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# LEGAL ADVISORY:

# THE EVOLVING STATE OF MARIJUANA LAW IN MASSACHUSETTS

## I. SUMMARY:

Recreational marijuana use was legalized in the Commonwealth via a statewide ballot question on November 8, 2016, with legalization under state law effective as of December 15, 2016. Medical marijuana has been legal in Massachusetts under state law since 2012. Despite these significant changes in state law over the past several years, marijuana remains an illegal drug under federal law, which makes no distinction between recreational and medical use. While a school district's outright prohibition of recreational marijuana use on school grounds and at school activities will likely be treated in the same manner as long-established bans on tobacco and alcohol use on campus, the discrepancy between state and federal law creates a conflict of laws issue for schools in the Commonwealth relative to staff or student use of medical marijuana on school grounds.

The state's medical marijuana statute itself does not require school districts to accommodate any on-campus use of medical marijuana. Further, allowing medical marijuana use on school grounds could potentially put schools' federal funding dollars at

risk, as schools would not be in compliance with the federal law. Districts could potentially be subjected to discrimination claims and special education related claims under state law in the future, however, upon prohibiting medical marijuana use or administration by registered medical marijuana patients, staff or students at school as prescribed. If faced with a medical marijuana accommodation request, school districts should balance the best interests of students with the associated risks and costs to the district, in the context of both state and federal law.

## II. RECREATIONAL USE:

### A. Federal Law is Unchanged by Legalization at the State Level

The legalization of recreational marijuana in Massachusetts, the possession and use of which is restricted to those twenty-one (21) years of age or older,[1] is so recent that implementing regulations[2] have yet to be created. It is clear, however, that legalization at the state level does not supersede existing federal laws or repeal all state law prohibitions relative to the possession, sale and use of marijuana, particularly on or near school grounds. The federal Controlled Substances Act, 21 U.S.C. § 801 *et seq.* ("Controlled Substances Act"), Drug-Free Workplace Act and Safe and Drug-Free Schools and Communities Act are not nullified or modified by the legalization of marijuana in Massachusetts. Marijuana is still a Schedule I illegal drug under the Controlled Substances Act, and schools must continue to comply with the Drug-Free Workplace Act

[1] Under the new M.G.L. Chapter 94G, Section 2(b), the law shall not be construed to allow a person under the age of twenty-one (21) to "possess, use, purchase, obtain, cultivate, process, manufacture, deliver or sell or otherwise transfer marijuana or marijuana accessories."

[2] Under and in accordance with the new M.G.L. c. 94G, Section 4, as well as in accordance with M.G.L. c. 30A, an appointed "Cannabis Control Commission" shall, in consultation with a "Cannabis Advisory Board," promulgate initial implementing regulations in accordance with the law's provisions no later than September 15, 2017.

and Safe and Drug-Free Schools and Communities Act as a condition of receiving federal funding.

Under the new M.G.L. Chapter 94G, Sections 2 (d) and (e), the law shall **not** be construed to:

(1) prevent the Commonwealth, a subdivision thereof or a local government agency from prohibiting or otherwise regulating the possession or consumption of marijuana or marijuana accessories within a building owned, leased or occupied by the commonwealth, a political subdivision of the commonwealth or an agency of the commonwealth;

(2) authorize the possession or consumption of marijuana or marijuana accessories on the grounds of or within a public or private school where children attend school preschool through grade 12;

(3) require an employer to permit or accommodate conduct otherwise allowed by the law (i.e. marijuana possession and consumption) in the workplace.

Section 13(c) of the new M.G.L. Chapter 94G prohibits the consumption of marijuana in public places and anywhere the smoking of tobacco is prohibited, along with regulating possession, in cars and otherwise.

### B. District Policies on Recreational Marijuana: Look to Alcohol/Tobacco Policies for Guidance

Alcohol and tobacco have long been legal for "recreational" use by those who are of legal age. Nonetheless, state laws and district policies can and do prohibit the use of alcohol and tobacco on school grounds, even for those who are of age. The same will no doubt continue to be true for recreational marijuana. The climate in schools will likely be even more prohibitive relative to recreational marijuana, as alcohol, unlike marijuana, is not an illegal substance under federal law. Massachusetts law has yet to address whether schools may prohibit employees from recreationally using marijuana at home outside of work hours, or may discipline or terminate an employee for doing so.

Issues that districts face relative to recreational marijuana will often not be as clear cut as those pertaining to alcohol. Testing procedures for marijuana are less easily implemented than the use of a breathalyzer, for example. Positive marijuana test results may be indicative of past use and not current use or current intoxication. Edibles and ointments will present additional challenges relating to underage consumption, possession and search and seizure issues.

## III. MEDICAL USE:

### A. State Medical Marijuana Statute and Regulations Do Not Require District Accommodation of Medical Marijuana Use on School Grounds

The state's medical marijuana statute does not require the accommodation of on-site medical marijuana use in a school or in *any* place of employment. Chapter 369 of the Acts of 2012, "An Act for the Humanitarian Medical Use of Marijuana," states, with the same language being codified in M.G.L. c. 94C, App. § 1-7: "[n]othing in this law requires any accommodation of any on-site medical use of marijuana in any place of employment, school bus or on school grounds, in any youth center, in any correctional facility, or of smoking medical marijuana in any public place." Aside from this provision, the state medical marijuana law and its implementing Massachusetts Department of Public Health ("DPH") regulations, see 105 CMR 725, focus on patient registration and dispensary licensing/operations, being otherwise silent on employer/employee and school considerations. M.G.L. c. 94C, App. § 1-7 expressly states that nothing in the law "requires the violation of federal law," "purports to give immunity under federal law," or "poses an obstacle to federal enforcement of the law."

## B. Analysis of Whether District Accommodation/Allowance of Medical Marijuana Use is Otherwise Required by Law

### 1. Staff Consumption of Medical Marijuana

#### a. On-Site Use By Staff

Although the state medical marijuana statute and regulations do not require an employer or, even more specifically, a school to accommodate on-site medical use of marijuana, the law is unclear as to whether any other statute or regulation may require such accommodation for registered medical marijuana patient staff. The potential for wrongful termination claims, discrimination claims, including those brought under M.G.L. c. 151B, and privacy claims brought under M.G.L. c. 214, § 1B, relative to the intrusiveness of any drug testing, should be considered. A reasonable accommodation analysis may come into play under the federal American Disabilities Act, 42 U.S.C. 12101 *et seq.* ("ADA"), in the future as well. To our knowledge, the ADA does not currently require any accommodation for the use of medical marijuana. Courts have articulated that medical marijuana accommodation is not required under the ADA because marijuana is classified as an illegal drug under federal law.[3]

While the state medical marijuana statute and its regulations do not require districts to allow or accommodate staff possession or use of medical marijuana on school grounds, and federal law continues to condition federal funding on schools being drug-free, the possession, use and effects of medical marijuana may be analogized to the use, possession and effects of other prescription medications needed to treat medical

[3] "...medical marijuana use is not protected by the ADA. Even as to plaintiffs 'who face debilitating pain,' Congress 'has made clear ... that the ADA defines 'illegal drug use' by reference to federal, rather than state, law, and federal law does not authorize the plaintiffs' medical marijuana use.'" The Kind and Compassionate v. City of Long Beach, 2 Cal.App.5th 116, 127 (Cal. Ct. of Appeal 2016), citing James v. City of Costa Mesa, 700 F.3d 394, 397 (9th Cir. 2012).

conditions in the future. As such, districts should consider any medical accommodation requests on a case-by-case basis.

**b. Off-Site / Off-Hours Use By Staff**

Massachusetts law has also yet to address whether a school may prohibit a registered medical marijuana patient employee from using properly obtained medical marijuana *prior* to coming to work, or discipline or terminate an employee for legally permissible use of medical marijuana off school grounds and outside of school hours. At least one relevant, though not entirely on point, case is currently pending.

In Barbuto v. Advantage Sales Marketing, 148 F.Supp.3d 145 (U.S. District Court, D. Mass. 2015), the United States District Court for the District of Massachusetts remanded a case involving the termination of a registered medical marijuana user[4] for a failed drug test to the state trial court, finding that the defendant employer had not met the burden of establishing that the amount in controversy exceeded the requisite $75,000.00 for removal to federal court. The Superior Court then granted the employer's motion to dismiss on all but one claim raised by the employee in Barbuto v. Advantage Sales Marketing, Suffolk Superior Court No. 1584CV02677. Direct appellate review has been allowed, and the case was transferred from the Appeals Court to the Supreme Judicial Court for review relative to the dismissed claims (SJC-12226, entered November 17, 2016).

According to docket records as of this writing, the parties have filed briefs, amicus briefs have been solicited and argument dates have been set. Because the Superior

[4] The Plaintiff, Cristina Barbuto, is a registered medical marijuana patient who used marijuana at home to treat a medical condition. Ms. Barbuto's private employer terminated her from her marketing position after she tested positive for marijuana use. Ms. Barbuto had disclosed to her employer that she was a medical marijuana user prior to taking the drug test.

Court's favorable ruling on the employer's motion to dismiss is not precedent setting, it will be important to monitor the SJC's treatment of this case moving forward. While the plaintiff in the Barbuto case was an employee of a private, non-school employer, the case's outcome will likely prove to be significant for districts relative to off-site, off-hours medical marijuana use, despite the substantial differences between a private workplace and a public school educating minor students.

In many states, including First Circuit states Maine and Rhode Island, state statutes and/or court decisions prohibit employers from discriminating against registered medical marijuana patients in hiring, while not requiring employers to allow employee use of medical marijuana in the workplace (AZ, CT, DE, IL, ME, MN, NV, NY, RI). Courts in some jurisdictions, such as Colorado,[5] have affirmed employer terminations of registered medical marijuana users for testing positive for marijuana, even if usage was off-site and off-hours, having no impact on the employee's work, because marijuana use of any kind remains illegal under the Controlled Substances Act. Arbitrators have come to the opposite conclusion in some cases. At least one state's medical marijuana statute, Arizona's,[6] incorporates protections against such termination, but includes an express exemption for employers who are recipients of federal funds, as schools are.

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[5] See Curry v. Miller Coors, Inc., 2013 WL 4494307 (D. Colo. 2013) and Coats v. Dish Network, L.L.C., 350 P.3d 849 (Supreme Court of Colo. 2015) (Colorado federal and state courts both finding that registered medical marijuana patient employee's consumption of medical marijuana outside of workplace / working hours and not impacting work was not "lawful activity" under state statute prohibiting employees from being fired for engaging in lawful activity outside of work because medical marijuana is illegal under federal law, despite being legal under Colorado state law).

[6] "Unless a failure to do so would cause an employer to lose a monetary or licensing related benefit under federal law or regulations, an employer may not discriminate against a person in hiring, termination or imposing any term or condition of employment or otherwise penalize a person based upon either: 1. The person's status as a cardholder. 2. A registered qualifying patient's positive drug test for marijuana components or metabolites, unless the patient used, possessed or was impaired by marijuana on the premises of the place of employment or during the hours of employment." See Ariz. Rev. Stat. Ann. ¶36-

### 2. Student Consumption of Medical Marijuana During School Day

The state's medical marijuana law and regulations also do not impose any obligation upon districts to allow or accommodate a student's in-school medical marijuana use. Massachusetts has yet to otherwise address the issue via statute, regulation, administrative guidance or case law. To our knowledge, neither the Massachusetts Department of Elementary and Secondary Education ("DESE") nor the DPH has issued guidance.

While permitting student consumption of medical marijuana on school grounds could potentially cause schools to lose federal funding,[7] as touched upon above, a handful of medical marijuana permissive states have nonetheless enacted legislation allowing for or requiring the accommodation of student medical marijuana use on school grounds during the school day.[8] As outlined in footnote no. 8, the majority, but not all, of the early

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2813(B), noting the exception applicable when an employer would lose monetary or licensing benefit under federal law or regulations.

[7] Guidance from the federal government may suggest that this risk is minimal, however. The Department of Justice issued memoranda in 2009 (Deputy Attorney General Ogden), 2011 (Deputy Attorney General Cole), and 2013 (Deputy Attorney General Cole), however, stating that, while marijuana remains illegal at the federal level, enforcement and prosecution efforts should be focused on the primary aims of federal prohibition, not on activities that have been "legalized" under state law, and particularly not on ill patients' use of medical marijuana in accordance with state law. The 2009 Ogden Memorandum is available at: https://www.justice.gov/opa/blog/memorandum-selected-united-state-attorneys-investigations-and-prosecutions-states; The 2011 Cole Memorandum is available at: https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dag-guidance-2011-for-medical-marijuana-use.pdf; The 2013 Cole Memorandum is available at https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf.

[8] **Washington State (April 14, 2015):**
An Act Relating To Establishing The Cannabis Patient Protection Act (Second Substitute Senate Bill 5052; Laws of 2015, Chapter 70); See amendments modifying, inserting new sections and repealing sections relative to R.C.W 66.08.012, 69.50, 69.51A, 43.70.320, 9.94A.518, 42.56, 82.04
- schools are permitted, yet not required to accommodate student medical marijuana use on-campus;
- "nothing in this chapter requires any accommodation of any on-site medical use of cannabis…in any school bus or on any school grounds, in any youth center… or smoking cannabis in any public place..." "However, a school may permit a minor who meets the requirements of section 20 of this act to consume marijuana on school grounds. Such use must be in accordance with school policy relating to medication use on school grounds."

**Maine (June 30, 2015):**
An Act to Provide Reasonable Accommodations for School Attendance for Children Certified for the Medical Use of Marijuana, (P.L. 2015, Chapter 369, H.P. 381-L.D. 557); See 20-A MRSA § 6306; 22 MSRA § 2426, sub-§§1 and 1-A
- it seems that a school is required to permit use on-campus and on a school bus as a reasonable accommodation for qualified medical marijuana patient student, via the statement that a registered medical marijuana patient student "may not be denied eligibility to attend school solely because the child requires medical marijuana in a nonsmokeable form as a reasonable accommodation necessary for the child to attend school;"
-marijuana must be administered in a "nonsmokeable form" only;
- a properly designated "primary caregiver" must administer.

**New Jersey (November 9, 2015):**
An Act Concerning Medical Marijuana, Supplementing Chapter 40 of Title 18A of the New Jersey Statutes and Chapter 6D of Title 30 of the Revised Statutes, and amending P.L. 2009, Chapter 307 and N.J.S.2C:35-18 (P.L. 2015, Chapter 158)
- schools shall create a policy authorizing use on-campus, on school bus, at school-sponsored events, by qualified students;
- calls for administration of marijuana by "parents, guardians, and primary caregivers" (subject to registration requirements);
-schools must identify locations on school grounds where marijuana may be administered;
- marijuana is prohibited in smoking form or via another form of inhalation on school grounds, on school bus or at school sponsored event.

**Colorado (June 6, 2016):**
An Act Concerning Requiring School Districts To Adopt A Policy Permitting The Use Of Medical Marijuana By Students Authorized To Use Medical Marijuana (H.B. 16-1373); See C.R.S. 22-1-119.3, 25-1.5-106
- student possession or self-administration on school grounds, on school bus, or at school-sponsored event is generally prohibited;
- a "primary caregiver" may administer on school grounds, on school bus, or at a school sponsored event; schools may adopt a policy determining who a primary caregiver may be;
- only a "nonsmokeable form" of marijuana is allowed on school grounds, in a manner that does not create "disruption to the educational environment" or cause "exposure to other students;"
- seems to prohibit storage on-campus – a caregiver must administer then remove any excess from school grounds post-dosing;
- states that nothing in the law requires school district staff to administer marijuana;
-states that the statutory paragraph allowing for primary caregiver to administer the marijuana on school grounds, on school bus or at school sponsored event "does not apply" if the school "loses federal funding as a result" of implementing that paragraph, or if the school "posts on its website in a conspicuous place a statement regarding its decision not to comply" with that paragraph.

**Delaware (September 7, 2016):**
An Act to Amend Title 16 of the Delaware Code Relating to Medical Marijuana Oil (Chapter 422, Formerly S.B. 181 As Amended By Senate Amendment No. 1); See § 4904A, Title 16, Delaware Code.
- only "marijuana based oils" to be permitted;
- schools are required to allow qualifying students to consume marijuana based oils for medical purposes on school grounds;
- authorizes only registered "designated caregivers to possess and administer" and students to use medical marijuana on school grounds and school buses;
- "[t]he designated caregiver shall not be a school nurse or other school employee hired or contracted by a school unless he or she is a parent or legal guardian of the minor qualifying patient, and said parent or legal guardian possesses no more than the number of dose(s) prescribed per day of medical marijuana oil which is kept at all times on their person.

adopter states taking a permissive legislative position on the issue of student consumption of medical marijuana on school grounds thus far seem to require:

> 1. that administration of the drug on school grounds be handled only by a parent, guardian or caregiver, subject to registration requirements; and
>
> 2. that consumption be permitted only in a nonsmokeable or nonsmokeable/noninhalable form.

State statutes vary regarding whether a school is (1) required (Maine, New Jersey, Delaware), (2) generally required but allowed to opt-out (a) if federal funding is at risk or (b) if a school chooses to affirmatively opt-out via a conspicuous website posting (Colorado), or (3) permitted but not at all required (Washington State), to accommodate/allow student medical marijuana use on school grounds. To our knowledge, none of these state statutes have been successfully challenged to date.

**a. Prohibition of On-Campus Dosing**

**i. No Accommodation**

A blanket prohibition on any accommodation of a qualified, registered student's consumption of medical marijuana during the school day is certainly the most conservative and protective relative to federal funding and district logistical expenses. Such a restrictive stance could potentially subject the district to claims of violations of M.G.L. c. 71B and discrimination claims under state law in the future, however. It could also force a student out-of-district who might otherwise be able to remain in-district. This may result in a parent bringing a claim against the district before the Bureau of Special Education Appeals ("BSEA"),[9] and/or the district being forced to incur expensive out-of-

[9] It is worth noting that the BSEA stated in its In Re: Ashley D. decision, 1 MSER 16 at p. 20, BSEA #93-1037 (H.O. Figueroa, 1995), that "ordering a school to administer an unapproved [unapproved by the F.D.A. in the United States] medication goes beyond the jurisdiction of the BSEA," and that the "[p]ower to issue such an order" would involve "a separate proceeding in a court with pertinent jurisdiction." The

district tuition fees, especially if a student's out-of-district placement ends up being residential. Claims brought against the district under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq. ("IDEA"), Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 ("Section 504") or the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq. ("ADA") would not likely be viable, however, as marijuana remains illegal under federal law.

**ii. Accommodation of Off-Campus Dosing Only**

Requiring that a student's parent/guardian/caregiver pick the student up at school, dose off campus, then return to the student to school would be similarly protective of federal funding, but might also lead to discrimination claims under state law and/or a parent bringing claims against the district before the BSEA, alleging M.G.L. c. 71B violations. Such a requirement might result in the district being forced to provide or fund a student's daily transportation home (or to an alternate caregiver dosing location) and then back to school again mid-day in order to accommodate off-campus dosing, which could also trigger costly expenses for the district.

**b. Permitting On-Campus Dosing**

On-campus dosing allowances would best accommodate the student's medical condition / disability and prescribed treatment protocol, while permitting the student to remain in school, minimizing disruption to learning time and eliminating the need for

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hearing officer concurred with the home school district that the proposed out-of-district placement was appropriate even without such an order relative to the home or out-of-district school. This case contemplated a student's use of Frisium to treat a seizure disorder, not medical marijuana use, but an analogy can be drawn relative to the BSEA's finding that it did not have proper jurisdiction to order a school to administer a drug not approved by the F.D.A. to a student.

student transportation and the related costs. It would also put the district in a position of violating federal law.

### i. Requiring Parent/Caregiver to Transport/Administer

The district would technically be violating federal law simply by having a policy permitting marijuana on school grounds in any capacity, even if it required a properly registered parent/caregiver to bring the drug to campus, administer it, and leave with any excess, thereby eliminating district involvement with possession, storage or administering of the drug. Nonetheless, this procedure has been adopted by the majority of the jurisdictions that have enacted legislation permitting student consumption of medical marijuana on-campus. This parent/caregiver, on-campus procedure would allow for treatment on campus without removing the student from school for part of the day due to his or her illness/disability, and without putting increased responsibility/potential liability on district staff / school nurses relative to the storage/possession/dosing of medical marijuana on school grounds.

Issues and expense will no doubt be raised, however, if a registered parent/caregiver is unable and/or unwilling to travel to school to administer the drug to the student during the school/work day. A school will also have less knowledge of and control over proper dosing, and less awareness of the extent of influence on the student in a parent dosing scenario, however, which could in some cases potentially increase student safety risks.

### ii. Allowing or Requiring School Nurse or Designee to Store/Administer

If medical marijuana were to be considered as any other prescription drug, storage and dosing on school grounds would be required to be in compliance with 105 CMR

210.000 et seq., the DPH regulations setting forth state requirements regarding a school nurse's supervision/delegation/medication administration plan relative to a school administering any drug to a student. This methodology would place the greatest onus upon the school district, which at that point would be in possession of, storing and administering the drug via its staff- likely in the form of the school nurse. While districts may have the greatest control and oversight with such a policy, and be in compliance with state DPH regulations, they would also be in clear violation of federal law and at a heightened risk of losing federal funding. Staff issues, including but not limited to M.G.L. c. 150E or contractual claims, may also arise if a school nurse refuses to store and/or administer the drug in an attempt to comply with federal law.

## IV. CONCLUSION:

As stated herein, neither the state's recreational nor medical marijuana laws, in and of themselves, require districts to permit or accommodate staff or student marijuana use on school grounds. Marijuana remains an illegal drug under federal law, even when used for medical purposes. Whether the accommodation of staff or student medical marijuana use on school grounds may otherwise be required by law remains to be seen. Massachusetts law is also unsettled as to staff use of marijuana off of school grounds and outside of school hours, particularly in the case of medical marijuana. Because this area of the law is new and rapidly changing, it is necessary to monitor the evolution of marijuana law in Massachusetts and throughout the country, particularly as it intersects with employment law, school law and federal funding requirements.