

Should your district accommodate student use of medical marijuana?

By the New York State
Association of School Attorneys

If a New York public school student participates in the state's medical marijuana program, can the school nurse or other designated school employee store and dispense the student's medical marijuana for use on school grounds?

Although the state's Compassionate Care Act does not address the use of medical marijuana in school directly, implementing regulations by the state Department of Health (DOH) specify that a designated caregiver in the state's medical marijuana program may be "a private or public school."

The federal government, however, does not recognize the lawful use of medical marijuana, and schools that participate in the federal free and reduced-price meal program are required to be "drug-free zones." This puts school districts in a legal no-man's land (see sidebar, below).

Although they have never actually done so, federal law enforcement officials could choose to prosecute school officials who possess or distribute medical marijuana. Or the U.S. Department of Education could find a violation

On THC, tension between federal and state law

School districts across New York and other states (in addition to Washington, D.C.) that have legalized marijuana for medical purposes are finding themselves in the middle of a unique legal conundrum: do we permit our students to use medical marijuana in schools, in compliance with state law, or do we prohibit them from doing so because marijuana use is still banned on the federal level?

On the federal level, marijuana is a "Schedule 1" controlled substance.

The federal government does not recognize the lawful use of medical marijuana even though medical marijuana typically has significantly less tetrahydrocannabinol (THC), the psychoactive compound in the drug that produces a "high" feeling, than recreational marijuana and contains more cannabidiol (CBD), the substance that does not produce psychoactive effects.

As of April 2019, there have not been any reported instances of the federal government prosecuting individuals for their use of medical marijuana in accordance with a state medicinal marijuana law. Nevertheless, school officials may be reluctant to risk running afoul of federal law and possibly losing federal funding.

On the other hand, another federal law, Section 504 of the Rehabilitation Act of 1973, generally requires school districts to assist a student in the administration of needed medication.

Schools should consider and determine on an individual basis whether to grant a request from a student with a disability to take medical marijuana during the school day after determining whether the use would be an appropriate reasonable accommodation to give the student equal access to a free appropriate public education in accordance with Section 504. Allowing students to use medicinal marijuana to alleviate the symptoms of a qualifying medical condition would be consistent with various state and federal laws requiring reasonable accommodations for students with disabilities (e.g., Section 504).

Consult with legal counsel should a student request to use medical marijuana during the school day or on school grounds.

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that would jeopardize federal funding.

In order to certify patients to receive medical marijuana in New York State, a health care practitioner must complete a DOH-approved online course and register with DOH. The law and regulations state that registered practitioners "certify" individuals to use medical marijuana, rather than prescribe it. The federal Controlled Substances Act lists cannabis as a Schedule I controlled substance with no accepted medical uses and, therefore, physicians cannot legally prescribe it to patients.

To be eligible to use medical marijuana, an individual must be diagnosed with a specific severe, debilitating or life-threatening condition (e.g., cancer, Parkinson's disease, multiple sclerosis, epilepsy or chronic pain) accompanied by an associated or complicating condition (e.g., severe nausea, severe or chronic pain or seizures).

Once certified as having such a medical condition, a patient must register with the DOH before purchasing medical marijuana from a registered dispensary. State law authorizes a patient's designated caregivers to purchase, store and/or administer medical marijuana to the patient.

Approved forms of medical marijuana in New York include oral and sublingual liquids, oil for vaporization or administration via inhaler, oral spray, powder, tablets and capsules. The state also authorizes the use of topicals such as ointments, lotions and patches; solid and semi-solid products, including chewable and effervescent tablets and lozenges; and certain non-smokable forms of ground plant material.

The state law permitting use of medical marijuana does not permit smoking medical marijuana or the use of edibles (food products infused with marijuana) and prohibits vaporization of medical marijuana products within 100 feet of the entrances, exits or outdoor areas of a public or private elementary or secondary school (unless the individual is located within the real property boundary lines of residential property).

New York's medical marijuana law also provides that certified patients, designated caregivers and practitioners will not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege as a result of the certified medical use or manufacture of marijuana, or for any other action permitted by the law.

Nevertheless, public school officials have raised questions about how state authorities will view school actions involving storage and administration of medical marijuana pursuant to the Compassionate Care Act. In January 2019, in response to a request from NYSSBA, the State Education Department's Office of Counsel wrote that it is SED's position that any activities related to medical marijuana pursuant to state law, including becoming a designated caregiver, is a local decision. SED said it will not discipline licensed practitioners or penalize or deny any right or privilege to designated caregivers, which includes a private or public school, solely for the certified medical use of marijuana or for any other action or conduct in furtherance of the state's medical marijuana law.

If a student requests to use medical marijuana during the school day consistent with the recommendation of the student's registered health care provider, the situation almost certainly will involve chronic pain or another serious medical condition. While the human dimensions invariably will inspire sympathy, the tension between

federal and state law puts school districts in an awkward position. This makes it important to consult with legal counsel about such requests. Also, districts may wish to consult with counsel and NYSSBA's Policy Services Department (or other policy service provider) as to whether a board policy would be beneficial.

If a district decides to grant an individual's request to use medical marijuana on school grounds, the district should consult with the district physician(s), school nurse(s) and legal counsel to develop internal procedures that fully comply with the state's medical marijuana program and serve to protect the best interests of students and staff.



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Tanshin's Law would clarify medical marijuana use in school

Ten states have medical marijuana laws that explicitly permit use on school grounds, with limitations, but New York is not among them. A bill pending in the state Senate, however, called "Tanshin's Law," could change that.

The bill would add a new section 923 to the Education Law to clarify that public and private schools can be designated caregivers for students who are certified to use medical marijuana. School boards would be explicitly allowed to adopt policies to authorize designated caregivers to administer medical marijuana to certified students on school grounds, aboard a school bus or during school-sponsored events.

The bill (S.219) is named after five-year-old Aiden Tanshin Stephen, who was diagnosed with generalized epilepsy and suffered between 100 to 200 seizures per day. After beginning a therapy of medical marijuana three times per day, he saw a dramatic decrease in the frequency of his seizures (down to 5 to 10 per day). One of his recommended dosages is administered in the middle of the day, but nurses in his school are hesitant to administer medical marijuana. As a consequence, the boy's caregivers and parents have been traveling to his school every day to administer the drug.

The bill's sponsors – Sens. Brian Benjamin (D-Manhattan) and Liz Krueger (D-Manhattan) – seek to reduce this hardship on parents by specifically authorizing school personnel to administer medical marijuana to students as designated caregivers. The bill would also specifically allow a facility that provides services for individuals with developmental disabilities to become a designated caregiver for those individuals.

The bill would not permit students to smoke or vaporize the medical marijuana; medical marijuana could be taken in other ways, such as tablets, capsules, liquids, oils or patches.

According to the bill's sponsoring memo, its purpose is to clarify that schools should not be hesitant to administer medical marijuana to certified students.

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