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OPINION
OF

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Opinion No. 94-03

BY: Fred Nathan
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TO: The Honorable Robert Perls
State Representative
State Capitol Building
Santa Fe, New Mexico 87503

QUESTION:

Does the State Board of Education and do local school boards have the authority to ban smoking on public school campuses if they choose?

CONCLUSION:

Yes.

ANALYSIS:

We begin our analysis of this question by observing that Congress recently mandated that no State or local subdivision thereof "shall permit smoking within any indoor facility owned or leased or contracted for and utilized... for provision of routine or regular kindergarten, elementary, or secondary education or library services to children." Pro-Children Act of 1994, Pub. L. No. 103-227, § 1043(a), 108 Stat. 125, 271 (1994). Violations are punished by a civil penalty of up to \$1,000 per violation. § 1043(f). This provision was signed into law on March 31, 1994 by President Clinton and goes into effect 270 days after enactment or 90 days after publication of a notice in the Federal Register, whichever occurs first. § 1043(d). Such notice has not yet been made and therefore the earliest this law could go into effect is mid-September, 1994, and the latest effective date is December 26, 1994. Once in effect this federal law will effectively ban smoking

in public school buildings by both minors and adults and will control over State law, to the extent State law conflicts with the Pro-children Act of 1994, pursuant to the Supremacy Clause in Article VI of the United States Constitution.

In the meantime, before the federal law takes effect, school officials have authority to adopt and enforce reasonable disciplinary regulations concerning students, Sims v. Board of Education of the Independent School District No. 22, 329 F. Supp. 678, 690 (D.N.M. 1971), and we understand that many New Mexico schools have already adopted no smoking policies. School policies that prohibit smoking by students need not be limited to public school buildings but can extend to the entire public school campus. In Randol v. Newberg Public School Board, 23 Or. App. 425, 542 P.2d 938 (1978), the Court stated:

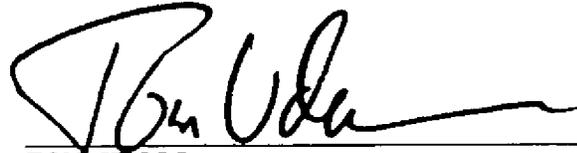
Virtually all of the reasons that would justify a smoking prohibition within a school building are equally applicable to a rule barring smoking next to the building....It is generally accepted fact that smoking is hazardous to a person's health. An effort to maintain and inculcate habits designed to preserve good health among pupils is a legitimate element of an educational system.

542 P.2d at 939. See generally Pierce v. Society of Sisters, 268 U.S. 510 (1924) (regulations controlling conduct at schools need only be reasonable to be constitutional).

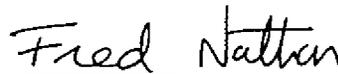
With regard to adults in public school buildings, including teachers, employees and parents, we must look to the Clean Indoor Air Act, NMSA 1978, §§24-16-1 to 11 (Repl. 1991). That act allows the use of tobacco products by adults in "smoking-permitted areas" in public buildings, including school buildings, owned or leased by the state or any of its political subdivisions.

Notwithstanding the legality of smoking-permitted areas for adults in public school buildings under State law prior to the Pro-Children Act of 1994 taking effect, the State Board of Education can choose to ban smoking for both adults and minors in public school buildings and campuses since the New Mexico Constitution grants the Board broad authority to "determine public school policy" in Article XII, Section 6A. Likewise, local school boards have authority to "supervise and control all public schools within" their district, NMSA 1978, §22-5-4A. (Repl. 1993), and we understand that some boards have already used that authority to ban smoking by both adults and minors on all public school campuses within their district. Although the legal rights of adult smokers in public schools must be weighed against the health effects on

children from passive smoke¹ and from exposure to adult role models (e.g. teachers) who smoke, it should be noted that "the right to smoke in public places is not a protected right, even for adults." Buncombe County Board of Education, 80 N.C. App. 683, 684, 343 S.E. 222, 223 (Ct. App. 1986).



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¹The New Mexico legislature in its declaration of policy and intent to the Clean Indoor Air Act stated, "the legislature finds and declares that the smoking of tobacco, or any other weed or plant, is a positive danger to health and a health hazard to those who are present in enclosed places and that smoking in such areas should be confined to designated smoking areas." Section 24-16-2.

There is an increasing body of scientific evidence documenting severe adverse health effects from exposure to passive smoke, the process of breathing secondhand smoke. The Environmental Protection Agency has concluded that passive smoke is carcinogenic. 1993 EPA Report, Respiratory Health Effects of Passive Smoking: Lung Cancer and Other Disorders, ("1993 EPA Report"). Environmental tobacco smoke contains more than 40 known carcinogens. 1993 EPA Report, p. 3-21 through 3-26. The health hazards associated with smoking itself are so well documented that tobacco products must carry a federally mandated health warning. 15 U.S.C., §1333.

Although all nonsmokers are at risk, young children are particularly sensitive to the adverse effects of secondhand smoke. For example, the EPA estimates that exposure to secondhand smoke increases the number of episodes and the severity of symptoms for 200,000 to one million asthmatic children in the United States. Scientists now contend that exposure to passive smoke itself is a significant risk factor in causing thousands of non-asthmatic children to develop asthma each year. 1993 EPA Report, Ch. 8.