
Governor's Small Business Regulatory Review Board

January 22, 2008

Secretary Kevin R. Hayden
Department of Health and Family Services
1 West Wilson Street
Madison, WI 53703

Re: HFS – 45 – Administrative Rule Relating to Minimum Requirements and Standards for the
Operation of Day Care Centers
CR 07-102

Dear Secretary Hayden:

Wisconsin 2004 Act 145 created the Small Business Regulatory Review Board (SBRRB) to serve as a voice for small businesses as defined in Wis. Stats. 227.114(1). The SBRRB's statutory authority for review of new rules is contained in 227.14(2g) and for emergency rules in 227.24(3m). The SBRRB respectfully submits this letter to the Wisconsin Department of Health and Family Services (DHFS) following the SBRRB's review of administrative rule HFS-45, relating to minimum requirements and standards for the operation of family day care centers. The SBRRB's comments on this rule are based on the testimony heard by both representatives of the DHFS and owners of family day care centers at the board's January 8, 2008 meeting.

Rules are brought before the SBRRB in a number of ways. Often, the department promulgating a rule determines, through a small business impact analysis, whether the rule will have a significant economic impact on a substantial number of small businesses and seeks SBRRB's comment on its analysis. In the case of HFS-45, DHFS did not believe that said economic impact existed. Representatives of affected industries may also bring a rule before the SBRRB where they believe that a department's analysis of economic impact on small business is lacking in some regard. This is the situation with regard to HFS-45.

The SBRRB provides the following submission to DHFS based on a majority vote of the members:

1. The analytical approach and methodologies used by DHFS when determining that HSF-45 would not have a significant impact on a substantial number of small businesses were lacking. DHFS used a flawed analytical approach and methodologies when making the determination that HSF-45 would not have a significant impact on a substantial number of small businesses.

The SBRRB heard testimony from family child care providers and a representative of the child care center industry questioning whether DHFS had performed a thorough analysis of the rule's economic impact on small business. Additionally, a DHFS representative provided the SBRRB with the department's position on which they based their determination that economic impact of the rule on small business was not significant. The SBRRB concurs with representatives of the family child care centers that one of the shortcomings of DHFS's impact analysis was its failure to recognize that restricting a family child care provider from operating more than one family care center may effectively eliminate this business model in the future and would have deleterious

consequences on the economic growth of the family child care industry. It is the consensus of the SBRRB that restricting business expansion would result in a significant economic impact on the owners of family child care centers.

The DHFS's small business economic impact analysis did not include a fiscal analysis with regard to the manner in which the proposed family child care center definition revision would impact these small businesses. The definition change requiring a licensee to reside within the location in which they operate their family care center clearly restricts their ability to expand their small business. While the proposed rule grandfathered 85 licensees and will preserve these licensees' ability to continue to operate multiple locations, 3,187 existing family child care providers will be denied the opportunity to expand their business. The DHFS analysis did not account for the loss of future profits to these 3,187 family child care providers. The SBRRB further finds that because DHFS offers the alternative of becoming a licensed group child care center as a form of regulatory relief from the negative impact of the definition change, they should have included cost estimates associated with becoming a licensed group child care center within their analysis.

The SBRRB finds that the small business economic impact analysis must contain the following criteria in order to accurately determine economic impact:

1. The loss of potential profits that family child care centers will experience as a result of the proposed definition change. The SBRRB requests that the DHFS analysis contain:
 - a. Fact-based and reliable data to support the agency's estimate of a family child care center's gross annual income. In doing so, the SBRRB requests that DHFS carefully evaluate how the child care subsidy rate freeze for calendar years 2007 and 2008 impacts the growth rate of family child care centers and also how this freeze is reflected in estimated gross profits.
 - b. Consideration for the geographic locations of family child care centers when analyzing economic impact. An analysis that uses a statewide average in estimating loss of revenue ignores the fact that small businesses will be impacted at varying levels dependant upon geographic location.
 - c. A comparison of lost profits based on estimated net annual income of family child care providers. The SBRRB contends that an analysis that solely considers gross annual income when determining economic impact does not represent an accurate or realistic fiscal measurement.
2. The costs of compliance for a family child care center to obtain a group child care center license from DHFS. This analysis should reflect costs associated with bringing a family child care facility into compliance with group facility state building code requirements, including those for safety and accessibility. The analysis should included costs related to group child care center administrator training requirements. The department should identify any restrictions that might prevent a family child care center from operating as a group child care center.

2. The DHFS should re-evaluate the data sources used in its economic impact analysis regarding the costs related to proposed permanent boundary requirements.

The SBRRB understands that the cost estimates provided in the DHFS's economic impact analysis met the bare minimum requirements allowable for acceptable fencing under the proposal.

The SBRRB contends that by neglecting to include a broadened range of fencing costs and compliance barriers, DHFS has misrepresented the economic impact that the proposed rule change will have on small businesses.

The SBRRB finds that the small business economic impact analysis must contain the following criteria in order to more accurately determine economic impact:

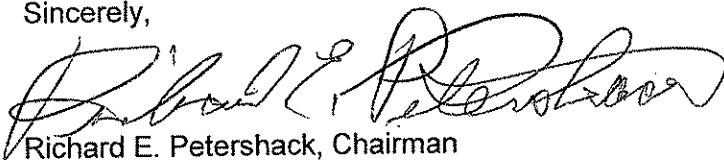
1. Documentation to support the agency's determination of the number of family child care centers that would need to make changes in order to comply with the permanent boundary requirements. DHFS should include documentation of the minimum square footage that each provider would be required to enclose in order to meet the permanent boundary requirements.
2. Realistic costs for various types of fencing or landscaping that would be considered a permanent boundary. DHFS shall include installation costs, permitting fees, maintenance fees, etc.
3. Describe any barriers that family day care providers may experience in being able to comply with the rule.

In conclusion, it is the intention of the SBRRB not to delay any agency's rulemaking process but to ensure the impact of this rule, or any rule, is thoroughly and accurately analyzed by the Department. In the case of HFS-45, the SBRRB finds that DHFS has not complied with the rulemaking procedures contained in Wis. Stats. 227.14(2g). The SBRRB requests that the DHFS prepare a small business economic impact analysis based on the requests contained in this letter. If the outcome of the re-analysis is that the proposed rule will have a significant economic impact on a substantial number of small businesses then the considerations for small business in the rulemaking requirements contained in Wis. Stats. 227.114(2) and (3) must be applied.

A response should be submitted to the SBRRB by February 25, 2008. Any request for an extension in submitting the response to the SBRRB should be provided to the Department of Commerce's Small Business Ombudsman. A copy of this report should also be provided to the legislature with the final rule draft as required in Wis. Stats. 227.19(3)(g).

As Chairman of the SBRRB, I appreciate DHFS's willingness to study the effects of this rule on small business so that DHFS, the SBRRB and the legislature may obtain an accurate picture of how small businesses will be affected by this rule change.

Sincerely,



Richard E. Petershack, Chairman
Governor's Small Business Regulatory Review Board

cc: Ron Sklansky, Joint Legislative Council
Rea Holmes, DHFS Executive Assistant
Reginald Bicha, Administrator, Division of Children and Family Services
Jill Chase, Director, Bureau of Regulation and Licensing
Rosie Greer, DHFS Small Business Regulatory Review Coordinator