Health Care Corporation
Erie County WIC Program
312 Chestnut Street
P.O. Box 2027
Erie, PA 16512
(814) 459-2761
County: Erie

**DEPARTMENT OF
HEALTH**
in pursuit of good health

FORTHCOMING: Harris
Tyrrell
Sandusky
Legal

03/01/97 PM 1:18

REVIEW COMMISSION

DATE: October 27, 1998

SUBJECT: *PENNSYLVANIA WIC PROGRAM
GUIDELINES AND BENEFIT INFORMATION PACKETS*

TO: Mary Lou Harris
Senior Regulatory Analyst
Independent Regulatory Review Commission

FROM: Lesa E. Tressler *LET/let*
Assistant Counsel
Office of Legal Counsel

Please find enclosed the packets of WIC information we discussed yesterday.

Enclosures

LET:kag

§1113.1-Right to Appeal

We suggest the following sentence be revised as follows: "...or when any other adverse action *which affects participation* is taken against the store...."

§1113.2(a)- Local Agency and Store Appeals/Appeal Procedures/Notification

Please ensure that all provisions of Federal Regulation 246.18(b)(1) and (2) are incorporated into your regulations.

§1113.2(d)-Local Agency and Store Appeals/Appeal Procedures/Scheduling the Hearing

We suggest you include a provision providing the State agency with the option to reschedule the hearing, including the number of times it may be rescheduled.

In item five, we suggest you limit the number of times a vendor may request a hearing be rescheduled. Without such a limit, a vendor could prolong a hearing for significant periods of time, all the while remaining on the Program.

§1113.3(a)-Adjudication and Order

Please be sure to incorporate all provisions of Federal Regulation 246.18(b)(8) into your regulations.

§1107.1(f)-Sanctions

It is stated that the Department will impose a "sanction" against a WIC authorized store if it incurs a civil money penalty in lieu of disqualification from the FSP. Does such a "sanction" include a CMP from WIC and/or a WIC disqualification?

§1107.1(g)-Sanctions

We suggest this provision further state that the notification to the USDA-FNS may result in the store's disqualification from the FSP.

§1107.1(h)(1)-Sanctions/Specific Sanctions

It is stated that for most first violations the Department will issue a letter to the store. We suggest you clarify what is meant by the term "most." Please refer to our related comment in §1105.6(b).

§1107.1(i)-Sanctions

We suggest you clarify that certification after a period of disqualification is not guaranteed and the store must compete with all other interested stores for the available store slot.

Chapter 1111-Applicant and Participant Appeals

§1111.5(c) and (d)-Applicant and Participant Appeals/Scheduling the Hearing/Timeframe for Scheduling a Hearing and Standards for Scheduling the Hearing

Federal Regulation 246.9(j) states that State or local agencies shall provide appellants with a minimum of ten days advance written notice of the time and place of a hearing. Please revise your regulations accordingly.

Chapter 1113-Local Agency and Store Appeals

General Comments

Please ensure that the following federal regulatory requirements are included in the regulation:

Expiration of an agreement is not subject to appeal (246.18(a)).

The State agency shall provide 15 days advance (246.12(f)).

The vendor shall comply with the nondiscrimination provisions of 7 CFR parts 15, 15a, and 15b (246.12(f)(xv)).

Either the State agency or the vendor may terminate the agreement after providing advance written notice of no less than 15 days (246.12(f)(xvii)).

agencies choose to institute this practice, we ask that the following changes be implemented:

Revise Item b(1)(viii) to specify the specific violations for which disqualification will occur after compliance buys with no warning letters being issued (i.e. warning letters will only be sent for minor violations).

Indicate that the warning letter will not include the date in which the violations were identified.

Indicate that warning letters will be sent by certified mail. This helps ensure that a record of a warning letter is available during administrative appeals.

Revise Item b(2) to specify the specific violations for which disqualification will occur after inventory audits and no warning letters will be issued (i.e. warning letters will only be sent for minor violations).

Chapter 1107-Sanctions

§1107.1-Sanctions

General Comment: The WIC/Food Stamp Program Disqualification Rule which was published as a proposed rule in the Federal Register on April 20, 1998 will soon be published as a final regulation. Once it is published, State agencies will have one year to implement the required provisions.

General Comment: Why is the State agency no longer offering civil money penalties in lieu of disqualification?



PFMA Officers

CHAIRMAN
William Bracey
Bill's Shur Saves
Moscow, PA

VICE-CHAIRMAN
Murray Battelman
Richboro Shop N Bag
Richboro, PA

TREASURER
David Genuardi
Genuardi's Family Markets
Norristown, PA

SECRETARY
Gary Kipp
Giant Eagle
Butler, PA

PRESIDENT
David L. McCorkle

PCSC Officers

CHAIRMAN
Scott Hartman
Rutter's Farm Stores
York, PA

VICE-CHAIRMAN
Vincent Anderson
Wawa, Inc.
Wawa, PA

SECRETARY/TREASURER
Jerry Orloski
Orloski's Quik Mart
Wilkes-Barre, PA

Services for our Members:

- Legislative Representation
- Coupon Redemption
- Money Orders
- Consumer Bill Payment Services
- Insurance Programs
- Seminars
- Annual Conventions
- Publications

May 7, 1999

The Honorable Harold F. Mowery, Jr.
Majority Chair, Public Health &
Welfare Committee
Senate of Pennsylvania
Senate Box 203031, Main Capitol Building
Harrisburg, PA 17120

Dear Senator Mowery:

The Pennsylvania Department of Health has sent you, or will shortly send you, a set of regulations implementing the Women, Infants, and Children (WIC) program. The Pennsylvania Food Merchants Association (PFMA) believes that the regulations are not only unwise but also unlawful. While the WIC regulations being proposed by the Department of Health presumably do not violate federal WIC requirements, they are inconsistent with Pennsylvania procedural law and Pennsylvania case law from a previous WIC dispute, and we believe that these regulations are unsound in terms of how the Department would continue to regulate the stores that serve WIC consumer-participants. We therefore urge you to disapprove the WIC regulations that the Department is sending to you for approval.

Regulatory Process

The Department of Health appears to acknowledge that the Regulatory Review Act, the Commonwealth Documents Law, and the Commonwealth Attorneys Act apply to the proposed regulations. However, the Department asserts that the "final-omitted" process under the Commonwealth Documents Law (CDL) (45 P.S. § 1204) allows the Department to skip the notice and comment requirements that are generally applicable to agency regulations. PFMA asserts, and asks you to conclude, that the final-omitted process is not available to the Department of Health with regard to these WIC regulations.

Section 1204 of the CDL lists three situations in which the "final-omitted" process would be lawful. Subsection 1204(1) allows the omission of ordinary procedures if a regulation relates to:



PFMA Officers

CHAIRMAN
William Bracey
Bill's Shur Saves
Moscow, PA

VICE-CHAIRMAN
Murray Battleman
Richboro Shop N Bag
Richboro, PA

TREASURER
David Genuardi
Genuardi's Family Markets
Norristown, PA

SECRETARY
Gary Kipp
Giant Eagle
Butler, PA

PRESIDENT
David L. McCorkle

PCSC Officers

CHAIRMAN
Scott Hartman
Rutter's Farm Stores
York, PA

VICE-CHAIRMAN
Vincent Anderson
Wawa, Inc.
Wawa, PA

SECRETARY/TREASURER
Jerry Orloski
Orloski's Quik Mart
Wilkes-Barre, PA

Services for our Members:

- Legislative Representation
- Coupon Redemption
- Money Orders
- Consumer Bill Payment Services
- Insurance Programs
- Seminars
- Annual Conventions
- Publications

May 7, 1999

The Honorable Frank L. Oliver
Democrat Chair, Health & Human Services
Committee
PA House of Representatives
34 East Wing, Main Capitol Building
Harrisburg, PA 17120

Dear Representative Oliver:

The Pennsylvania Department of Health has sent you, or will shortly send you, a set of regulations implementing the Women, Infants, and Children (WIC) program. The Pennsylvania Food Merchants Association (PFMA) believes that the regulations are not only unwise but also unlawful. While the WIC regulations being proposed by the Department of Health presumably do not violate federal WIC requirements, they are inconsistent with Pennsylvania procedural law and Pennsylvania case law from a previous WIC dispute, and we believe that these regulations are unsound in terms of how the Department would continue to regulate the stores that serve WIC consumer-participants. We therefore urge you to disapprove the WIC regulations that the Department is sending to you for approval.

Regulatory Process

The Department of Health appears to acknowledge that the Regulatory Review Act, the Commonwealth Documents Law, and the Commonwealth Attorneys Act apply to the proposed regulations. However, the Department asserts that the "final-omitted" process under the Commonwealth Documents Law (CDL) (45 P.S. § 1204) allows the Department to skip the notice and comment requirements that are generally applicable to agency regulations. PFMA asserts, and asks you to conclude, that the final-omitted process is not available to the Department of Health with regard to these WIC regulations.

Section 1204 of the CDL lists three situations in which the "final-omitted" process would be lawful. Subsection 1204(1) allows the omission of ordinary procedures if a regulation relates to:



PFMA Officers

CHAIRMAN
William Bracey
Bill's Shur Saves
Moscow, PA

VICE-CHAIRMAN
Murray Battelman
Richboro Shop N Bag
Richboro, PA

TREASURER
David Genuardi
Genuardi's Family Markets
Norristown, PA

SECRETARY
Gary Kipp
Giant Eagle
Butler, PA

PRESIDENT
David L. McCorkle

PCSC Officers

CHAIRMAN
Scott Hartman
Rutter's Farm Stores
York, PA

VICE-CHAIRMAN
Vincent Anderson
Wawa, Inc.
Wawa, PA

SECRETARY/TREASURER
Jerry Ortoski
Ortoski's Quik Mart
Wilkes-Barre, PA

Services for our Members:

- Legislative Representation
- Coupon Redemption
- Money Orders
- Consumer Bill Payment Services
- Insurance Programs
- Seminars
- Annual Conventions
- Publications

May 7, 1999

The Honorable Dennis M. O'Brien
Majority Chair, Health & Human Services
Committee
PA House of Representatives
209 Capitol Annex
Harrisburg, PA 17120

Dear Representative O'Brien:

The Pennsylvania Department of Health has sent you, or will shortly send you, a set of regulations implementing the Women, Infants, and Children (WIC) program. The Pennsylvania Food Merchants Association (PFMA) believes that the regulations are not only unwise but also unlawful. While the WIC regulations being proposed by the Department of Health presumably do not violate federal WIC requirements, they are inconsistent with Pennsylvania procedural law and Pennsylvania case law from a previous WIC dispute, and we believe that these regulations are unsound in terms of how the Department would continue to regulate the stores that serve WIC consumer-participants. We therefore urge you to disapprove the WIC regulations that the Department is sending to you for approval.

Regulatory Process

The Department of Health appears to acknowledge that the Regulatory Review Act, the Commonwealth Documents Law, and the Commonwealth Attorneys Act apply to the proposed regulations. However, the Department asserts that the "final-omitted" process under the Commonwealth Documents Law (CDL) (45 P.S. § 1204) allows the Department to skip the notice and comment requirements that are generally applicable to agency regulations. PFMA asserts, and asks you to conclude, that the final-omitted process is not available to the Department of Health with regard to these WIC regulations.

Section 1204 of the CDL lists three situations in which the "final-omitted" process would be lawful. Subsection 1204(1) allows the omission of ordinary procedures if a regulation relates to:



PFMA Officers

CHAIRMAN
William Bracey
Bill's Shur Saves
Moscow, PA

VICE-CHAIRMAN
Murray Battleman
Richboro Shop N Bag
Richboro, PA

TREASURER
David Genuardi
Genuardi's Family Markets
Norristown, PA

SECRETARY
Gary Kipp
Giant Eagle
Butler, PA

PRESIDENT
David L. McCorkle

PCSC Officers

CHAIRMAN
Scott Hartman
Rutter's Farm Stores
York, PA

VICE-CHAIRMAN
Vincent Anderson
Wawa, Inc.
Wawa, PA

SECRETARY/TREASURER
Jerry Orloski
Orloski's Quik Mart
Wilkes-Barre, PA

Services for our Members:

- Legislative Representation
- Coupon Redemption
- Money Orders
- Consumer Bill Payment Services
- Insurance Programs
- Seminars
- Annual Conventions
- Publications

May 7, 1999

The Honorable Mike Fisher
Attorney General
Office of the Attorney General
16th Floor, Strawberry Square
Harrisburg, PA 17120

Dear Honorable Fisher:

The Pennsylvania Department of Health has sent you, or will shortly send you, a set of regulations implementing the Women, Infants, and Children (WIC) program. The Pennsylvania Food Merchants Association (PFMA) believes that the regulations are not only unwise but also unlawful. While the WIC regulations being proposed by the Department of Health presumably do not violate federal WIC requirements, they are inconsistent with Pennsylvania procedural law and Pennsylvania case law from a previous WIC dispute, and we believe that these regulations are unsound in terms of how the Department would continue to regulate the stores that serve WIC consumer-participants. We therefore urge you to disapprove the WIC regulations that the Department is sending to you for approval.

Regulatory Process

The Department of Health appears to acknowledge that the Regulatory Review Act, the Commonwealth Documents Law, and the Commonwealth Attorneys Act apply to the proposed regulations. However, the Department asserts that the "final-omitted" process under the Commonwealth Documents Law (CDL) (45 P.S. § 1204) allows the Department to skip the notice and comment requirements that are generally applicable to agency regulations. PFMA asserts, and asks you to conclude, that the final-omitted process is not available to the Department of Health with regard to these WIC regulations.

Section 1204 of the CDL lists three situations in which the "final-omitted" process would be lawful. Subsection 1204(1) allows the omission of ordinary procedures if a regulation relates to:

The Honorable Mike Fisher
May 7, 1999
Page Two

(i) military affairs; (ii) agency organization, management or personnel; (iii) agency procedure or practice; (iv) Commonwealth property, loans, grants, benefits or contracts; or (v) the interpretation of a self-executing act of Assembly or administrative regulation.

None of these applies here. The Department of Health is making ordinary discretionary decisions in the WIC regulations that are coming before you.

Subsection 1204(2) allows agencies to bypass certain procedures when it provides individual notice to all affected persons. The Department of Health has not suggested that it will try to satisfy this subsection.

Subsection 1204(3) deals with emergencies. That is, it permits an agency to bypass the regular rule-making process for WIC programs when complying with the ordinary rule-making process would be impracticable, unnecessary, or contrary to the public interest. There is no emergency in this case. The federal rules for WIC programs require state plans, but not state regulations. The Department of Health apparently believes that it must issue regulations fairly soon because of the programmatic problems described in the Commonwealth Court decision in *Giant Food Stores, Inc v. Commonwealth, Dept. of Health*, 713 A.2d 177 (Pa. Cmwlth. 1998)]. We do not agree; the Commonwealth Court did not order the issuance of any regulations and did not establish any deadline. More important for present purposes, however, is the fact that the Commonwealth Court decision was issued on June 11, 1998. The passage of almost a year since then demonstrates that there is no emergency and defeats any suggestion that issuing proposed WIC regulations in the ordinary course of rule-making is impracticable. See *Automotive Service Councils v. Larson*, 82 Pa. Cmwlth. 47, 474 A.2d 404 (1984), where the court said that omitting proposed rule-making under section 204 of the Commonwealth Documents Law was improper in light of the time available to the agency.

The Honorable Mike Fisher
May 7, 1999
Page Three

In short, the Department of Health's current "final-omitted" gambit violates the Commonwealth Documents Law and needlessly subjects everyone involved to the specter of litigation any time in the future that the regulations are invoked.

Recertification System and Penalties

A fundamental feature of the Department's traditional and proposed system is that WIC stores are certified or authorized for limited periods. Currently, there exists a system of penalties when inspections occur for recertification purposes that does not make sense in light of the system of penalties used when identical WIC inspections occur for other reasons. The grading of offenses in the proposed draft regulations may be a step in the right direction. But the fundamental problem remains. The federal WIC rules require periodic reviews and adjustments where necessary, but do not call for periodic automatic decertification and recertification nor do the federal rules prescribe the specific details of recertification. Thus, the fundamental problem with the recertification reviews is a creation of the Department of Health, not the federal government.

A decade ago, Commonwealth Court invalidated a Department of Health WIC action that removed a Giant Food Store from the program, because the Department of Health's action was based on the above mentioned artificial distinction between recertification inspections and other inspections. *Giant Food Stores, Inc. v. Commonwealth, Department of Health*, 123 Pa. Cmwlth. 418, 554 A.2d 174 (1989). The court correctly concluded that the Department's WIC recertification system was illogical and therefore invalid. In the 1989 case, Giant store #48 was to be expelled from the program for committing an offense in a recertification review which would have only brought a warning in a "monitoring" review. In that decision the court said:

The Department admits that the nature of the violation was such that in any period except a recertification one, the penalty would have been a warning. It is difficult to follow

The Honorable Mike Fisher
May 7, 1999
Page Four

the Department's logic. The substantive effect of a one time shortage should make no qualitative difference depending on the time or type of inspection. As to whether a store is properly managed, there is no distinction to be made between a recertification inspection and any other type of inspection.

The finding [of violation made by the Department] is not based on substantial evidence. Substantial evidence is evidence that a reasonable mind would accept as adequate to support a conclusion. If a single product shortage is not sufficient to justify disqualification during a routine inspection, it is not sufficient to terminate store #48 from the WIC program on the basis of a one time shortage during a recertification inspection.

Giant, 123 Pa. Cmwlth. at 421-422, 554 A.2d at 176 (citations omitted). The Court therefore reversed the Department's decision to terminate the store. *Giant*, 123 Pa. Cmwlth. at 423, 554 A.2d at 176-177. After the 1989 court decision, the Department claimed that it could pursue its flawed approach to recertification once it wrote that approach down in a Handbook. We assume that the Department will feel all-the-more emboldened to pursue its judicially-invalidated approach once it publishes it as a regulation as it is currently attempting to do. Because the draft regulations are inconsistent with the Commonwealth Court decision, they are improper and should be rejected. The Department's approach, if allowed to go forward, will predictably lead to more needless litigation. The rancor and inefficiency of that process should be avoided by rejecting the regulation that is now being contemplated by the Department.

Other Substantive Issues

We have had initial discussions with the Department of Health regarding a different view of the program. In our view, for example, WIC store authorization should not be based on scarcity and monopolies, WIC

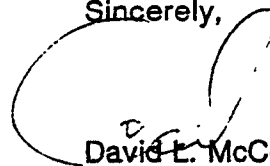
The Honorable Mike Fisher
May 7, 1999
Page Five

store authorization should not automatically "sunset" every few years, and the Department's means of comparing store prices is dysfunctional. The Department and the Governor's office have said that they are willing to rethink these issues over the longer term (and we acknowledge that this is a potentially good sign). However, the Department's proposal to promulgate the regulations through the "final omitted" process would push that process off further, and without good reason.

PFMA believes that this rethinking should happen now, with broad consultation with stake holders, through ordinary regulatory procedures. Thus, because of the procedural improprieties, the inconsistency with the case law regarding recertification inspections, and the program design flaws that are ripe for discussion, PFMA believes that the current "final-omitted" regulatory effort of the Department should be rejected.

We regret that we are at temporary loggerheads with the Department on this regulation, and we believe that your intervention now will spare us all needless conflict and put us on a road to achieving a consensus with which we all can live.

Sincerely,



David L. McCorkle
President & CEO

DLM/mac

Commonwealth of Pennsylvania



99 APR 16 PM 5:04

DEPARTMENT OF HEALTH

HARRISBURG

THE SECRETARY

April 16, 1999

Mr. Robert E. Nyce
Executive Director
Independent Regulatory Review Commission
14th Floor, 333 Market Street
Harrisburg, Pennsylvania 17101

RE: Department of Health Regulations
Supplemental Food Program for Women, Infants and Children (WIC Program)
No. 10-158

Dear Mr. Nyce:

Please accept this letter as formal notice that the Department of Health is withdrawing the above-referenced regulations. The Department expects to again serve the Commission and the standing committees with final-omitted regulations by April 29, 1999.

Sincerely,

A handwritten signature in black ink, appearing to read "Gary L. Gurian".

Gary L. Gurian
Acting Secretary of Health

cc: Representative Dennis M. O'Brien
Representative Frank L. Oliver
Senator Harold F. Mowery, Jr.
Senator Vincent J. Hughes