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October 7, 2002

Opinion No. 02-111

Children's Exposure to Environmental Smoke in State Owned or Controlled Property

QUESTIONS

1. Does Tenn. Code Ann. § 4-4-121 require the establishment of a smoking policy for facilities owned, leased or operated by state agencies?

2. If not, does Tenn. Code Ann. § 4-4-121 require that if there is a smoking policy established by a state agency, it include an indoor area in a state leased or owned facility for the use of such smokers?

3. How is Tenn. Code Ann. § 4-4-121(c) reconciled with the provisions of Tenn. Code Ann. §§ 39-17-1601, *et seq.*, where health care facilities, child day care centers, educational services or other covered activities are provided on state-owned or operated property?

4. If a smoking policy is established under Tenn. Code Ann. § 4-4-121, then, under the facts provided regarding the presence of children in the combined offices of the Departments of Children's and Human Services (DCS and DHS), does the "Pro-Children's Act of 1994," 20 U.S.C. §§ 6801, *et seq.*, prohibit establishment, under Tenn. Code Ann. § 4-4-121(b) and (c), of a smoking area in the indoor area of the combined offices of the two departments for persons within any, or all parts, of a facility that is funded in whole or in part by federal funds and that is operated by lease by the State of Tennessee, or is that under ownership or control of the State:

a. Where children may be incidentally present in that facility in the context of their parent's or caretaker's presence in the combined office for the purpose of receiving any state or federally funded services from DHS; or

b. In which children who may be in the custody or guardianship of DCS are present for short periods of time for visitation with parents, or in which they may temporarily remain in the combined office during a child protective services investigation being conducted by DCS or while the children may be awaiting transfer to a foster home or other facility operated or contracted for by DCS; and

c. In which children, in either (a) or (b), do not receive on a routine or regular basis, as specified in 20 U.S.C. §§ 6082 or 6083, health care, day care, education or library services?

5. How are the provisions of Tenn. Code Ann. § 4-4-121 reconciled with the requirements of a lease to the State of Tennessee that prohibits smoking in the space leased by the State?

6. If the building is under the jurisdiction of the Department of General Services, or is leased by the Department of Finance and Administration, then which entity(ies) are responsible for the development of a smoking policy for that location — the individual agency that occupies the facility, or the Departments of Finance and Administration or General Services to whom the property is leased or which administers the state-owned property?

OPINIONS

1. Tenn. Code Ann. § 4-4-121 does not require state agencies[1] to establish a smoking policy, nor does it prohibit smoking.

2. Tenn. Code Ann. § 4-4-121 requires a state agency to designate an indoor smoking area if the agency establishes a smoking policy.

3. Because Tenn. Code Ann. §§ 39-17-1601, *et seq.*, was passed after Tenn. Code Ann. § 4-4-121 and because it is more specific, it will be the controlling statute if there is an irreconcilable conflict between these two state statutes.

4. (a) and (b). If the facility is covered by 20 U.S.C. §§ 6081, *et seq.*, this statute controls and not Tenn. Code Ann. § 4-4-121. A state agency could not designate an indoor smoking area. If the facility does not fall under the federal act, then the facility is governed by Tenn. Code Ann. § 4-4-121 and must have a designated smoking area, unless Tenn. Code Ann. §§ 39-17-1601, *et seq.*, prohibits smoking. The length of time a child spends at a state owned or state leased facility, incidental or not, does not determine which act applies and whether smoking is permitted.

(c) In the fact situation in question 4(c), 20 U.S.C. §§ 6081, *et seq.*, would not apply. Tenn. Code Ann. § 4-4-121 would control, but only in situations not covered by Tenn. Code Ann. §§ 39-17-1601, *et seq.*

5. The lessor's "no smoking" policy would not conflict with Tenn. Code Ann. § 4-4-121 if the state agency administrative head has not instituted a smoking policy. The answer to this question, otherwise, is highly dependent on the facts and must be answered on a case-by-case basis. The determining factor will be who has control over or supervises the building, which could be either the state agency or the private lessor, depending on the circumstances.

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[1] We use the terms "state agency" and "state agencies" to mean each state department, agency, board, commission and other entity of the state, and the administrative head of each public institution of higher education. Tenn. Code Ann. § 4-4-121(a).

6. Because the law has no definitions for "control" or "supervision" and because a decision about who controls or supervises a building will be a question of fact, we cannot give a definite answer about which state agency would be responsible for the smoking policy under Tenn. Code Ann. § 4-4-121. It appears that the most logical agency to develop a smoking policy would be the agency that occupies the location, but only if the agency head controls or supervises the building. There is nothing to prevent two or more agencies from cooperating to develop the smoking policy.

ANALYSIS

In your opinion request, you provided the facts that follow.

The Departments of Children's Services and Human Services (DCS and DHS) each provide services to the public that involve direct or indirect services to children under a variety of programs funded entirely, or in large part, by federal funds.

The Department of Children's Services provides child protective services, foster care, and adoption services through funding provided under Titles IV-B (42 U.S.C. §§ 620, *et seq*.) and IV-E (42 U.S.C. §§ 670, *et seq*.) of the Social Security Act, to children either in its custody or guardianship or for whom certain protective services may be required.

The Department of Human Services provides services to children through its Families First program of cash assistance and welfare-to-work services, including the issuance of child care certificates to provide day care services to parents in the program, pursuant to funding provided under Title IV-A (42 U.S.C. §§ 601, *et seq*.) of the Social Security Act; through the provision of Food Stamps to the child's household pursuant to funding made available under 7 U.S.C. §§ 2011 *et seq*., and through Medicaid/TennCare eligibility determination services for the child and/or the child's caretaker funded under Title XIX of the Social Security Act (42 U.S.C. §§ 1395 and 1396, *et seq*.). The Department of Human Services also provides Child Support services to the parents of children through its contractors in offices located in each judicial district in Tennessee under funding provided through Title IV-D (42 U.S.C. §§ 651, *et seq*.) of the Social Security Act.

Visits between children in the legal custody of DCS and those children's parents may occur in the combined offices of DCS and DHS. Children who may be under investigation by DCS under Tennessee Code Annotated, Title 37, Chapter 1, Parts 4 and 6, as alleged victims of child abuse, may also be present in the combined offices, but are not likely to routinely receive health, day care, educational or library services at the office.

When parents or caretakers of children come to the DHS offices to apply for public benefits through the Families First, Food Stamp, Medicaid/TennCare programs that are administered by DHS, or, in the case of the child support program, through offices operated by DHS's contractors using federal funds, they may have their children present with them while applying for these services.

The children themselves are not present for the regular, routine provision of direct services involving health care, day care,[2] education or library services from DHS in the state-operated and federally-funded facility.

Federal funds are also used as part of the funding for the lease or operation of many, if not most, of the buildings in which these services are provided. DCS and DHS are, in many counties in Tennessee, co-located in the same facility and share common waiting areas, restrooms and conference rooms.

In addition, some lease arrangements that the State has entered into with private lessors on behalf of DHS prohibit smoking in the leased space. In some cases, the landlords have notified the State of a change in the smoking policy for the property to make the facility a non-smoking facility.

In many locations, DHS and other state agencies, such as DCS, occupy space under lease arrangements made by the Department of Finance and Administration as lessee. In others, the space is under the jurisdiction of the Department of General Services. Even in space that is leased directly to DHS, the Department of Finance and Administration negotiates the arrangements.

1. Applicable Law

Your questions require an interpretation of three laws: Tenn. Code Ann. § 4-4-121, Tenn. Code Ann. §§ 39-17-1601, *et seq.* (Children's Act for Clean Indoor Air), and 20 U.S.C. §§ 6081, *et seq.* (Pro-Children Act of 1994).[3] Each statute deals with smoking and when and where smoking is prohibited. We begin with a summary of purposes and requirements of the three laws.

The purpose of Tenn. Code Ann. § 4-4-121 is to allow smoking policies and to protect the rights of smokers and those who do not smoke. Tenn. Code Ann. § 4-4-121(b). The General Assembly's intent in passing the Children's Act for Clean Indoor Air was to reduce the extent to which children are exposed to environmental tobacco smoke in facilities where children's services are provided. Tenn. Code Ann. § 39-17-1602. The federal Pro-Children Act is similar in purpose to the latter. The Pro-Children Act of 1994 does not state a purpose, but from the name of the act and the statute as a whole, one can infer that the intent is to protect children from second hand smoke by eliminating smoking in all facilities covered by that act.

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[2] Except in Davidson County at a state operated day care facility for state employees.

[3] *See also* the Pro-Children Act of 2001, 20 U.S.C. §§ 7181, *et seq.*, dealing with environmental tobacco smoke in school settings.

a. Tenn. Code Ann. § 4-4-121

Tenn. Code Ann. § 4-4-121, passed in 1990, does not prohibit smoking nor does it require a state agency to adopt a smoking policy. It authorizes administrative heads of state agencies to create smoking policies for buildings the administrative heads supervise or control. Tenn. Code Ann. § 4-4-121(a). If an agency adopts a smoking policy, the agency must provide smokers with at least one designated indoor smoking area. Tenn. Code Ann. § 4-4-121(c). This statute does not have an enforcement mechanism.

b. The Children's Act for Clean Indoor Air (Children's Clean Air Act), Tenn. Code Ann. §§ 39-17-1601, *et seq.*

The Children's Clean Air Act, passed in 1995, is more restrictive than Tenn. Code Ann. § 4-4-121 and limits smoking in certain facilities where children are present.[4] Tenn. Code Ann. §§ 39-17-1601, *et seq.*, prohibits all indoor smoking in areas of a community center being used for children's activities and in all private, public and private kindergartens, elementary and secondary schools. Tenn. Code Ann. § 39-17-1604(2) and (6). The statute allows smoking, in designated areas, but not elsewhere, in child care centers, group care homes, health care facilities, museums and school grounds after regular hours. Tenn. Code Ann. § 39-17-1604(1), (3) - (5), (7) - (10). The Children's Clean Air Act requires smoking areas, when permitted, to be designated areas to which children are not allowed access. Tenn. Code Ann. §§ 39-17-1603(4) and 39-17-1604.

In addition, the Children's Clean Air Act requires that "No Smoking" signs or symbols be posted at each main building entrance where smoking is regulated by this statute. Tenn. Code Ann. § 39-17-1605(a). At elementary and secondary school sporting events, a sign must be posted, saying, "Smoking is prohibited by law in seating areas and in restrooms." Tenn. Code Ann. § 39-17-1605. A violation of the act is a Class B misdemeanor punishable by a fine up to five hundred dollars ($500). Tenn. Code Ann. § 39-17-1606(b).

c. The Pro-Children Act of 1994, 20 U.S.C. §§ 6081, *et seq.*

Congress passed the Pro-Children Act in 1994.[5] The Act prohibits persons from smoking in any indoor facility where children[6] receive routine or regular health, day care, education or library

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[4] This statute applies to child care centers, public community centers, group care homes, health care facilities (except nursing homes), state and not-for-profit museums, residential treatment facilities, all public and private kindergartens, elementary schools and secondary schools, school grounds, youth development centers and zoos. Tenn. Code Ann. § 39-17-1604.

[5] This statute covers state agencies and state subdivisions and corporations or partnerships and individuals that own, operate or otherwise control facilities where federally funded children's services are provided.

[6] A child is an individual who has not yet turned eighteen (18). 20 U.S.C. § 6082.

services, if these services are funded "directly by the federal government, or through state or local governments, by federal grant, loan, loan guarantee, or contract programs." 20 U.S.C. § 6082(2)(A). This Act is applicable to state agencies, among others. 20 U.S.C. § 6082(3). It prohibits smoking in two situations: (1) in indoor facilities where kindergarten, elementary, or secondary education or library services are provided to children on a regular or routine basis and (2) in indoor facilities where regular or routine health care, day care, or early childhood development services are provided. It permits no smoking in any indoor facility meeting these criteria.[7] 20 U.S.C. § 6083(a)-(b).[8] If a facility is not being used for these defined children's services, it is not covered by the act. Violations of the act may give rise to an assessment of civil penalties. 20 U.S.C. § 6083(f).

2. What Law Applies Where and When

All three statutes deal with prohibiting or allowing smoking. The statutes are not consistent with one another in either applicability or the limitations placed on smoking. For this reason, to assure compliance, state agencies must know which law takes precedence in which situation. We refer to the United States Constitution and to rules of statutory construction to guide this

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[7] The Act defines certain words and terms, and thus the Act's coverage. The relevant definitions include "children," "children's services," "person," and "indoor facility." 20 U.S.C. § 6082(1)-(4). They are as follows:

(1) "Children." The term "children" means individuals who have not attained the age of 18.

(2) "Children's services."

> The term "children's services" means the provision on a routine or regular basis of health, day care, education, or library services--
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> (A) that are funded, after March 31, 1994, directly by the Federal Government or through State or local governments, by Federal grant, loan, loan guarantee, or contract programs--
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> (i) administered by either the Secretary of Health and Human Services or the Secretary of Education (other than services provided and funded solely under titles XVIII and XIX of the Social Security Act [42 U.S.C.A. §§ 1395, et seq. and 1396 et seq.]); or
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> (ii) administered by the Secretary of Agriculture in the case of a clinic (as defined in 7 CFR 246.2) under section 17(b)(6) of the Child Nutrition Act of 1966 (42 U.S.C. § 1786(b)(6)), or
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> (B) that are provided in indoor facilities that are constructed, operated, or maintained with such Federal funds, as determined by the appropriate Secretary in any enforcement action under this subchapter, except that nothing in clause (ii) of subparagraph (A) is intended to include facilities (other than clinics) where coupons are redeemed under the Child Nutrition Act of 1966 [42 U.S.C.A. §§ 1771, et seq.].

(3) "Person" means any State or local subdivision thereof, agency of such State or subdivision, corporation, or partnership that owns or operates or otherwise controls and provides children's services or any individual who owns or operates or otherwise controls and provides such services.

(4) An "indoor facility" is a building that is enclosed.

[8] There are two exceptions which are not applicable here. *See* 20 U.S.C. § 6083(b)(1)-(2).

determination. Where possible, the statutes should be read in harmony. *See Frazier v. East Tennessee Baptist Hospital*, 55 S.W.3d 925, 928 (Tenn. 2001).

Where the state statutes conflict, Tenn. Code Ann. §§ 39-17-1601, *et seq.*, will control. The cardinal rule of statutory construction requires that statutes be interpreted to give effect to the intent of the Legislature. Rules of statutory construction are tools to aid in reaching that objective. *Browder v. Morris*, 975 S.W.2d 308, 311 (Tenn. 1998). When there is a conflict which cannot be resolved, rules of statutory construction provide that the most recently enacted statute repeals by implication any irreconcilable provisions of the former act. *Tennessee-Carolina Transportation, Inc. v. Pentecost*, 362 S.W.2d 461, 211 Tenn. 72 (1962). Furthermore, under the rules of statutory construction, statutes which address the specific are given precedence over those that address the general. *Drennon v. General Electric Company*, 897 S.W.2d 243, 246 (Tenn. 1994).

The state's Children's Clean Air Act is a very specific act, covering a certain constituency and certain locations. Because the General Assembly passed the Children's Clean Air Act after it adopted Tenn. Code Ann. § 4-4-121, we may assume that the General Assembly passed the Act with full knowledge of the other statute and intended the result that follows. *See Roberts v. Sanders*, 2002 WL 256740, *3 (Tenn. App.). Thus, where the two conflict, the Children's Clean Air Act governs. In some instances, however, where the Children's Clean Air Act allows for an indoor smoking area and thus does not conflict with the earlier statute, the statutes can be harmonized. *See Roberts*, 2002 WL 256740, *3.

The federal Pro-Children Act prevails over state law to the extent that state law conflicts with the federal act. Tennessee is bound by federal law under the Supremacy Clause of the United States Constitution, art. VI, cl. 2.[9] State law is displaced by federal law under the Supremacy Clause where (1) Congress expressly preempts state law; (2) congressional intent to preempt is inferred from the existence of a pervasive federal regulatory scheme; or (3) state law conflicts with federal law or interferes with the achievement of congressional objectives. *Hodges v. Delta Airlines, Inc.*, 4 F.3d 350, 352 (5th Cir. 1993), *rev'd and rem'd on other grounds*, 44 F.3d 334 (1995) (*en banc hearing).*

Tenn. Code Ann. § 4-4-121, which allows smoking, clearly conflicts with the federal Pro-Children Act in instances where the latter act prohibits smoking. They cannot be reconciled. Thus, the federal act would be the standard to follow when children's services, as defined by the Pro-Children Act, are provided at the facility. If children's services are not provided in the space or facility, then the federal Pro-Children Act does not apply. Where children are incidentally or temporarily at a facility not used for providing children's services, children are not protected against environmental smoke under this act. They may, however, be protected by the state's Children's

[9] The clause provides that the laws and Constitution of the United States "shall be the supreme law of the land; and the judges in every state shall be bound thereby."

Clean Air Act, depending upon what type of facility is involved.[10] Congress did not intend, by passing the Pro-Children Act, to preempt any provision of state law that is more restrictive than a provision of the Pro-Children Act. 20 U.S.C. § 6084.

3. Responsibility for Developing Smoking Policy

The only statute of the three that specifies who is in charge of developing a smoking policy in a particular facility is Tenn. Code Ann. § 4-4-121. It gives the authority and responsibility to the state agency administrative head who has control of or supervises a building. The statute does not define "control" or "supervision." It is very difficult to determine who has control or supervision of a building without reviewing all the facts of a particular situation.

While several state agencies[11] may have authority and responsibilities relating to the same facility, it seems that the state agency or agencies occupying the facility have the most immediate need to see that a smoking policy is in place. The occupying agency or agencies are not only on site, but also are in charge of the programs provided in the facility. It seems logical that the occupying agency or agencies, which are informed about the programs and whether they fit the criteria of any applicable statute, would be the agencies to develop a smoking policy. The statute gives no guidance where two or more agencies occupy the same facility. It would seem, in that instance, that the agencies could agree who was to draft the smoking policy or could collaborate on drafting the policy.

In some situations, a state agency or agencies occupy leased space that is privately owned. You are concerned about how to reconcile Tenn. Code Ann. § 4-4-121 with a privately owned facility's "No Smoking" policy. First, there will be no conflict if the agency head has not developed a smoking policy under Tenn. Code Ann. § 4-4-121 or if the agency head does not control or supervise the building. Second, if the facility is governed by the federal act, the facility has to be smoke free and Tenn. Code Ann. § 4-4-121 does not apply.

Third, if the state's Children's Clean Air Act applies, a conflict could arise because this act allows designated smoking areas in most facilities covered by the act. A conflict should seldom result, however, because in all but two instances,[12] Tenn. Code Ann. § 39-17-1604 gives authority

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[10] An example of a facility where the state's Children's Clean Air Act may be more restrictive than federal law is a zoo. It is unlikely that "children's services," as defined by the Pro-Children Act, would be provided at a zoo and in that case, the federal Pro-Children Act would not apply. The state's Children's Clean Air Act, however, applies to an indoor area of a zoo and limits smoking to designated smoking areas to which children are not allowed access. Tenn. Code Ann. §§ 39-17-1603(11) and 1604(9).

[11] *E.g.*, Tenn. Code Ann. § 4-3-1009-1010; Tenn. Code Ann. § 12-1-104, -106 (the Department of Finance and Administration); Tenn. Code Ann. § 4-3-1105(8) (the Department of General Services).

[12] *See* Tenn. Code Ann. § 39-17-1604(3),(6), and (10), which allow smoking under limited conditions.

to permit smoking in designated areas ("may be permitted") but does not require that such areas be designated. If a conflict does arise, the lease must conform to the law.

The federal and state acts protecting children against environmental smoke do not exclude private property from their reach. In each fact situation you have presented, Tenn. Code Ann. § 4-4-121 will not apply in instances covered by either Tenn. Code Ann. §§ 39-17-1601, *et seq.*, or 20 U.S.C. §§ 6081, *et seq*. The private owner will have to abide by both the federal and state children's clean air acts, if its facility or operation fits within the criteria of either statute, thus obviating the need of reconciling a lease with Tenn. Code Ann. § 4-4-121 in all instances you have posed.

In sum, if a person and facility fall under the criteria of the federal Pro-Child Act, that act will apply where federal act and state law conflict and the state law is less restrictive that the federal act. In instances governed by the state Children's Clean Indoor Act, and not by the federal act, if the state act and Tenn. Code Ann. § 4-4-121 are in conflict, the Children's Clean Air Act will apply.

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