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Law Center

AT WILLIAM MITCHELL COLLEGE OF LAW



HEALTHY CHILD CARE

# *Using Local Authority to Create Healthier Child Care Settings:* New York City

Over the past 30 years, the obesity rate among children ages 2-19 years old has more than tripled in the United States.<sup>1</sup> Contributing causes include advertising that promotes unhealthy foods, lack of easy access to healthy foods, increased portion sizes, and lack of opportunities to be physically active.<sup>2</sup> Other factors, including sex, race, ethnicity, and socioeconomic status, place some groups of children at greater risk for obesity. For example, a national report noted that according to 2010 data, 14.4% of low-income children between the ages of two and five are obese, which is almost 20% higher than the national average of 12.1% for all children of similar age.<sup>3</sup> Children in certain racial or ethnic groups have even higher rates of obesity compared to the national average—21.1% for American Indian and Alaskan Native children, and 17.6% for Latino children.<sup>4</sup>

Unhealthy weights come with significant health consequences. Children who are obese are more likely to be obese as adults, and are at risk for developing serious, life-shortening chronic diseases, including cardiovascular disease, type-2 diabetes, and several types of cancer.<sup>5</sup> The earlier children



The Public Health Law Center and the Child Care Law Center have created this series of fact sheets to highlight ways that local governments are enhancing and supporting child care providers' efforts to provide healthy environments for children to learn and grow. This fact sheet focuses on New York City, which uses its regulatory authority to set rules for physical activity, nutrition, and screen time in child care centers to promote good health in young children. New York City's approach offers a helpful model for other localities and states.

can learn healthy eating and physical activity habits, the better for their long-term health.

Because over half of all infants and young children regularly spend much of their time in non-parental child care,<sup>6</sup> child care settings provide a unique and important opportunity to address the childhood obesity epidemic.<sup>7</sup> Child care providers are well positioned to intervene and help decrease the risk of childhood obesity by cultivating environments that promote healthy eating and positive exercise habits at young ages.<sup>8</sup>

### Child Care Regulation in New York and New York City

New York law, like the laws of many states, regulates child care settings differently depending on type of program or setting. In New York, the different kinds of programs include school-aged child care (ages 6-13), child care services, and two classes of family child care – family day care homes and group family day care homes.<sup>9</sup> All of these programs, with the exception of child care services and school-based early childhood programs in New York City (as



**What is preemption?** Preemption is a legal concept where state (or federal) law restricts or eliminates local authority over an area, such as child care regulation. Preemption can be express or implied. With express preemption, the law includes phrases or a provision that explicitly states the legislature's intent to preempt local authority. With implied preemption, a court finds that a law is preemptive even though there is no explicit statement of preemption, after examining the legal landscape and/or the legislative history of the law.

discussed below), are regulated by the New York Office of Children and Family Services (OCFS).

State law limits – or preempts – the authority of most local governments in New York to regulate child care providers in significant ways.<sup>10</sup> New York City (NYC) is an exception, however. Before the state began to regulate child care programs, NYC had a well-established history of regulating child care services. Although the State regulates school-aged (after school) and family and group family day care home providers in NYC, the NYC Board of Health regulates child care services programs in the City,<sup>11</sup> and these programs must comply with the NYC Health Code. The NYC Board of Health has used its authority to regulate child care services in the City to promote

healthy eating and physical activity for children in these programs in innovative ways.<sup>12</sup>

## What Do New York City's Regulations Require?

In 2006, the NYC Board of Health amended the city's Health Code to add requirements relating to nutrition, physical activity, and screen time for group child care services programs. These requirements are incorporated into the city's child care licensing regulations, and every group child care center licensed to operate in New York City must follow them.

The NYC Health Code requires that all food in group child care centers be prepared "in accordance with nutritional guidelines provided or approved by the Department [of Health and Mental Hygiene]."<sup>16</sup> These guidelines<sup>17</sup> are not directly part of the Health Code, giving the NYC health department the flexibility to update them without having to go through the standard regulatory process. The guidelines state that the child care environment should promote healthy eating, and that food should not be used as a punishment or reward.<sup>17</sup>

## New York City by the Numbers

NYC's regulations apply to group child care services that serve three or more children less than six years of age, for five or more hours per week, for more than 30 days in a 12-month period.<sup>13</sup>

According to 2011 figures, there were about 154,873 children in year-round full-day child care in NYC:

- 10% in state-regulated family day care homes
- 30% in state-regulated group family day care home
- 60% in city-regulated child care services programs<sup>14</sup>

The local regulations discussed in this fact sheet affect the 60% of children receiving full-day care in city-regulated programs (about 92,000 children ages 5 and under), plus about 23,900 children in part-time care.<sup>15</sup>



## Table 1: New York City's Regulations At A Glance

### Food Guidelines.<sup>18</sup> The guidelines address both food and beverages.<sup>19</sup>

- The NYC guidelines reference the U.S. Department of Agriculture's "Choose My Plate" as a recommended basis for the food groups that should be eaten each day, and the Child and Adult Care Food Program's meal requirements as a resource for meal patterns and serving sizes.
- They recommend exclusive breastfeeding for infants up to 6 months of age.
- Healthy foods should be provided along with any desserts or sweets.
- Breads and other grains should be whole grain.
- At least two non-fried vegetable or fruit options should be offered at lunch and dinner, and at least three servings of non-starchy vegetables should be offered weekly per lunch and per dinner.
- Requires a minimum amount of fiber for sandwich bread and cereal (2 g/serving), and recommends a minimum fiber intake of 19 g/day for children under 4, and 25 g/day for children ages 4-19.
- Artificial trans fats are prohibited.
- Sugar content is limited for breakfast cereals (<6 g) and canned fruits (no added sugar).
- The NYC guidelines address both sodium content for specific foods as well as total sodium intake:
  - breakfast cereals (<215 mg/serving); canned or frozen vegetables (<290 mg/serving or "no salt added"); sandwich bread (<180 mg/serving); and pasta and other grains (<290 mg/serving)
  - total daily intake should be <1,700 mg (breakfast should be <425 mg; lunch and dinner should be <600 mg each; and snacks should be <170 mg)

### Beverage Guidelines

- Beverages with natural or artificial added sweeteners cannot be served.
- Only 100% juice may be provided to children over eight months of age, and must be limited to no more than six ounces/day.
- Children ages two and older may only be served 1% or skim milk, unless they require a higher fat content for medical reasons.
- Water must be made available at all times, including during meals and special occasions.

### Physical Activity Regulations. Child care services must provide "a program of age and developmentally appropriate physical activity,"<sup>20</sup> as follows:

- Children attending a full-day program who are 12 months and older must get at least 60 minutes of activity per day; children in a part-day program must have a proportional amount of activity.
- For children ages three and older, at least 30 of the 60 minutes must be structured and guided activity with the remainder being active play, learning, and movement activities.
- Structured and guided activities must be led by caregivers and promote basic movement, creative movement, motor skills development, and general coordination.
- Physical activity must be documented and included in the daily schedule.
- Children may not be sedentary for over 60 minutes at a time, except during rest or nap times.
- Play areas must include sufficient equipment to allow children to engage in developmentally appropriate physical activity,<sup>21</sup> and children must be able to play outdoors, except in inclement weather.<sup>22</sup>

### Screen Time Regulations<sup>23</sup>

- Television and video viewing in child care services is not permitted for children under two.
- For children over two, viewing is limited to no more than 60 minutes per day, and the programs must be educational or actively promote child movement.
- If children attend a part-day program, screen time must be limited proportionally.
- Television should not be viewed during mealtimes.<sup>24</sup>



### Lessons from New York City

NYC’s child care regulations provide a useful model for how physical activity and better nutrition for young children can be promoted through local regulatory authority over child care settings. These types of regulations could be implemented by other local jurisdictions with authority over child care providers, or at the state level.

When local regulation of child care is being considered, tension can arise between the goals of promoting availability of care and establishing high health and safety standards for providers. Courts in New York and other states have recognized that trying to ensure that affordable, quality child care is available for parents is good public policy.<sup>25</sup> So, for example, courts have held that local zoning requirements that make it difficult or impossible for family child care providers to operate in residential neighborhoods are impliedly preempted—

or trumped—by state child care licensing laws that allow family child care providers to receive licenses. In these cases, courts typically find that the local requirements are preempted because they undermine the state’s interest in ensuring that there are adequate child care options for parents.

Nonetheless, states can empower local governments to regulate in ways that both support the availability of child care *and* promote better health for children.

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New York did this by preserving NYC’s authority to regulate group child care services, which has allowed the city to continue to innovate in creating healthier environments in these settings. A state could also establish state-level nutrition and physical activity regulations specifically as a *floor*—as minimum requirements, not maximums—so that local jurisdictions could pass additional or more rigorous regulations related to these issues. Local governments then would need to take care that additional requirements were not imposed in a way that would undermine the public policy of promoting availability of affordable, quality child care.

NYC provides a model for how more rigorous nutrition and physical activity requirements can be achieved without creating impractical burdens for child care providers. Complying with new regulations may add expenses and be time consuming for providers.<sup>26</sup> NYC mitigated these effects by providing free technical support and training to providers.

The NYC health department developed curricula on nutrition and physical activity, and provided play equipment to trained child care center staff, through two programs—*Eat Well, Play Hard*<sup>27</sup> and *Move-to-Improve*.<sup>28</sup> The New York state health department now offers the Eat Well, Play Hard curriculum for family day care home providers as well. NYC also developed voluntary guidelines to assist child care services staff in implementing the physical activity requirements.

Providing this kind of support could help promote faster implementation and better compliance with new regulations. Additional information about promoting healthy eating and physical activity in child care settings is available on the Public Health Law Center's website, [www.publichealthlawcenter.com](http://www.publichealthlawcenter.com).

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- <sup>1</sup> JEFFREY LEVI ET AL., TRUST FOR AMERICA'S HEALTH, *F AS IN FAT 2012: HOW OBESITY THREATENS AMERICA'S FUTURE* 9 (2012), <http://healthyamericans.org/assets/files/TFAH2012FasInFatFnlRv.pdf> [hereinafter "F AS IN FAT 2012"].
- <sup>2</sup> CENTERS FOR DISEASE CONTROL AND PREVENTION ("CDC"), *CHILDHOOD OVERWEIGHT OBESITY: A GROWING PROBLEM*, <http://www.cdc.gov/obesity/childhood/problem.html>.
- <sup>3</sup> *F AS IN FAT 2012*, *supra* note 1, at 19.
- <sup>4</sup> *Id.*
- <sup>5</sup> CDC, *CHILDHOOD OBESITY FACTS*, <http://www.cdc.gov/healthyyouth/obesity/facts.htm>.
- <sup>6</sup> U.S. Census Bureau, *Who's Minding the Kids? Child Care Arrangements: Spring 2011*, Table 1, *Preschoolers in Types of Child Care Arrangements: Spring 2011*, available at <http://www.census.gov/prod/2013pubs/p70-135.pdf>
- <sup>7</sup> Karen Kaphingst et al., *Child Care as an Untapped Setting For Obesity Prevention: State Child Care Licensing Regulations Related to Nutrition, Physical Activity, and Media Use For Preschool-Aged Children in the United States*, 6 PREVENTING CHRONIC DISEASE: PUB. RESEARCH, PRACTICE AND POL'Y AI I (2009), available at [www.cdc.gov/pcd/issues/2009/jan/07\\_0240.htm](http://www.cdc.gov/pcd/issues/2009/jan/07_0240.htm), and Nicole Larson and Sara Benjamin Neelon et.al., *What Role Can Child Care Settings Play in Obesity Prevention? A Review of Evidence and Call for Research Efforts*, 111 J. AM. DIETETIC ASS'N 1343 (2011).
- <sup>8</sup> See AM. ACAD. OF PEDIATRICS, AM. PUB. HEALTH ASS'N, AND NAT'L RESOURCE CTR. FOR HEALTH AND SAFETY IN CHILD CARE AND EARLY EDUC., *PREVENTING CHILDHOOD OBESITY IN EARLY CARE AND EDUCATION: SELECTED STANDARDS FROM CARING FOR OUR CHILDREN: NATIONAL HEALTH AND SAFETY PERFORMANCE STANDARDS; GUIDELINES FOR EARLY CARE AND EDUCATION PROGRAMS* (3rd ed. 2010), [http://nrckids.org/CFOC3/PDFVersion/preventing\\_obesity.pdf](http://nrckids.org/CFOC3/PDFVersion/preventing_obesity.pdf).
- <sup>9</sup> N.Y. SOC. SERV. LAW § 390(1)(b)-(f) (McKinney 2010).
- <sup>10</sup> See N.Y. SOC. SERV. LAW § 390(12)(a) (McKinney 2010). See, e.g., *People v. Town of Clarkston*, 559 N.Y.S.2d 736 (N.Y. App. Div. 1990), and *Matter of Unitarian Universalist Church of Cent. Nassau v. Shorten*, 314 N.Y.S.2d 66 (N.Y. Sup. Ct. 1970).
- <sup>11</sup> N.Y. SOC. SERV. LAW § 390(13) (McKinney 2010).
- <sup>12</sup> The NYC Board of Health also regulates school-based programs for children ages 3-5 to some extent, with respect to health and safety, but does not establish nutritional standards for these programs.
- <sup>13</sup> NEW YORK CITY, N.Y., HEALTH CODE § 47.01(c)(1).
- <sup>14</sup> CTR. FOR CHILDREN'S INITIATIVES. *CHILD CARE PRIMER 2011: KEY FACTS ABOUT EARLY CARE AND EDUCATION IN NEW YORK CITY*, 27, [http://www.centerforchildrensinitiatives.org/ccinyc/Website\\_PDF\\_s/CCI-Primer-2011\\_14.pdf](http://www.centerforchildrensinitiatives.org/ccinyc/Website_PDF_s/CCI-Primer-2011_14.pdf).
- <sup>15</sup> Both publicly subsidized and private child care centers are subject to New York City's regulations.
- <sup>16</sup> NEW YORK CITY, N.Y., HEALTH CODE § 47.61(b).
- <sup>17</sup> NEW YORK CITY DEP'T OF HEALTH AND MENTAL HYGIENE, *NUTRITION GUIDELINES FOR GROUP CHILD CARE SERVS.* (effective date Jan. 1, 2007; revised Sept. 1, 2011), <http://www.nyc.gov/html/doh/downloads/pdf/cdp/DayCareNutritionGuidelines.pdf> (hereinafter "N.Y.C. NUTRITION GUIDELINES FOR GROUP CHILD CARE SERVS.").
- <sup>18</sup> *Id.*
- <sup>19</sup> NEW YORK CITY, N.Y., HEALTH CODE § 47.61(b)(1)-(4).
- <sup>20</sup> *Id.* § 47.71(a), and (1)-(4).
- <sup>21</sup> *Id.* § 47.71(b).
- <sup>22</sup> *Id.* § 47.71(c)(1).
- <sup>23</sup> *Id.* § 47.71(d)(1).
- <sup>24</sup> N.Y.C. NUTRITION GUIDELINES FOR GROUP CHILD CARE SERVS., *supra* note 17, at 1.
- <sup>25</sup> See, e.g., *People v. Town of Clarkston*, 559 N.Y.S.2d 736, 739 (N.Y. App. Div. 1990); N.Y. SOC. SERV. LAW § 410-d (McKinney 2010).
- <sup>26</sup> See, e.g., Pablo Monsivais and Donna B. Johnson, *Improving Nutrition in Home Child Care: Are Food Costs a Barrier?* 15 PUBLIC HEALTH NUTRITION 370 (2011).
- <sup>27</sup> <http://www.health.ny.gov/prevention/nutrition/cacfp/ewphccs.htm>.
- <sup>28</sup> <http://www.nyc.gov/html/doh/html/living/phys-move.shtml>.