Legal Update: Medical Marijuana and CBD Considerations
By: Nicole M. Donovsky, Melissa M. Bondy, and Beverly A. Meyer, Bricker & Eckler, LLP

DISCLAIMER: The topic discussed in this publication is subject to quickly evolving change and interpretation. The information contained below does not constitute legal advice. You should consult board counsel if you encounter an issue related to medical marijuana or CBD products, so that the most current information and specific facts can be considered.

The legalization and regulation of marijuana and hemp is a process that is not yet complete at either the federal or state level. As a result, there is a significant amount of confusion and misinformation circulating. Headlines suggesting that medical marijuana and CBD products, as well as other derivatives, are legal, only tell a fragment of the story. For public schools, there are many issues to consider in this quickly evolving, but uncertain, landscape.

Federal law regarding marijuana

At the federal level, marijuana has historically been a Schedule I controlled substance, with high potential for abuse and no currently accepted medical use, and maintains that status as of the date of this publication. There are NO federally recognized medical conditions for which “medical” marijuana is authorized for treatment.

Federal law and regulation regarding CBD products

In the Agriculture Improvement Act of 2018 (the “Farm Bill”), cannabis and cannabis derivatives, including cannabidiol (CBD), with a 0.3% or lower THC content (by dry weight) were removed from the definition of “marijuana” contained in the Controlled Substances Act. This change makes CBD products “legal” from a cultivation standpoint. However, the Food and Drug Administration maintains regulatory authority over these products when the use is intended to have a therapeutic effect, such as treating a disease, or when sold as a dietary supplement. The FDA maintains that such CBD products cannot be sold as a drug without FDA approval, or an FDA monograph if sold as an over-the-counter item. Currently, the only drug containing CBD that the FDA has approved is Epidiolex, which is used to treat a rare and severe form of epilepsy. The FDA maintains that, “CBD cannot be marketed as a dietary supplement [compared to a drug], and foods to which CBD has been added cannot be introduced into interstate commerce.” To do so is in violation of the Federal Food, Drug, and Cosmetic Act prohibition on selling or transporting such products across state lines. The FDA is continuing to evaluate regulatory frameworks for CBD products.

Ohio law and regulations regarding marijuana

Under Ohio law (O.R.C. 3719.01), “medical marijuana” is a Schedule II drug. It may be used to treat 21 qualifying medical conditions, which include:
- Acquired immune deficiency syndrome
- Alzheimer’s disease
- Amyotrophic lateral sclerosis
- Cancer
- Chronic traumatic encephalopathy
- Crohn’s disease
- Epilepsy or another seizure disorder
- Fibromyalgia
- Glaucoma
- Hepatitis C
- Inflammatory bowel disease
- Multiple sclerosis
- Pain that is either chronic and severe, or, intractable
- Parkinson’s disease
- Positive status for HIV
- Post-traumatic stress disorder
- Sickle cell anemia

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The State Medical Board recently declined adding anxiety and autism to the list of qualifying medical conditions.

In order to purchase medical marijuana, an individual must develop a legitimate doctor-patient relationship, and the doctor must recommend that medical marijuana be used to treat one of the qualifying medical conditions. This allows the individual to register as a patient in the state registration system, which is a confidential system, which is inaccessible by schools and other employers. Parents may obtain registration for their minor child. Due to the federal treatment of marijuana as a Schedule I drug, at this time, a physician is unable to "prescribe" medical marijuana.

Medical marijuana is sold in a variety of forms, but cannot be smoked, in the way traditional marijuana is consumed. Rather, medical marijuana is available in the form of oils, tinctures, plant material, edibles and patches. While medical marijuana may not be smoked, it may be vaped. Cultivation, processing and sale of medical marijuana is regulated by the Ohio Department of Commerce and the State Pharmacy Board.

A registered patient may legally possess and use medical marijuana, and possess any paraphernalia or accessories required for its use. However, a registered patient may not possess more than a 90-day supply of medical marijuana. Further, a registered patient may not operate a vehicle while under the influence of marijuana.

Ohio law and regulations regarding CBD products

Recently, Senate Bill 57 was signed into law, paving the way for the hemp industry to become one of Ohio’s agricultural yields. Industrial hemp comes from cannabis plants that contain no more than 0.3% of tetrahydrocannabinol (THC) by dry weight. Hemp and hemp products meeting these requirements are excluded from the definition of marijuana and are "legal" in Ohio.

The Ohio Department of Agriculture is charged with regulating the cultivation and sale of the now legal hemp and soon anticipated to be legal CBD products. The rule-making process is expected to take approximately six months. According to the ODA website, licensure for cultivators will not be available until the Spring of 2020. The ODA will also test CBD products and review CBD labels. Until accurate labeling and testing are in place, school administrators are put in the untenable position of deciding whether to allow staff and students to be exposed to products that they are cannot determine are legal and safe.

Student issues for Ohio public schools

• Can a student with a medical marijuana registration bring medical marijuana to school?
  o Not legally. School districts usually have policies related to prescription and over-the-counter medications. Currently, medical marijuana remains a prohibited Schedule I drug under federal law. Allowing Schedule I drugs on school property violates the Drug-Free Workplace Act and could potentially put federal funds at risk.

• Can a student bring CBD products to school?
  o Not currently. Neither the FDA nor the Ohio Department of Agriculture currently have regulations in place to process, label, test or sell CBD products. Therefore, any CBD products that a student may possess are not authorized by the FDA or ODA, and most importantly, without regulation, consumers do not know the exact content with any degree of confidence. Properly manufactured and labelled CBD products may become legal at some time in the future.

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• **Should a staff member store or administer medical marijuana or CBD products to a student?**
  o Not medical marijuana. Currently, medical marijuana remains a prohibited Schedule I drug under federal law. Allowing Schedule I drugs on school property violates the Drug-Free Workplace Act and could potentially put federal funds at risk. In addition, medical marijuana requires a registration (not a prescription) that staff members are not able to verify.
  o Currently, not CBD products. The FDA currently has no regulations in place to process, label or sell CBD products. Given this, the FDA maintains that CBD products cannot be sold in interstate commerce. In Ohio, the Ohio Department of Agriculture regulates CBD products. Again, no regulations currently exist for the processing, testing, labeling or sale of CBD products. Therefore, any CBD products that a student may possess are not authorized by the FDA or ODA, and there is no way to verify or test the products to determine THC or other content.

• **Should a school allow a parent to bring medical marijuana to the school to administer it to their child?**
  o It is not advisable. Currently, medical marijuana remains a prohibited Schedule I drug under federal law. Allowing Schedule I drugs on school property violates the Drug-Free Workplace Act and potentially puts federal funds at risk.
  o According to federal law, schools are required to provide an educational environment that is free from controlled substances as a condition of receiving federal funds.

• **What happens if a student athlete tests positive for THC?**
  o Participation in athletics is a privilege, not a right. A school district may establish reasonable rules and regulations related to participation. A positive test for THC, due to use of medical marijuana or accumulation of THC in the body due to prolonged use of CBD products, should be considered and treated as a positive test for THC under the district’s rules and regulations.
  o Before testing, as testing protocol, a school may want to ask students to provide any relevant information that may result in a positive test.
  o Requests for an accommodation of a disability should be considered carefully in consultation with legal counsel.

• **What if a student appears impaired?**
  o Use of medical marijuana can have intoxicating effects. Use of CBD products that contain less than 0.3% THC (by dry weight), should not result in any impairments. However, studies suggest it is possible for THC to accumulate in the body due to prolonged use. As discussed herein, CBD products lack any reliable regulating, testing or labeling at the current time.
  o If a student claims that he or she smoked marijuana or hemp (with a 0.3% THC concentration or lower) rather than marijuana, their conduct is illegal. Remember that there is currently no legal authorization to smoke either medical marijuana or hemp.
  o As in every case, information that a student provides during any due process hearing should be considered before disciplinary action is taken.

• **What if a parent requests that use/administration of medical marijuana or CBD products be included in the student’s IEP, 504 or health plan?**
  o Medical marijuana is not “legal” under federal law. At this time, there is no legal obligation under Ohio law to accommodate students regarding their use of medical marijuana. Further, an individual can register for medical marijuana only if the individual suffers from one of the qualifying medical conditions recognized under Ohio law.
  o Regulations are not yet in place regarding cultivation, labeling, testing or sale of CBD products under federal or state law.
  o This is a quickly evolving area and any requests for accommodations, including adding use or administration of medical marijuana or CBD products to an IEP, 504 or health plan should be carefully considered in consultation with legal counsel. Employment issues for Ohio public schools
Employment issues for Ohio public schools

• Should a staff member with a medical marijuana registration be permitted to bring medical marijuana to work for personal use?
  o No. Ohio law does not require an employer to permit or accommodate an employee’s use, possession, or distribution of medical marijuana. Further, Ohio law does not prohibit an employer for taking adverse action against a person regarding their employment for use, possession or distribution of medical marijuana.
  o School districts usually have policies related to prescription and over-the-counter medications. Currently medical marijuana remains a Schedule I controlled substance under federal law and is not considered a “prescription” or “over the counter” medication. Allowing Schedule I drugs on school property violates the Drug-Free Workplace Act and potentially puts federal funds at risk.

• Should a staff member be permitted to bring CBD products to work for personal use?
  o Not currently. The FDA currently has no regulations in place to process, label or sell CBD products. Given this, the FDA maintains that CBD products cannot be sold in interstate commerce. In Ohio, the Ohio Department of Agriculture regulates CBD products. Again, no regulations currently exist for the processing, testing, labeling or sale of CBD products. Therefore, any CBD products that an employee may possess for therapeutic use are not authorized by the FDA or ODA.

• What happens if a staff member tests positive for THC, due either to medical marijuana use, or due to accumulation of THC in their body due to prolonged “legal” CBD use?
  o A high enough quantity of CBD products consumed through edibles, vaping or other means could result in a positive drug test.
  o The legalization of medical marijuana and CBD products does not change an employer’s obligations to drug-test certain employees (for example, school bus drivers and other CDL holders) under federal law.
  o Ohio law does not prohibit an employer from establishing or enforcing a drug testing policy, drug-free workplace policy, or zero-tolerance drug policy.
  o No cause of action is created against an employer for taking an adverse employment action against a person who tests positive on a drug test administered under the employer’s drug testing policies, even if the employee claims that the positive test is related to medical marijuana.
  o Under Ohio law, a person who is discharged from employment because of the person’s use of medical marijuana shall be considered to have been discharged for just cause for purposes of unemployment, if the person’s use of medical marijuana was in violation of an employer’s policy.

• What if an employee appears impaired?
  o Ohio law prohibits registered patients from driving a vehicle under the influence of medical marijuana.
  o While use of CBD products is not expected to result in impairment due to its low THC content, currently, there is no approved testing or required labeling of CBD products.
  o An employer may require an employee to submit to a drug or alcohol test if it reasonably suspects that employee of reporting to work in an impaired state.

• What if the employee requests an “accommodation” for use of medical marijuana or a CBD product?
  o Medical marijuana is not “legal” under federal law. At this time, there is no legal obligation under Ohio law to accommodate employees regarding their use of medical marijuana. An individual can register for medical marijuana only if the individual suffers from one of the qualifying medical conditions recognized under Ohio law. Still an employer has no obligation to allow an employee to use medical marijuana for therapeutic purposes.
  o Regulations are not yet in place regarding cultivation, labeling, testing or sale of CBD products under federal or state law. Currently, it is questionable whether an employer must “accommodate” an employee’s use of CBD products.

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Remove
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This is a quickly evolving area and any requests for accommodations should be carefully considered in consultation with legal counsel.

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