

**NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE
BOARD OF HEALTH**

**NOTICE OF ADOPTION OF AMENDMENTS TO
ARTICLE 47 OF THE NEW YORK CITY HEALTH CODE**

In compliance with Sections 1043(b) and (d) of the New York City Charter, a notice of intention to amend Article 47 of the New York City Health Code was published in the City Record on March 17, 2006 and a public hearing was held on April 19, 2006. One person testified and written comments were received. In response to two of the comments, further amendments were made to §47.36 and §47.37 (b). At its meeting on June 15, 2006, the Board of Health adopted the following resolution.

STATUTORY AUTHORITY

These amendments to the New York City Health Code (the “Health Code”) are made pursuant to §§556, 558 and 1043 of the New York City Charter (the “Charter”). Section 556 of the Charter grants the New York City Department of Health and Mental Hygiene (the “Department”) jurisdiction to regulate matters affecting health in the City of New York. Section 558 (b), (c) and (g) of the Charter empowers the Board of Health to amend the Health Code and to include in the Health Code all matters to which the Department’s authority extends. Section 1043(a) of the Charter grants rule-making powers to the Department.

STATEMENT OF BASIS AND PURPOSE

The New York City Department of Health and Mental Hygiene is required by law to protect and promote the health of all New Yorkers. This requirement includes the prevention and control of chronic disease, as well as communicable disease. The Department’s Bureau of Chronic Disease Prevention and Control, in the Division of Health Promotion and Disease Prevention, supports programs which promote increased physical activities and nutrition to prevent chronic diseases. The Bureau of Day Care, in the Division of Environmental Health, enforces Article 47 (“Day Care Services”) of the Health Code, which regulates public and private group day care services operating within New York City. The Bureau of Tuberculosis Control in the Division of Disease Control supervises reporting, control and prevention of tuberculosis in the City.

The Department has requested the Board of Health to amend various provisions relating to operation of day care services regulated by Article 47 of the Health Code. The affected provisions include §47.27(d), which has been amended to update requirements for day care staff tuberculosis testing and followup; §47.35(b), which has been amended to require increased indoor and outdoor play; adding a new §47.36 to require structured and guided physical activities and establish limits on sedentary TV viewing; and §47.37(b) and (c), which have been amended to update requirements for nutritional standards.

Tuberculosis testing and followup

Currently, Health Code §47.27(d) requires new employees and volunteers who work in sites that provide day care services for children to be medically evaluated for tuberculosis infection at hire and annually thereafter. This requirement dates from a time when tuberculosis rates were considerably higher than they are currently. Tuberculosis rates in New York City are at an all-time low although rates of newly reported cases continue to be high in certain populations within New York City (e.g., immigrant communities), and new tuberculosis infections are increasingly uncommon. Day care and other teachers are not considered to be among the populations at high risk for tuberculosis disease and infection, and no national body recommends annual testing for this group. See, e.g., “Targeted tuberculin testing and treatment of latent tuberculosis infection,” US Centers for Disease Control and Prevention (“CDC”), MMWR, June 9, 2000. In view of these circumstances, this provision has been amended to eliminate annual retesting of day care staff for tuberculosis infection.

It is still important to monitor tuberculosis infection in new day care staff because they will be working with children, a vulnerable population. Children are at high risk of progressing from latent tuberculosis infection to active tuberculosis disease. The purpose of testing staff and volunteers at hire is to intervene when there is evidence of tuberculosis infection to prevent such individuals from progressing from latent tuberculosis infection to active tuberculosis disease. This can be achieved by testing all day care staff when they are initially hired, and requiring reporting only of those persons with latent infection to the Department.

The amended provision also requires day care operators to report to the Department the names of newly hired staff found to be infected with latent tuberculosis, so that the Department may determine whether such staff were placed on treatment, and, if treatment was started, what was the final outcome. The Bureau of Day Care currently receives calls from day care operators requesting guidance when staff tuberculosis testing is positive. Requiring a formal report to the Department’s Bureau of Tuberculosis Control will facilitate this Bureau’s ability to improve completion of preventive treatment. Reports received will be considered confidential, in accordance with Health Code §11.07, and staff testing positive will not be compelled to undergo treatment for latent tuberculosis infection. Examination forms and instructions for their completion will continue to be provided by the Department, and will be modified to include instructions on reporting positive test results.

The amended provision preserves the Department’s authority to order further tuberculosis testing of day care services staff and children at any time if deemed necessary for epidemiological investigation.

Obesity prevention

Obesity is epidemic in New York City, and it begins early in life. Being obese in childhood increases the likelihood of adult obesity, which is associated with diabetes, high blood pressure, high cholesterol, heart disease, and cancer. Nationally, childhood obesity more than doubled over the past two decades, from 7% in 1980 to 16% in 2002. U.S. Department of Health and Human Services (“DHHS”), *The Surgeon General’s Call to Action to Prevent and Decrease*

Overweight and Obesity, 2001. In 2003, a joint Department and Department of Education survey found that as early as kindergarten, 21% of children were obese. DOHMH, Vital Signs, June 2003. A 2004 study of NYC children ages two to four enrolled in the Special Supplemental Nutrition Program for Women, Infants and Children (“WIC”) found that 22% were obese. Nelson, et al., American Journal of Public Health, 94, 2004. This level is more than 50% higher than national data reported by the CDC Pediatric Nutrition Surveillance System that 14% of two- to four year-old children from low-income families were obese in 2000. Sherry, et al. Archives of Pediatric and Adolescent Medicine, 158, 2004.

Obesity increases risks of diabetes, heart disease, stroke, cancer and other health problems. Fortunately, obesity is preventable and if obesity rates decrease, so will chronic disease and associated mortality. This epidemic requires similar urgency in public health response to that traditionally accorded to infectious disease monitoring and control. Left unabated, the CDC estimates that among children born in 2000, one of three will develop diabetes during their lifetime; this applies to one of every two Hispanic children. Narayan, et al. JAMA, 290, 2003.

Enhanced outdoor and indoor physical activities

Section 47.35(b) of the Health Code currently provides only that “[a]dequate periods of outdoor play shall be provided daily for all children, except during inclement weather.” This provision has been amended to require that children be appropriately dressed for outdoor play and that in inclement weather, safe, active indoor play be substituted. In addition, a new §47.36 has been added to establish a required minimum number of minutes of structured and guided physical activity daily. Both the CDC and the National Association for Sport and Physical Education (“NASPE”) recommend that toddlers and preschoolers receive a total of at least 60 minutes of physical activity per day, and that young children not be sedentary for more than 60 minutes at a time, except when sleeping. U.S. Department of Health and Human Services (“DHHS”), *Healthy People, 2010*, 2000; DHHS, *Physical Activity and Health: A Report of the Surgeon General*, 1996; NASPE, *Active Start: A Statement of Physical Activity Guidelines for Children Birth to Five Years*, 2002. This requirement is reduced proportionately for children who spend less than a full day in a day care service.

Limits on television viewing

An additional challenge to obesity prevention is the increasing amount of passive, sedentary time that children spend in front of the television. Television viewing is positively associated with an increase in body-mass index (“BMI”). Among children in the longitudinal Framingham Children’s Study, those who watched the most television had the greatest increase in body fat when followed from age four to age 11. Proctor, et al., *Int’l Journal of Obesity*, 27(7), 2003. A study of three- to four-year-old children found that television viewing was a significant predictor of BMI over three years, and that it became an even stronger predictor over time. Jago, et al., *Int’l Journal of Obesity*, 29(6), 2005. Evidence from the Institute of Medicine also indicates that food and beverage marketing targeted to children ages 12 and under leads them to request and consume high-calorie, low-nutrient products. Institute of Medicine, *Food Marketing to Children and Youth*, 2006.

Excessive television and other sedentary viewing undermine the establishment of healthy behaviors in early childhood. Consistent with the recommendations of the American Academy of Pediatrics (“AAP”), this new Health Code provision sets limits on television viewing in the group day care environment. In order to address the negative impact of television on children, the AAP recommends against television viewing for children younger than two years of age. For older children, the AAP recommends no more than one to two hours per day of quality, educational screen time. AAP Position Statement, *Television’s impact on children*, 2002. §47.36 (b) limits passive sedentary activities such as television viewing in group day care services to no more than 60 minutes per day. The limitation on passive sedentary activities is also to be applied proportionately to children who spend less than a full day in a day care service.

Nutritional standards

Section 47.37 (b) of the Health Code currently states that “Food shall be supplied to children which is...sufficient in amount, varied according to a diet approved by the Department ...” This language was written during a time when insufficient amounts of food were the major concerns affecting nutritional health, and when the Department maintained a Bureau of Nutrition with many nutritionists to review and approve day care menus. This language has been updated in order to address the current environment of obesity and the need for guidance on appropriate kinds of foods and portion sizes for children. The updated language also now accurately reflects the role and capacity of the Department in establishing nutritional guidelines, but not directly approving each day care service’s diet plan.

In accordance with this amended provision, the Department will establish and distribute, or approve, nutrition standards and guidelines. The amended provision also establishes limits on beverages served by day care services. In order to reduce energy imbalance and juice over consumption, the proposed regulations would only allow juice to be provided to children over eight months of age, and only 100% juice would be permitted. In the original proposal, children over six months of age would have been limited to consuming no more than six ounces of 100% juice per day. As a result of a comment from the New York State Department of Health Division of Nutrition Child and Adult Care Food Program (“CACFP”), the age limit has been increased to eight months to be consistent with CACFP regulations. Beverages with added sweeteners would not be permitted. Since parents and caregivers rarely set limits on juice consumption and since juice can be consumed more quickly than its whole fruit equivalents, children are prone to over-consume juice. Although juice has some benefits, it offers no nutritional advantage over whole fruit. In fact, juice lacks the fiber of whole fruit, and is more concentrated with sugars and calories.

When milk is served, children ages two and older may receive only low-fat (1%) or non-fat (skim) milk, unless medically indicated. Although potable drinking water supplies are already required by §47.39, a new paragraph (iv) of §47.37 (b) requires that water be made easily accessible to children throughout the day, including at meals.

These beverage standards are consistent with the AAP Position Statement, *The Use and Misuse of Fruit Juice in Pediatrics*, [Pediatrics, 107(5), 2001] and the American Heart

Association's "Dietary Recommendations for Children and Adolescents: A Guide for Practitioners." Pediatrics, 117(2), 2006; USDA/DHHS, *U.S. Dietary Guidelines*, 2005.

In addition, §47.37 (c), which applies to food provided by parents, has been similarly updated to provide guidance to parents, through materials provided or approved by the Department, regarding current nutritional standards.

Because of the addition of a new §47.36, the Table of Section Headings has also been amended.

Public comment

Four written comments were received, and one person testified at the hearing, and provided a written comment as well. Three of the persons submitting comments favored the proposal. As noted above, a further change was made to §47.37 in response to the comment from a public health nutritionist at CACFP. One person opposing the amendments wrote that restricting television viewing to one hour per day actually encourages viewing, rather than restricting it, and that the requirement for structured and guided physical activity was likely to inhibit children's "freedom to explore and stretch the limits of their individual physical capabilities." In response to this comment, the Department has amended §47.36 to indicate that it will provide guidelines to clarify what activities should be considered structured physical activities and assist teachers in achieving an appropriate balance of structured and free play activities. In addition, because the Department guidelines concerning structured activity (§47.36) and nutrition (§47.37) were not available at the time of adoption, the resolution adopted by the Board of Health includes new provisions postponing the effective date of these amendments.

STATEMENT PURSUANT TO SECTION 1042-REGULATORY AGENDA

This proposal was not included in the fiscal year 2005 New York City Department of Health and Mental Hygiene Regulatory Agenda as this action is the result of recent analyses by the Department.

The proposal is as follows:

Note - matter in brackets [] to be deleted
matter underlined is new

RESOLVED, that the table of section headings in Article 47 of the New York City Health Code as adopted on the seventeenth of October nineteen hundred eighty-eight be, and the same hereby is, amended, to be printed together with explanatory notes, to read as follows:

Article 47

Day Care Services

§47.01 Definitions.

* * *

§47.35 Outdoor play.

§47.36 Physical activity and limits on television viewing.

§47.37 Food and food areas.

* * *

Notes: The table of section headings was amended by resolution adopted on June 15, 2006 to add a new section §47.36 “Physical activity and limits on television viewing.”

RESOLVED, that subdivision (d) of §47.27 of the New York City Health Code as adopted on the seventeenth of October nineteen hundred eighty-eight be, and the same hereby is, amended, to be printed together with explanatory notes, to read as follows:

47.27 Health; staff.

* * *

[(d) Such medical examinations must include an annual tuberculin skin test. Tuberculin tests shall be administered and interpreted in accordance with criteria established by the Department. If a tuberculin test is negative, no X-ray examination is necessary. If an individual’s tuberculin test is positive, he/she shall be X-rayed unless there are medical contraindications to X-ray examination. Documentation of the X-ray, any further medical and laboratory examination, and any treatment or follow-up are required to be kept on file in the place of employment. Exemption from tuberculin testing shall be permitted for a previously positive tuberculin test, documentation of diagnosis or treatment of tuberculosis in the past, or having had BCG examination.]

(d) Test for tuberculosis infection for new hires. Prior to commencing work at a day care service, all persons newly hired as an employee or accepted as a volunteer to work in a day care service shall provide a written statement to the day care service operator from a physician indicating that a test for tuberculosis infection has been performed and, if necessary, an X-ray examination, in a manner consistent with the Department’s medical and epidemiologic recommendations. Persons with a history of BCG vaccination shall not be exempt from testing.

(i) Either a tuberculin skin test or blood based test may be performed. A documented positive test result may be submitted regardless of the date the test was performed. A documented

negative test result may be submitted only if such test was performed within one year prior to commencing work in the day care service.

(ii) Persons who have tested positive for tuberculosis infection shall be reported to the Department by the day care service operator, on forms provided by the Department. Such reports shall contain all information required by the Department, including whether such persons have been or are being treated for latent tuberculosis infection, and, if treated, whether they have completed such treatment, and shall be maintained as confidential in accordance with §11.07 of this Code.

(iii) The Department may require further testing for tuberculosis at any time of any persons working in or attending a day care service when such testing is deemed necessary for epidemiological investigation.

Notes: Subdivision (d) was amended by resolution adopted on June 15, 2006 to update the requirements for tuberculosis testing for day care services staff, and, in view of the generally low risk of tuberculosis transmission in day care settings, limit such testing to the time of hiring only.

RESOLVED, that subdivision (b) of section 47.35 of the New York City Health Code as adopted on the seventeenth of October, nineteen hundred eighty-eight, be, and the same hereby is amended, to be printed together with explanatory notes, to read as follows:

47.35 Outdoor Play

* * *

(b) Adequate periods of outdoor play shall be provided for all children, except during inclement weather. During outdoor play, children shall be dressed appropriately for weather and temperature. In inclement weather, active play shall be encouraged and supported in safe indoor play areas.

Notes: Subdivision (b) of Section 47.35 was amended by resolution adopted on June 15, 2006 to add a provision to substitute active indoor play for outdoor play during inclement weather.

RESOLVED, that Article 47 of the New York City Health Code as last amended on the twenty-second of July, two thousand and four, be and the same hereby is amended to add a new section 47.36, to be printed together with explanatory notes, to read as follows:

47.36 Physical activity and limits on television viewing.

(a) Physical activity. Each day care service shall provide a program of age and developmentally appropriate physical activity.

(i) Children ages 12 months or older attending a full-day program shall be scheduled to participate in at least 60 minutes of physical activity per day. Children attending less than a full day program shall be scheduled to participate in a proportionate amount of such activities. For children ages three (3) and older, at least 30 of the 60 minutes shall be structured and guided physical activity. The remainder of the physical activity may be concurrent with other active play, learning and movement activities.

(ii) Structured and guided physical activity shall be facilitated by teachers and/or caregivers and shall promote basic movement, creative movement, motor skills development, and general coordination. A program of structured and guided physical activity shall be developed in accordance with guidelines provided or approved by the Department.

(iii) Day care operators shall document physical activities and make such documentation available to the Department upon request. This documentation shall be included in the program daily schedule and program lesson/activity plans.

(iv) Children shall not be allowed to remain sedentary or to sit passively for more than 60 minutes continuously, except during scheduled rest or naptime.

(b) Television viewing. Television, video and other visual recordings shall not be used with children under two (2) years of age. For children ages two (2) and older, viewing of television, videos, and other visual recordings shall be limited to no more than 60 minutes per day of educational programs or programs that actively engage child movement. Children attending less than a full day program shall be limited to a proportionate amount of such viewing.

(c) Effective date. This section shall be effective 30 days after approval of the guidelines referred to in paragraph (ii) thereof, or January 1, 2007, whichever is earlier.

Notes: Section 47.36 was added by resolution adopted on June 15, 2006 in response to data showing young children at increasing risk of obesity and associated diseases, and requires enhanced structured and guided physical activity and a limit on passive and sedentary activities, including watching television, and video or other visual recordings.

RESOLVED, that subdivisions (b) and (c) of Section 47.37 of the New York City Health Code as last amended on the fourteenth of January, two thousand three, be and the same hereby are amended, to be printed together with explanatory notes, to read as follows:

47.37 Food and Food Areas

* * *

(b) Food [shall be] supplied to children [which is] shall be wholesome, of good quality, properly prepared [,] [sufficient in amount, varied according to a diet approved by the Department] in accordance with nutritional guidelines provided or approved by the Department, age-appropriate in portion size and variety, and served at regular hours at appropriate intervals.

(i) Beverages with added sweeteners, whether artificial or natural, shall not be provided to children.

(ii) Juice shall only be provided to children eight (8) months of age and older, and shall not be provided in a bottle. Only 100% juice shall be permitted and children shall receive no more than six (6) ounces per day.

(iii) When milk is provided, children ages two and older shall only be served milk with 1% or less milk-fat unless milk with a higher fat content is medically required for an individual child, as documented by the child's medical provider.

(iv) Water shall be made available and shall be easily accessible to children throughout the day, including at meals.

(v) Any special diet shall be provided only in accordance with a note from a physician.

(vi) The provisions of this subdivision shall not apply to day care services operated by a religious organization in instances where religious dietary requirements would be inconsistent with such provisions.

(vii) The amendments to this subdivision adopted on June 15, 2006 shall be effective 30 days after approval of the guidelines referred to herein, or January 1, 2007, whichever is earlier.

(c) When [children bring] parents or other responsible persons provide meals, [from home, they] such foods shall be properly refrigerated and the operator shall provide [parents with information regarding appropriate diet for age] such persons with age-appropriate nutritional guidelines approved or provided by the Department. [Any special diet shall be provided only in accord with a physician's order.] The amendments to this subdivision adopted on June 15, 2006 shall be

effective 30 days after approval of the guidelines referred to herein, or January 1, 2007, whichever is earlier.

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Notes: Subdivision (b) of §47.37 was amended by resolution adopted on June 15, 2006 to limit the use of sweetened beverages and require service of non-fat or low fat milk in meals served by day care services. The requirement in subdivision (c) that any special diet be medically recommended was removed to and renumbered as paragraph (v) in subdivision (b). A new paragraph (vi) provides that this subdivision is not intended to affect religious dietary requirements in day care services operated by religious organizations.

Subdivision (c) of §47.37 was amended by resolution adopted on June 15, 2006 to require day care services to provide parents with Department approved or provided age-appropriate nutritional guidelines when parents supply food for service to their own children, and the requirement that special diets be medically recommended was removed to and renumbered as paragraph (v) in subdivision (b).