



# Tobacco Public Policy Center at Capital University Law School

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## The Duty To Protect Foster Children From Secondhand Smoke

Approximately 500,000 children live with foster families in the United States.<sup>1</sup> In Ohio, there are no state laws or regulations against smoking in foster homes and exposing foster children to secondhand smoke. Secondhand smoke may victimize foster children twice; once by causing illness, and again by decreasing their chances of adoption due to failing health. Smoke-free foster homes will dramatically improve the future of Ohio foster children.

### Tobacco Smoke Poisons The Living Environment In Foster Homes

- The U.S. Environmental Protection Agency found secondhand smoke to be a Group A carcinogen, a cancer-causing agent for which there is no known safe level of exposure. The U.S. Surgeon General has confirmed that there is no safe level of exposure to secondhand smoke.<sup>2</sup>
- According to the 2006 U.S. Surgeon General’s report on secondhand smoke, “the home is now becoming the predominant location for exposure of children and adults to secondhand smoke.”<sup>3</sup>
- Most secondhand smoke ingested by foster children is sidestream smoke which contains twice as much nicotine and tar as smoke consumed by the smoker.<sup>4</sup>

### Secondhand Smoke Has Proven Deadly, Especially To Children

- Secondhand smoke causes over 1,000,000 illnesses in children and 280 childhood deaths per year.<sup>5</sup>
- Secondhand smoke is known to contribute to the following childhood illnesses and diseases:

Asthma <sup>6</sup>	Ear Infections <sup>7</sup>	Pneumonia <sup>8</sup>
Bronchitis <sup>9</sup>	Sudden Infant Death Syndrome <sup>10</sup>	
Upper Respiratory Infection <sup>11</sup>	Other Respiratory Illnesses <sup>12</sup>	

- Secondhand smoke worsens asthmatic conditions in over 1,000,000 children,<sup>13</sup> and it has been linked to decreased lung function and ultimately lung cancer.<sup>14</sup>
- The health costs of secondhand smoke in Ohio are estimated to be \$4.02 billion dollars, of which \$1.3 billion is paid by Medicaid.<sup>15</sup>
- Foster children in homes that are not smoke-free are more likely to be smokers in the future than children in a smoke-free home.<sup>16</sup>

This information is provided for educational purposes only and is not to be construed as a legal opinion or as a substitute for obtaining legal advice from an attorney. The Tobacco Public Policy Center provides legal information and education about tobacco and health, but does not provide legal representation. Readers with questions about the application of the law to specific facts are encouraged to consult legal counsel familiar with the laws of their jurisdictions.

## Other Jurisdictions Are Acting To Protect Foster Children From Secondhand Smoke

- Alaska<sup>17</sup>, Arizona<sup>18</sup>, Maine<sup>19</sup>, Montana<sup>20</sup>, New Jersey<sup>21</sup>, North Dakota<sup>22</sup>, Oklahoma<sup>23</sup>, Oregon<sup>24</sup>, Texas<sup>25</sup>, Vermont<sup>26</sup>, Washington,<sup>27</sup> and several counties in California<sup>28</sup> have all passed laws or regulations to protect foster children from secondhand smoke.
- Judges have made secondhand smoke exposure a material issue in cases involving child custody determinations<sup>29</sup> and prison conditions.<sup>30</sup> Therefore, judges have already recognized the importance of protecting children and wards of the state from secondhand smoke.

## A Smoke-Free Policy Will Improve The Foster Care System

- Foster children are considered to be wards of the state, and therefore regulators and lawmakers have a heightened duty to protect their health and well-being. This duty includes protection from the effects of secondhand smoke.
- Although it has been argued that passing a smoke-free policy would substantially reduce foster home capacity, there is no evidence to support this prediction.<sup>31</sup>
  - In Vermont, the Children Services Coordinator did not receive any negative feedback on its smoke-free regulation, and the Foster and Adoptive Parent Association characterized the smoking prohibition in foster homes as overdue.<sup>32</sup>
  - Foster parents will continue to serve because they will only be asked to refrain from smoking in the house and vehicle. The policies are intended to protect children from exposure; they do not require foster parents to quit smoking.
  - After Ontario prohibited smoking in foster homes there was a 42% increase in availability between 1998 and 2003.<sup>33</sup>
- Ohio counties have the authority to pass their own rules regarding smoking in foster homes that are not inconsistent with state rules.<sup>34</sup> Ohio counties do not need to wait for state action in order to protect foster children from secondhand smoke exposure.
- A smoke-free foster home regulation would be much like other foster care regulations intended to protect the health and well-being of foster children. As foster care agencies already check for compliance with relevant rules and regulations, a smoke-free regulation would not require any new staff or funding.<sup>35</sup>

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<sup>1</sup> U.S. Dept. of Health & Human Servs. Admin. for Children & Families, *The AFCARS Report*, [http://www.acf.dhhs.gov/programs/cb/stats\\_research/afcars/tar/report10.htm](http://www.acf.dhhs.gov/programs/cb/stats_research/afcars/tar/report10.htm) (last visited June 22, 2007).

<sup>2</sup> U.S. Environmental Protection Agency, *Setting the Record Straight – Secondhand Smoke Is a Preventable Health Risk* (1994), available at <http://www.epa.gov/smokefree/pubs/strsfs.html> (last visited June 22, 2007).

<sup>3</sup> Office of Smoking & Health, U.S. Dep't of Health and Human Servs., *A Report of the Health Consequences of Involuntary Exposure to Tobacco Smoke – Executive Summary* 14 (2006), available at <http://www.surgeongeneral.gov/library/secondhandsmoke/report/executivesummary.pdf>.

<sup>4</sup> Carlos Clark, *An Argument for Considering Parental Smoking in Child Abuse and Neglect Proceedings*, 19 J. Contemp. Health L. & Pol'y 225, 239-241 (2002).

<sup>5</sup> Campaign for Tobacco-Free Kids, *Health Harms From Secondhand Smoke* (2004), <http://tobaccofreekids.org/research/factsheets/pdf/0103.pdf>.

<sup>6</sup> Office of Smoking and Health, *supra* note 1, at 2.

<sup>7</sup> *Id.* at 3.

<sup>8</sup> *Id.* at 2.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 11.

<sup>11</sup> *Id.* at 2.

<sup>12</sup> *Id.*

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- <sup>13</sup> U.S. Environmental Protection Agency, *Fact Sheet: Respiratory Health Effects of Passive Smoking* (1993), available at <http://www.epa.gov/smokefree/pubs/etsfs.html>.
- <sup>14</sup> C. Svanes et al., *Parental Smoking in Childhood and Adult Obstructive Lung Disease: Results from the European Community Respiratory Health Survey*, 59 *Thorax* 295, 295–302 (2005).
- <sup>15</sup> Gregory Tung & Stanton Glantz, *Clean Air Now, But a Hazy Future: Tobacco Industry Influence and Tobacco Policy Making 1997-2007*, Center for Tobacco Control Research and Education 7 (2007), available at <http://repositories.cdlib.org/ctcre/tcpmus/OH1997to2007>.
- <sup>16</sup> See generally E. Gilpin et al., *Home Smoking Restrictions: Which Smokers Have Them and How They Are Associated With Smoking Behavior*, 1 *Nicotine and Tobacco Research* 153-62 (1999) (stating that smoke-free homes make children less likely to smoke).
- <sup>17</sup> Alaska Admin. Code tit. 7 § 10.1085 (2007).
- <sup>18</sup> Ariz. Admin. Code § 6-5-7465 (2006).
- <sup>19</sup> 10-148-16 Me. Code R. § 9 (Weil 2007).
- <sup>20</sup> Mont. Admin. R. 37.51.825 (2006).
- <sup>21</sup> N.J. Admin. Code § 10:122C-7.2 (2004).
- <sup>22</sup> N.D. Admin. Code 75-03-14-04 (2007).
- <sup>23</sup> Okla. Admin. Code § 340:75-7-12 (2007).
- <sup>24</sup> Or. Admin. R. 413-200-0346(3)(b) (2001).
- <sup>25</sup> 40 Tex. Admin. Code § 749.2931 (2007).
- <sup>26</sup> Vermont Department for Children and Families, Family Services Division, Licensing Regulations for Foster Care No. 403 (2005).
- <sup>27</sup> Wash. Rev. Code § 70.160.010 (2005).
- <sup>28</sup> See Child Welfare League of America, *Snuffing Out Secondhand Smoke In Foster Homes*, Children's Voice, May/June 2006, available at <http://www.cwla.org/voice/0605health.htm>.
- <sup>29</sup> See generally Americans for Nonsmokers' Rights, *Rights of Nonsmokers* (2003), <http://www.no-smoke.org/document.php?id=230> (discussing "Child Custody Disputes").
- <sup>30</sup> See generally *Helling v. McKinney*, 509 U.S. 25 (1993) (holding that secondhand smoke exposure could be cruel and unusual punishment in certain situations in violation of the 8th Amendment).
- <sup>31</sup> See Child Welfare League of America, *supra* note 28 (stating that the cofounder of the Adoptive and Foster Families of Maine believes that Maine's smoke-free foster home policy "has not thwarted parents' interest in bringing children into their homes").
- <sup>32</sup> John Briggs, *Foster Homes Would Be Smokefree*, Burlington Free Press, May 8, 2005, at 1C.
- <sup>33</sup> Ontario Med. Ass'n, *Exposure to Second-hand Smoke: Are We Protecting Our Kids? 7* (2005), available at <http://www.oma.org/Health/tobacco/smoke2004.pdf>.
- <sup>34</sup> See Ohio Rev. Code Ann. § 5153.10 (West 2007).
- <sup>35</sup> See Ontario Med. Ass'n, *supra* note 33, at 7.