

Smoke-Free Environments Law Project

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MEMORANDUM

To: Whom it may concern

Date: July 27, 2006

From: James A. Bergman, J.D.
Co-Director, The Center for Social Gerontology, Inc.

RE: Does federal law require states or localities to exempt nursing home residents from smoke-free laws, or may states or localities enact laws which make nursing homes and other workplaces smoke-free?

This memorandum is in response to the issues presented in remarks made by a representative of the Indiana Health Care Association (IHCA) – a lobbying group representing for-profit nursing homes in Indiana – to the effect that state and federal Medicaid and Medicare regulations require nursing home and assisted living residents to have the right to smoke in these facilities and that localities should therefore provide exemptions from their smoke-free laws for nursing homes and assisted living facilities.

For background, The Center for Social Gerontology, Inc. (TCSG) is a national research, training and social policy organization which focuses on the rights and autonomy of older persons. TCSG has been in existence since 1972 and has been a federally-funded National Support Center in Law and Aging since 1985. TCSG also, for the past 8 years has operated the Smoke-Free Environments Law Project, which is funded in part by the Michigan Department of Community Health to work with local communities and statewide groups on smoke-free environments issues. Early this decade, TCSG conducted a comprehensive study of smoking policies in nursing homes, assisted living facilities, senior centers and adult day care centers; we also conducted a review of all federal and state laws regarding smoking in said facilities. We have also been deeply involved in the development of local and state laws, as well as model apartment lease policies, concerning smoke-free workplaces and public places, including nursing homes, assisted living facilities, and other multi-unit residential facilities serving old and young persons alike.

In 2002, we conducted a national, random sample survey of smoking policies in nursing homes, assisted living facilities, senior centers and adult day care centers. We found that the following were the percentages of each of these types of facilities which reported they had total prohibitions on smoking: Senior Centers, 96% smoke-free; Adult Day Care Centers, 88%

smoke-free; Assisted Living Facilities, 94% did not permit smoking in the residential areas; and Nursing Homes, 64% did not permit smoking. This demonstrates that smoke-free policies are clearly the norm in each of these types of facilities. It is equally clear that these facilities, and thousands more across the nation, would not have these policies if it violated federal or state Medicaid, Medicare or any other laws.

Further, in the same study, we reviewed the laws of all 50 states and federal laws to determine what, if any, smoking restrictions they had. We found that there were no federal laws which prohibited smoking in any of these four types of facilities, including Medicare and Medicaid laws. Likewise, we found nothing in these federal laws which prevented a nursing home or assisted living facility or Senior Center or adult day care center from adopting total smoke-free policies, so long as normal due process and contractual requirements were met. We also found that most, if not all, states permitted owners of these facilities to adopt total smoke-free policies if they wished to, again taking care to meet due process and contractual requirements.

It should be noted that there is no so-called Constitutional right to smoke. In fact, to the contrary, nonsmokers who are seriously effected by secondhand smoke have rights under the Americans with Disabilities Act and the federal Fair Housing Act to seek "reasonable accommodations" from facilities to protect them from secondhand smoke, including seeking to have the facility made totally smoke-free.

Further, since we conducted our review of federal and state laws regarding smoking policies in these facilities, I know of no subsequent federal Medicaid or Medicare laws which have been enacted which would change the above findings.

However, numerous local and state laws have been enacted which address smoking in nursing homes and assisted living facilities. These laws vary in their provisions, but some, such as the Washington state law prohibit smoking in all nursing homes. While some have challenged the Washington state law, the challenges were rejected, as was a subsequent attempt to have the legislature amend the law to allow smoking in nursing homes. Thus, the Washington state law prohibiting smoking in nursing homes stands; no federal Medicaid or Medicare law was found which would have struck that law down. When the Washington state law, as well as similar local laws, went into effect, it over-rode any contractual or other due process rights because state law supercedes these, as would a local law, inasmuch as public notice has been given in the process of adopting the law.

In addition, the Joint Commission on Accreditation of Healthcare Organizations (JCAHO), which sets the standards for health care facilities, including long-term care (LTC) facilities, has Standard EC.1.30 concerning smoking policies in long-term care facilities. The policy is very clear and straight-forward in saying LTC facilities should prohibit smoking, except in very specific resident's situations. The JCAHO standard was clearly developed in recognition of federal Medicaid and Medicare laws, since both Medicaid and Medicare require organizations to meet JCAHO standards, and found no legal barrier to total smoke-free policies in LTC facilities.

Finally, the Surgeon General's report on secondhand smoke which was issued on June 27, 2006 states unequivocally that "there is no risk-free level of exposure to secondhand smoke. Breathing

even a little secondhand smoke can be harmful." The Surgeon General goes on to say that "the only way to fully protect yourself and your loved ones from the dangers of secondhand smoke is through 100% smoke-free environments." The report has a special section dealing with nursing homes in which it states: "Despite the challenges, there is a slow but increasing movement toward laws and policies that restrict or ban smoking in health care and assisted living facilities, including nursing homes". [p. 629 of the report] The Surgeon General concludes that section as follows:

One obstacle to enacting smoking restrictions in nursing homes is the hesitance of some policymakers to impose such restrictions in a residential setting (i.e., places of residence). Nursing homes are workplaces and homes to nonsmokers, some of whom might be especially susceptible to health effects associated with secondhand smoke exposure because of their advanced age. One study found traces of a tobacco-specific lung carcinogen in the urine of employees of a long-term care hospital; the employees were required as part of their jobs to spend time in a patient smoking lounge that was not separately ventilated (Parsons et al. 1998). In addition, fires caused by smoking pose a special hazard in nursing homes and other long-term care facilities (U.S. Fire Administration 2001).

Significant also was what the Surgeon General did not say. He did not say that there was anything in federal Medicaid or Medicare laws which prevents nursing homes or states or localities from adopting smoke-free laws in nursing homes and assisted living facilities. This was clearly not an oversight, since the Surgeon General's office is located in the Department of Health & Human Services, which administers the Medicaid and Medicare programs. Further, since the Surgeon General states explicitly that there is a movement toward laws and policies that restrict or ban smoking in these facilities, it is clear that if there were anything in federal laws which prevents this, the Surgeon General would have so stated.

In conclusion, it is clear that the statements attributed to the IHAC representative are not supported by any federal Medicaid or Medicare laws that I am aware of, and equally importantly, are not consistent with statements of the U.S. Surgeon General and standards set by JCAHO. The IHAC request for an exemption from smoke-free laws for nursing homes and assisted living facilities also ignores the dangers of secondhand smoke posed to nonsmoking residents and employees, and also ignores the dangers posed by cigarette-caused fires.

If you have any further questions, please feel free to contact me. Feel free also to share this memorandum with others whom you think may be interested.