

97-126 HFS 45³ 46 - OUTDOOR SPACE
DAY CARE CENTERS



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Governor

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Department of Health and Family Services

OFFICE OF LEGAL COUNSEL

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June 11, 1998

The Honorable Brian Rude, President
Wisconsin State Senate
1 East Main, Suite 402
Madison, WI 53702

The Honorable Scott Jensen, Speaker
Wisconsin State Assembly
1 East Main, Suite 402
Madison, WI 53702

Re: Clearinghouse Rule 97-126

HSS 45.05 (11) and HFS 46.06 (11), relating to outdoor play space for children attending day care centers.

Gentlemen:

In accordance with the provisions of s. 227.19(2), Stats., you are hereby notified that the above-mentioned rule is in final draft form. This notice and the report required by s. 227.19(3), Stats., are submitted herewith in triplicate.

The rule was submitted to the Legislative Council for review under s. 227.15, Stats. A copy of the Council's report is also enclosed.

If you have any questions about the rule, please contact Patty Hammes at 267-7933.

Sincerely,


Paul E. Menge

Administrative Rules Manager

cc. Gary Poulson, Deputy Revisor of Statutes
L Senator Robert Welch, JCRAR
Representative Glenn Grothman, JCRAR
Patty Hammes, Division of Children and Family Services
Pat Franke, Division of Children and Family Services
Kevin Lewis, Secretary's Office

END



END

PROPOSED ADMINISTRATIVE RULES—HSS 45.05 (11) & HFS 46.06 (11)
ANALYSIS FOR LEGISLATIVE STANDING COMMITTEES
PURSUANT TO S. 227.19 (3), STATS.

Need for Rules

Among requirements for operation of a family or group day care center for children under the Department's rules is that a center in operation more than 3 hours a day (a group center) or where a child is in care for more than 3 hours a day (a family center) must include daily outdoor activities in its program "except during inclement weather or when not advisable for health reasons" (s. HFS 46.07(1)(e)4.). The rules now provide that the location of the required outdoor activities be on the premises of the center. This is expressly stated in the group center rules and is implicit in the family center rules where the requirements for outdoor play space are included in the section relating to the home.

Section 5 of 1995 Wisconsin Act 439 directed the Department to promulgate rules that establish a procedure under which an applicant for a license to operate a day care center which would have outdoor play space off the premises of the center may obtain an exemption from the current rules for outdoor play space that include a requirement that the outdoor play space be on the center's premises. The rules for an exemption are to include requirements that the applicant must meet to obtain the exemption. These are the rules.

The rules provide that a request for an exemption include a plan for outdoor play space. That plan is to identify and describe the location of the outdoor play space; provide for adequate supervision of the children; explain the arrangements made to ensure that the toileting and diapering needs of the children will be met; and affirm the center's compliance with requirements for the size and safety of the off-premises outdoor play area. If the off-premises play space is reached by walking, all children under 3 years of age must be transported to it in wheeled vehicles. The plan is subject to approval by the Department.

Response to Clearinghouse Recommendations

All comments of the Legislative Council's Rules Clearinghouse were accepted.

Public Hearings

The Department held three public hearings on the proposed rules. The hearings were in Wausau, Milwaukee and Madison in December 1997. Thirteen persons registered at the hearings. Four of them testified on the proposed rules, and one other submitted written comments. Two other persons submitted written comments to the Department after the hearings. A complete list of persons who attended the hearings or submitted written comments to the Department on the proposed rules can be found in an attachment to this

document, along with a summary of their comments and the Department's responses to the comments.

No modifications were made in the proposed rules in response to comments received during public review.

Final Regulatory Flexibility Analysis

These rule changes will not have a significant economic impact on a substantial number of small businesses.

Although almost all of the 2665 licensed family day care centers in the state are small businesses, as "small business" is defined in s. 227.114 (1) (a), Stats., as are about 700 of the 2269 licensed group day care centers in the state, the changes will affect only centers that do not have on-premises outdoor play space and even these will not be much affected because they are now permitted to use off-premises outdoor play space under exceptions granted by the Department on a case-by-case basis.

The rule changes exempt a center from the requirement that outdoor play space be on the premises of the center provided that the center complies with new rules for centers with off-premises play space and that its plan for use of the off-premises play space is approved by the Department.

At the Department's public hearings on the proposed rules, two persons objected to the requirement that children under 3 years of age be transported to off-premises outdoor play space in wheeled vehicles and another person to the requirement that group day care centers have at least 9 inches of energy-absorbing material under climbing equipment, swings and slides in their on-premises outdoor play area. Two of the persons cited cost considerations. The Department responded that both requirements are necessary for the safety of the children. The requirement for an energy-absorbing surface under outdoor play equipment at group day care centers is carried over from current rules.

**DEPARTMENT OF HEALTH AND FAMILY SERVICES
BUREAU OF REGULATION AND LICENSING**

**PUBLIC HEARING AND WRITTEN COMMENT SUMMARY
HFS 45 AND HFS 46**

Three public hearings were held on the proposed rules. The hearings were in Wausau on December 1, 1997, in Milwaukee on December 4, 1997, and in Madison on December 5, 1997.

Staff in attendance:

- Julie Strong, Hearing Officer, Chief Regulation and Licensing Section, Northern Regional Office, Dec. 1, 1997
- Patricia Franke, Child Care Program Specialist, Bureau of Regulation and Licensing, Dec. 1, Dec. 5 and Dec. 7, 1997
- Helen Scovel, Day Care Licensing Specialist, Bureau of Regulation and Licensing, Dec. 1, 1997
- Cindy Larsen, Day Care Licensing Specialist, Dec. 1, 1997
- Joan Ehrenreich, Day Care Licensing Specialist, Dec. 1, 1997
- Judy Hermann, Hearing Officer, Chief Regulation and Licensing Section, Southeastern Regional Office, Dec. 7, 1997
- Kenneth Menting, Day Care Licensing Specialist, Dec. 7, 1997
- Lee Broman, Day Care Licensing Specialist, Dec. 7, 1997
- Daniel Kerwin, Hearing Officer, Chief Regulation and Licensing Section, Southern Regional Office, Dec. 8, 1997.

The hearing record was left open until December 12, 1997, for receipt of written comments. Participation in the hearings is tabulated below. The indication of support and opposition reflect the positions indicated on the registration slips or written statements filed by the hearing participants. One written comment was received by the department during the public review period that ended 7 days after the last hearing. One written comment was received after the close of the written comments period.

Registered: 13

Oral Testimony: 4

Written comments from persons who attended but did not testify: 1

Support the rules: 5

Oppose the rules in part: 6

Written comment, did not attend hearing: 2

**Proposed HFS 45 and HFS 46 Amendments
Hearing Attendees or Commenters**

The following is a complete list of the persons who attended a public hearing or submitted written comments on the proposed permanent rules. With each individual's name and affiliation is an indication of the individual's position on the proposed rules and whether or not the individual testified or provided written comments. The letter preceding a name serves in the attached summary of hearing comments to indicate the person who made the specific comment.

	NAME AND ADDRESS	POSITION	ACTION
a.	Sao Lor Nina Care Center 1010 S. 5 th Ave. Wausau, WI. 54401	Not indicated	Observed hearing only
b.	Sharon Fruik County Certification 400 E. Thomas Wausau, WI. 54403	Not indicated	Observed hearing only
c.	Dolly Hall UMOS Migrant Headstart 205 E. Main St. Wautoma, WI. 54982	Supports as written	Spoke at hearing
d.	Janie Velasquez United Migrant Opportunity Services	Supports as written	Spoke at hearing
e.	Debbie Sonnemann N34 W24041 Capitol Dr. Pewaukee, WI. 53072	Supports as written	Observed hearing only
f.	Amanda Warfield 5806 N. 39 th St. Milwaukee, WI.	Not indicated	Observed hearing only
g.	Carmen Rivers N75 W23435 N. Ridgeview Sussex, WI. 53089	Opposes in part	Observed hearing only
h.	Mary Alice Cannon 3418 W. 12 th St. Milwaukee, WI.	Supports as written	Observed hearing only
i.	Carrie Palmer 3270 N. 30 th St. Milwaukee, WI.	Not indicated	Observed hearing only
j.	Lamonte Blade Allen Chapel Day Care 4260 N. Teutonia Ave. Milwaukee, WI.	Supports as written.	Observed hearing only

	NAME & ADDRESS	POSITION	ACTION
k.	Ann Smith 6 Windhaven Ctr Madison, WI. 53717	Opposes in part	Spoke at hearing
l.	Caroll Keinitz Satellite Family Child Care 3200 Monroe St Madison, WI. 53711	Opposes in part	Spoke at hearing
m.	Karen Larson 2157 Middleton Beach Rd. Middleton, WI. 53562	Opposes in part	Observed hearing only
n.	Dave Cochrane Family Forum, Inc. 2231 Catlin Ave. Superior, WI. 54880	Opposes in part	Written comment
o.	James Vermeul Headstart Child & Family Development Ctrs. 333 Buchner Pl. LaCrosse, WI. 54603	Opposes in part	Written comment

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#	RULE REFERENCE	COMMENT	DEPARTMENT RESPONSE
c.	HSS 45.05(11)(c)2.	Speaks for Migrant Headstart. This rule will help family day care providers by allowing the use of parks. Many of these rules are already in the Headstart Performance Standards.	Acknowledged.
d.	HSS 45.05(11)(c)	Supports the use of off premises outdoor play space by children because it gives more people an opportunity to be licensed.	Acknowledged.
k.	HSS 45.05(11)(c)6.	Objects to requirement for wheeled vehicles for children under 3 years when outdoor play space is reached by walking. Most children in family day care are under 3 years of age. Pushing a twin stroller and pulling a wagon behind by one person may create a hazard.	Disagree. The hazard related to one provider walking 8 children including carrying some non-walking children is greater than the theoretical hazard related to wheeled vehicles.
l.	HSS 45.05(11)(c)6.	Supports remarks of (k) above. Lower income providers cannot afford wheeled vehicles. Too expensive.	Disagree. The safety of children being walked distances to an off-premises play space should not be jeopardized by eliminating the requirement. Wheeled vehicles are economically available from garage sales and resale shops and Goodwill.
n.	HFS 46.06(11)(b)2.d.	Opposes current requirement for 9 inches of energy absorbing surface such as loose sand, pea gravel or pine or bark mulch under climbing equipment, swings and slides four feet or more in height on the basis that the energy absorbing material is expensive, would freeze in winter and would be difficult to maintain.	The energy absorbing material is recommended by the Bureau of Maternal and Child Health, the American Academy of Pediatrics and American Public Health Association. Injuries on playgrounds account for roughly half of injuries to children in care. Falls on resilient surfaces are less likely to cause serious injury since peak deceleration and force are reduced.
o.	HFS 46.06(11)	Opposes requirement for outdoor play space if children are present more than 3 hours a day. Suggests requiring outdoor play space if children are present in a 4.5 or 5 hour time frame.	No change. A licensee may request an exemption or an exception if not able to meet the specified time frames.

PROPOSED ORDER OF THE
DEPARTMENT OF HEALTH AND FAMILY SERVICES
REPEALING AND RECREATING RULES

To repeal and recreate HSS 45.05(11) and HFS 46.06(11), relating to outdoor play space for children attending day care centers.

Analysis Prepared by the Department of Health and Family Services

Among requirements for operation of a family or group day care center for children under the Department's rules is that a center in operation more than 3 hours a day (a group center) or where a child is in care for more than 3 hours a day (a family center) must include daily outdoor activities in its program "except during inclement weather or when not advisable for health reasons" (s. HFS 46.07(1)(e)4.). The rules now provide that the location of the required outdoor activities be on the premises of the center. This is expressly stated in the group center rules and is implicit in the family center rules where the requirements for outdoor play space are included in the section relating to the home.

Section 5 of 1995 Wisconsin Act 439 directed the Department to promulgate rules that establish a procedure under which an applicant for a license to operate a day care center which would have outdoor play space off the premises of the center may obtain an exemption from the current rules for outdoor play space that include a requirement that the outdoor play space be on the center's premises. The rules for an exemption are to include requirements that the applicant must meet to obtain the exemption. These are the rules.

The rules provide that a request for an exemption include a plan for outdoor play space. That plan is to identify and describe the location of the outdoor play space; provide for adequate supervision of the children; explain the arrangements made to ensure that the toileting and diapering needs of the children will be met; and affirm the center's compliance with requirements for the size and safety of the off-premises outdoor play area. If the off-premises play space is reached by walking, all children under 3 years of age must be transported to it in wheeled vehicles. The plan is subject to approval by the Department.

The Department's authority to create these rules is found in s. 48.67, Stats., and s. 5 of 1995 Wisconsin Act 439. The rules interpret s. 48.65, Stats., and s. 5 of 1995 Wisconsin Act 439.

SECTION 1. HSS 45.05(11) is repealed and recreated to read:

HSS 45.05(11) OUTDOOR PLAY SPACE. (a) Requirement for outdoor play space. A center shall have outdoor play space if any child is receiving care for more than 3 hours a day.

(b) Required features of outdoor play space. Except when an exemption is requested and is approved by the department under par. (c), a center shall comply with all of the following requirements for outdoor play space:

1. The outdoor play space shall be on the premises of the center.
2. There shall be at least 75 square feet of outdoor play space for each child using the space at a given time.
3. The outdoor play space shall be well-drained and shall be free of hazards such as uncovered wells, cisterns and unused appliances.
4. A permanent enclosure not less than 4 feet high shall be provided where there are hazards nearby, including but not limited to traffic or bodies of water, which present a threat to the safety of children in care.
5. Concrete and asphalt are prohibited under climbing equipment, swings and slides.

(c) Exemption for off-premises play space. 1. In this paragraph, "main thoroughfare" means a heavily traveled street or road used by vehicles as a principal route of travel.

2. A center wanting to use an off-premises play space may ask the department for an exemption from the requirements under par. (b) for a center's outdoor play space. The request for an exemption shall be in writing and shall be accompanied by a plan for outdoor play space which does all of the following:

- a. Identifies and describes the location to be used, the travel distance from the center to that location and the means of transporting the children to that location.
- b. Provides for adequate supervision of the children as specified in Table 45.04.
- c. Provides for daily vigorous exercise in the out-of-doors for the children.
- d. Describes the arrangements to meet the toileting and diapering needs of the children.
- e. Affirms the center's compliance with the requirements included in subds. 3. to 6.

Note: Send the request for an exemption and the off-premises outdoor play space plan to the licensing representative at the appropriate field office of the Department's Division of Children and Family Services. See Appendix A for addresses of the field offices.

3. The off-premises outdoor play space shall be free of hazards such as bodies of water, railroad tracks, unfenced in-ground swimming pools, heavily wooded areas and ~~vehicle traffic on nearby~~ nearby highways and main thoroughfares.

4. There shall be at least 75 square feet of play space for each child using the space at a given time.

5. No climbing equipment, swing or slide in the play space may have concrete or asphalt under it.

6. When the off-premises outdoor play space is reached by walking, the center shall transport children under 3 years of age in wheeled vehicles, such as strollers or wagons, with a seating capacity equal to the number of children under 3 years of age to be transported.

7. A center's plan for use of an off-premises outdoor play space is subject to approval by the department. Within 30 days after receipt of a plan and request for an exemption from the requirements under par. (b), the department shall either approve the plan and grant the exemption or not approve the plan and therefore deny the request for exemption. The department shall notify the center in writing of its decision and, if it does not grant an exemption, shall state its reasons for not granting the exemption.

8. If any circumstance described in an approved plan for use of off-premises outdoor play space changes or if any condition for plan approval is not met or is no longer met, the department may withdraw its approval of the plan and cancel the exemption. A center with an approved plan shall immediately report to the department's licensing representative any significant change in any circumstance described in the plan.

SECTION 2. HFS 46.06(11) is repealed and recreated to read:

HFS 46.06 (11) **OUTDOOR PLAY SPACE.** (a) Requirement for outdoor play space. A center shall have outdoor play space if children are present for more than 3 hours a day or if outdoor play is included in the center program.

(b) Required features of outdoor play space. Except when an exemption is requested and is approved by the department under par. (c), a center shall comply with all of the following requirements for outdoor play space:

1. 'Location.' The outdoor play space shall be on the premises of the center.

2. 'Amount of space.' a. There shall be at least 75 square feet of outdoor play space for each child 2 years of age or older using the space at a given time.

b. There shall be at least 35 square feet of outdoor play space for each child under 2 years of age using the space at a given time except as provided in ~~subpar-~~ subd. 2. c.

c. The total outdoor play space of a center shall accommodate not less than 1/3 of the number of children for which the center is licensed or shall be a minimum of 750 square feet, whichever is greater. The number of children under one year of age need not be included for purposes of computing the minimum required outdoor play space if the center provides spaces in wheeled vehicles such as strollers and wagons equal to the number of children under one year of age.

3. 'Features.' a. The outdoor play space shall be well-drained and shall be free of hazards such as uncovered wells, cisterns and unused appliances.

b. The boundaries of the outdoor play space shall be defined in such a way as to protect the children. A permanent enclosure not less than 4 feet high shall be provided where there are hazards nearby, including but not limited to traffic or bodies of water, which present a threat to the safety of children in care.

c. Concrete and asphalt are prohibited under climbing equipment, swings and slides.

d. An energy-absorbing surface, such as loose sand, pea gravel or pine or bark mulch, in a depth of at least 9 inches is required under climbing equipment, swings and slides and in a fall zone of 4 feet beyond and whenever play equipment is 4 feet or more in height.

(c) Exemption for off-premises play space. 1. In this paragraph, "main thoroughfare" means a heavily traveled street or road used by vehicles as a principal route of travel.

2. A center wanting to use an off-premises play space may ask the department for an exemption from the requirements under par. (b) for a center's outdoor play space. The request for an exemption shall be in writing and shall be accompanied by a plan for outdoor play space which does all of the following:

a. Identifies and describes the location to be used, the travel distance from the center to that location and the means of transporting the children to that location.

- b. Provides for adequate supervision of the children as specified in Table 46.05-D.
- c. Provides for daily vigorous exercise in the out-of-doors for the children.
- d. Describes the arrangements to meet the toileting and diapering needs of the children.
- e. Affirms the center's compliance with the requirements included in subsd. 3. to 6.

Note: Send the request for an exemption and the off-premises outdoor play space plan to the licensing representative at the appropriate field office of the Department's Division of Children and Family Services. See Appendix A for addresses of the field offices.

3. The off-premises outdoor play space shall be free of hazards such as bodies of water, railroad tracks, unfenced in-ground swimming pools, heavily wooded areas and ~~vehicle traffic on~~ nearby highways and main thoroughfares.

4. There shall be at least 75 square feet of outdoor play space for each child 2 years of age or older using the space at a given time, and at least 35 square feet of outdoor play space for each child under 2 years of age using the space at a given time.

5. No climbing equipment, swing or slide in the play space may have concrete or asphalt under it.

6. When the off-premises outdoor play space is reached by walking, the center shall transport children under 3 years of age in wheeled vehicles, such as strollers or wagons, with a seating capacity equal to the number of children under 3 years of age to be transported.

7. A center's plan for use of an off-premises outdoor play space is subject to approval by the department. Within 30 days after receipt of a plan and request for an exemption from the requirements of par. (b), the department shall either approve the plan and grant the exemption or not approve the plan and therefore deny the request for exemption. The department shall notify the center in writing of its decision and, if it does not grant an exemption, shall state its reasons for not granting the exemption.

8. If any circumstance described in an approved plan for use of off-premises outdoor play space changes or if any condition for plan approval is not met or is no longer met, the department may withdraw its approval of the plan and cancel the exemption. A center with an approved plan shall immediately report to the department's licensing representative any significant change in any circumstance described in the plan

report to the department's licensing representative any significant change in any circumstance described in the plan.

The repeals and rules contained in this order shall take effect on the first day of the month following publication in the Wisconsin Administrative Register, as provided in a. 227.22(2), Stats.

Wisconsin Department of Health and
Family Services

Dated:

By: _____
Joseph Leean
Secretary

SEAL: