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## Administering Medical Marijuana at School in Colorado: A Legal Analysis

*Spencer C. Weiler Ph.D.\*; Philip Westbrook, Ed.D.†*

### INTRODUCTION

The topic of this legal analysis is the administration of medical marijuana to students attending Colorado K-12 public schools. Colorado has been a pioneer in legalizing the use of marijuana.<sup>1</sup> Beginning in the year 2000, Colorado voters approved Amendment 20 legalizing the use of marijuana for medical purposes.<sup>2</sup> This law specifically allows minors to receive a prescription for medical marijuana under certain conditions. An unintended consequence of this law is that minors meeting its requirements are requesting, along with their caregivers and physicians, to have marijuana-based medication<sup>3</sup> administered to them at schools. The purpose of this legal analysis is to explore issues related to students prescribed marijuana-based medical products which require administration during school hours. The analysis will include a summary of relevant federal and state statutes, case laws, and legal discussion of issues educators, policymakers, and legal scholars should consider.

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<sup>1</sup> Colorado was the fifth state to legalize the use of marijuana for medical purposes and one of the first two states to legalize the drug recreationally. See *Legal Medical Marijuana States and DC*, PROCON.ORG (2019), <https://medicalmarijuana.procon.org/legal-medical-marijuana-states-and-dc/#Colorado>.

<sup>2</sup> COLO. CONST. art. XVIII, § 14.

<sup>3</sup> For the purpose of this legal analysis, “marijuana-based medication” refers to non-smokable products for therapeutic purposes.

John Dewey referred to education as, “a fostering, a nurturing, a cultivating process.”<sup>4</sup> A vast majority of educators work tirelessly to ensure that their efforts to properly educate all children meet the ideal established by Dewey over 100 years ago. For most students, the current public school system works. However, in order for students to be successful at school, their individual needs must be met - and these individual needs are proving to be more complex than in years past.<sup>5</sup> An example of the complexities associated with public education in the 21<sup>st</sup> century is found in the 33 states that have legalized the use of marijuana for medicinal purposes for adults.<sup>6</sup> Of these 33 states, 17 allow the prescription of marijuana-based medical products to minors.<sup>7</sup> There are students attending public schools in Colorado who rely on marijuana-based products for therapeutic uses and, after having met the legal requirements in the state, these students, along with their parents and physicians, are requesting permission to have these marijuana-based products administered at school.<sup>8</sup>

#### I. OVERVIEW OF MARIJUANA-BASED MEDICAL PRODUCTS

Marijuana is a type of cannabis plant that contains approximately 540 chemical substances, with the two most notable compounds being tetrahydrocannabinol (THC) and cannabidiol (CBD).<sup>9</sup> THC is the compound that causes the psychoactive effect of being “high” most associated with the recreational use of marijuana. Recreational marijuana has primarily been smoked, but THC can also be extracted from marijuana and used in the form of oils, edibles, cap-

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4 John Dewey, *DEMOCRACY AND EDUCATION* 10 (1916).

5 Colorado Department of Education, *Medication Administration Guidelines in the School and Child Care Settings* 4 (2019), <https://www.cde.state.co.us/healthandwellness/medicationadministrationguidelinesaugust2019pdf>.

6 See Legal Medical Marijuana States and DC, *supra* note 1.

7 Tom Kelly, When Medical Marijuana Meets School Drug Policy, What Can States Do?, *EDNOTE* (2019), <https://ednote.ecs.org/when-medical-marijuana-meets-school-drug-policy-what-can-states-do/>; see also State Medical Marijuana Laws, NATIONAL CONFERENCE OF STATE LEGISLATURES (2019), <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx>.

8 Crystal King, Student Access to Medical Marijuana in the School System, 48(3) *J. L. & EDUC.*, 405, 405 (2019).

9 National Center for Complementary and Integrative Health, Cannabis (Marijuana) and Cannabinoids: What You Need to Know (2019), <https://nccih.nih.gov/health/marijuana-cannabinoids>.

sules, tinctures, and other forms. Known therapeutic benefits of THC are limited and include treatment to nausea due to chemotherapy and an appetite enhancer.<sup>10</sup> There is concern that THC can be harmful to some people – especially adolescents. Concerns include an increased risk of motor vehicle crashes and a higher risk of developing schizophrenia and other psychoses in adolescents who are predisposed to these illnesses.<sup>11</sup>

Unlike THC, CBD can produce a variety of therapeutic applications including the treatment of seizures, epilepsy, glaucoma, inflammatory bowel disease, multiple sclerosis, and movement disorders due to Tourette Syndrome without producing the psychoactive “high” produced by THC.<sup>12</sup> CBD can be extracted from marijuana and sold in the form of gels, gummies, oils, supplements, and other forms that may be added to products such as lotions, soaps, oils for vaping, and foods and beverages infused with the compound. The U.S. Food & Drug Administration (FDA) has regulatory authority over CBD products that make therapeutic claims and foods that contain CBD.<sup>13</sup> While a growing number of states and the District of Columbia have legalized marijuana for both recreational and medical use, marijuana remains illegal under federal law as a Schedule I substance under the Controlled Substance Act.<sup>14</sup>

## II. MEDICAL MARIJUANA ADMINISTERED AT SCHOOL

In November 2000, Colorado voters approved Amendment 20, which legalized the use of marijuana by both adults and minors for medical purposes.<sup>15</sup> Since that time, several issues related to the use of marijuana have surfaced in Colorado’s public schools. A hypothetical case study will be presented to explore the issues related to administering medical marijuana to students.

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<sup>10</sup> E.A. Carlini, The Good and the Bad Effects of (-) Trans-delta-9-tetrahydrocannabinol (THC) Humans, 44(4) TOXICON 461, 461 (2004).

<sup>11</sup> National Center for Complementary and Integrative Health, *supra* note 9.

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

<sup>13</sup> John D. Finch, *Hemp, CBD, and Marijuana: What’s the Difference?*, NAT’L L. REV. (2019), <https://www.natlawreview.com/article/hemp-cbd-and-marijuana-what-s-difference>.

<sup>14</sup> *Id.*

<sup>15</sup> COLO. CONST. art. XVIII, § 14.

*A. The Case Study*

Dr. Mary J. Potter sits at her desk pondering the situation before her and she cannot determine the best course of action. Dr. Potter is the principal of a high school in a suburban community within an hour's drive from Denver. Two students out of the roughly 1,500 attending her high school have medical situations that can be alleviated by the use of medical marijuana-based products. The first student has cerebral palsy, is confined to a wheelchair, and relies on computerized speech assistance to communicate. The student, named Paul, and his parents have requested an adult, either one of his parents or a school employee with proper medical training, be authorized to apply a CBD patch to Paul's arm during the school day. According to Paul and his physician, the CBD patch alleviates his seizures and allows him to concentrate better than non-marijuana-based medicine. Paul's previous pharmaceutical medicine made him feel like a "zombie" and made school attendance difficult.

The second student, named Casey, has Dravet's syndrome and suffers from frequent seizures. Casey takes a CBD capsule to reduce the frequency and severity of her seizures. Casey would like to be able to take the CBD capsule at school. Casey's parents have requested that school officials administer the medication to her since they both work and cannot be at school at the designate time each day.

Dr. Potter wants to help Paul and Casey, but she has also identified concerns with the requests, including the fact that schools, according to federal law, are drug-free zones.<sup>16</sup> Dr. Potter feels she is being asked to make an accommodation related to an activity that is potentially illegal according to federal law, which could put the entire school in a compromised position.<sup>17</sup> Some of Dr. Potter's concerns and considerations include:

- Are marijuana-based products an illegal form of marijuana?
- Would the school district potentially lose federally funding as a result of administering marijuana-based medical products to students?
- Where would the medicine be stored and dispensed?
- Would school personnel administer the marijuana-based medical products?

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<sup>16</sup> 21 U.S.C. § 841 (1988).

<sup>17</sup> *Id.* See also 21 U.S.C. § 812(b) (1970) (establishing marijuana as a Schedule I drug).

Ultimately, Dr. Potter feels captured in a dilemma pondering the appropriate course of action based on her desire to provide for the needs of these students and complying with federal law.

*B. Issues for Consideration from the Case Study*

In this case study, the principal has to weigh a number of conflicting interests and legal considerations. These considerations focus on the impact her decisions will have on the students making the requests, other students, the school, and the employees charged with overseeing or administering the marijuana-based products. Each is explained below:

**Students:** Students in need of marijuana-based medical products are at the core of this issue. Will school officials enable students with health issues to have access to marijuana-based medical products while at school or not? School officials who decide to support students in need of marijuana-based medication while at school are at risk of losing all federal funding; whereas, school officials who opt to ban marijuana-based medical products in schools run the risk of creating unnecessarily burdens for certain students and their families.

**Other students:** What is not clear is how the practice of allowing certain students to have marijuana-based medical products administered to them at school would impact other students. In the case study, Paul and Casey clearly have medical conditions that can be alleviated by the use of marijuana-based medical products. A policy allowing students to have marijuana-based medical products at school could be perceived by others as the school district endorsing the use of marijuana.

**School:** In schools where officials chose to allow students to have marijuana-based medication administered to them, federal funding could be jeopardized. In addition, there is evidence that parents of students with unique health issues are relocating their families to states with friendly marijuana laws.<sup>18</sup> Based on this occurrence, it seems logical that school officials that take a marijuana-friendly stance could see an enrollment increase in students with significant health issues. However, the alternative stance, a marijuana-unfriendly position, could hold different challenges for school officials. Either decision made by the educational administrators hold

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<sup>18</sup> King, *supra* note 8.

implications.

Employees: Another consideration focuses on employees who would be required to administer or oversee the administration of the marijuana-based medical products. Would these employees have the ability to opt out of performing this duty if they have moral objections?

In addition to the impact on people, there are logistical considerations for educational administrators. These logistical considerations include determining if the marijuana-based medical product would be stored on campus or would the family have to make special arrangements to get the medication to the school on a daily basis? If the medication is stored on campus it would need to be secured in a way to ensure that it is not accessible to others within the school.

### III. RELATED FEDERAL AND STATE STATUTES

There are two federal statutes related to marijuana that will be reviewed in this section. In addition, Colorado's Amendment 64, which legalized the recreational use of marijuana, will be summarized. Finally, two additional state statutes aimed at the administration of marijuana-based medical products at schools are discussed.

#### A. *Controlled Substances Act (1970)*

The Controlled Substance Act (CSA), enacted in 1970, is the federal government's law related to drugs that explicitly outlaws the manufacture, importation, possession, use, and distribution of specific illicit drugs (stimulants, depressants, and hallucinogens) and anabolic steroids. CSA breaks drugs into five schedules:

Schedule I - which addresses drugs with a high potential for abuse and are not used for medical treatment.

Schedule II - which addresses drugs with a high potential for abuse and are used for medical treatment.

Schedule III - which addresses drugs that have the potential for being abused but less than the drugs in Schedules 1 and 2.

Schedule IV - which addresses drugs with a lower potential for being abused than the drugs listed in Schedule 3.

Schedule V - which addresses drugs with a lower potential for being abused than the drugs listed in Schedule 4.

Specific to this study, marijuana is currently listed under Schedule I.

### B. *Drug-free School Zone Act (1988)*

In conjunction with the passage of the CSA in 1970, the federal government began a campaign widely referred to as the “War on Drugs” by passing laws that increased the penalties levied on people in violation of various drug offenses. For decades since, the “War on Drugs” has continued to focus on reducing the illegal drug trade in the U.S. In 1988, the U.S. Congress passed the Drug-free School Zone Act (DFSZ) which levied harsh penalties for illegal drug-related activities that occurred near school grounds.<sup>19</sup> Eventually, all 50 states enacted their own version of the Drug-free School Zone Law.<sup>20</sup> The notion of a DFSZ sought to protect students by increasing the penalty, both in terms of prison sentence and fines, for anyone caught within the zone attempting to distribute or manufacture controlled substances.<sup>21</sup>

In Colorado, state law establishes the DFSZ as the area within 1,000 feet of a public school or school bus.<sup>22</sup> Specifically, Colorado state law targets the possession of illicit drugs with the intent to distribute, deliver, sale, and manufacture. State law places a minimum of an 8-year sentence for anyone convicted of violating the DFSZ law.<sup>23</sup>

### C. *Colorado’s Amendment 20*

Entitled *Medical Use of Marijuana for Persons Suffering From Debilitating Medical Conditions*, Amendment 20 was approved by Colorado voters in November 2000.<sup>24</sup> As can be derived from the title, the focus of the amendment was to provide those suffering from “debilitating medical conditions” with relief through the use of marijuana-based medical products. However, the language specifically prohibits eligible individuals from engaging “in the medical use of marijuana in plain view of, or in a place open to, the general pub-

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<sup>19</sup> The Chiefs of Police National Drug Task Force, *Drug-Free School Zones: Implementation Manual*, <https://www.ncjrs.gov/pdffiles1/Digitization/140213NCJRS.pdf>.

<sup>20</sup> Jeffery T. Walker, *Eliminate Residency Requirement for Sex Offenders*, 6 CRIMINOLOGY & PUB. POL’Y 863, 864.

<sup>21</sup> The Chiefs of Police National Drug Task Force, *supra* note 19.

<sup>22</sup> *Id.* at 38.

<sup>23</sup> *Id.*

<sup>24</sup> COLO. CONST. art. XVIII, § 14.

lic.”<sup>25</sup> In addition, there are specific requirements placed on individuals under the age of 18 who suffer from debilitating medical conditions. These conditions include two medical doctors diagnosing the medical condition as debilitating and one of the two doctors explaining to the minor the “possible risks and benefits of medical use of marijuana to the patient and each of the patient’s parents residing in Colorado.”<sup>26</sup> In addition, each parent of the minor requesting marijuana-based medical products are required to provide the state health agency with written consent in support of this alternative medical approach and the parent(s) must be the “patient’s primary caregiver.”<sup>27</sup> Finally, the amendment requires the parent(s) of the minor to possess the medical use identification card and handle the purchasing and administering of the medication.<sup>28</sup>

#### *D. Colorado’s Statutes Related to Marijuana at School*

By 2016, state legislative members were growing frustrated by perceived bureaucratic barriers faced by students with debilitating medical conditions when these students and their parents attempted to have marijuana-based medical products administered at school. In response to these barriers, the state legislature enacted a bill aimed at requiring school boards of education to adopt policy permitting the use of medical, non-smokable, marijuana at P-12 schools.<sup>29</sup> This law specifically states that students are prohibited from possessing or self-administering medical marijuana at P-12 schools or school functions unless the students and their parents have been approved to do so.

Once approved to administer medical marijuana at school, the caregiver is authorized to “possess, and administer to a student who holds a valid recommendation for medical marijuana,” non-smokable medical marijuana at the school the student attends.<sup>30</sup> However, the law also requires that the caregiver remove the marijuana-based medical product from campus once it has been administered. The act places a burden of expectation on the caregiver, who must be able to

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<sup>25</sup> *Id.* at 5.a.ii.

<sup>26</sup> *Id.* at 6.a-c.

<sup>27</sup> *Id.* at 6.d-f.

<sup>28</sup> *Id.* at 6.g-i.

<sup>29</sup> COLO. REV. STAT. § 22-1-119.3

<sup>30</sup> *Id.* at § 22-1-119.3.d.I.A.

come to school at the designated time, administer the medication, and then leave campus with it. The act also states that “nothing in this section requires the school district staff to administer medical marijuana.”<sup>31</sup>

The act states that these requirements do not apply to school districts that (1) document they will lose federal funding as a result of accommodating students, (2) actually lost federal funding, or (3) if the school district clearly publicizes on its website its decision to not comply with this law.<sup>32</sup> These exceptions are of interest in that state officials are recognizing Colorado’s medical marijuana laws are not in compliance with federal regulations and compliance with this law could result in punitive measures from the federal government negatively impacting funding for public schools. In addition, school district officials can opt to not comply with the law by providing an internet accessible rationale for doing so. In response to the 2016 act, some school districts decided to avoid all of the legal ambiguities associated with administering marijuana-based medical products in drug-free school zones by posting their decisions to not comply with the law on their websites.

Frustrated by the fact that barriers continued to impede students with debilitating medical conditions from accessing alleviating marijuana-based medical products at school, the Colorado legislature passed a second law in 2018 that allowed school district personnel to administer medical marijuana-based products at school.<sup>33</sup> Similar to the law enacted in 2016, the 2018 legislation required students and parents to obtain written permission from school district officials. The law specifically states that “school personnel may possess, and administer to a student who holds a valid recommendation for medical marijuana, medical marijuana in a non-smokable form.”<sup>34</sup> In addition, the school personnel administering marijuana-based medical products are required to ensure the act is not seen by other students and does not disrupt the educational environment.<sup>35</sup>

The second law still provided school district officials with the same three ways to opt out of its requirements – (1) document they

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<sup>31</sup> *Id.* at § 22-1-119.3.d.II.

<sup>32</sup> *Id.* at § 22-1-119.3.d.A-C.

<sup>33</sup> *Id.* at § 22-1-119.3.

<sup>34</sup> *Id.* at § 22-1-119.3.III.A.

<sup>35</sup> *Id.*

will lose federal funding as a result of accommodating students, (2) actually lost federal funding, or (3) if the school district clearly publicizes on its website its decision to not comply with this law.<sup>36</sup> This second law also allowed the minor's caregiver to provide the school officials with more than a daily dosage of the medication along with physician's written directions that address the patient, route, time, medication, and dosage.<sup>37</sup> In addition, school officials are required to properly document each administration.

#### E. *Related Case Law*

As of 2019, there has not been an adjudicated case involving a student's request to have medical marijuana-based products administered at schools. As a result, educational administrators lack direct guidance from courts on this issue. However, there have been a number of cases involving employees' use of marijuana and the subsequent adverse job actions taken by the employers. These cases serve to illustrate the conflict between state and federal law. The available case law potentially discourages educational administrators from taking a friendly position on the issue of marijuana-based medical products in schools.

##### 1. *Ross v. RagingWire Telecommunications (2008)*<sup>38</sup>

In *Ross v. RagingWire Telecommunications (2008)*, a newly hired employee of RagingWire Telecommunications was subsequently terminated for failing a drug test due to his marijuana use. Ross, the employee, contended that his valid medical use card authorized him to consume marijuana for medical reasons. California's Superior Court upheld the employer's decision to terminate Ross. This ruling was appealed and affirmed by the Court of Appeals. Ross' claim centered on an assertion that his termination violated California's law that permitted him to use marijuana for medical purposes. However, the court's decision held that California's law did not include accommodations for employees using medical marijuana and that the termination did not violate Ross' rights since, "federal law ... continues to prohibit the drug's possession, even by medical use-

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<sup>36</sup> *Id.* at § 22-1-119.3.V.C.

<sup>37</sup> *Id.* at § 22-1-119.3.VII. *See also* Colorado Department of Education, *supra* note 5.

<sup>38</sup> *Ross v. RagingWire Telecommunications, Inc.*, 174 P.3d 200 (2008).

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ers.”<sup>39</sup>

2. *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Industry* (2010)<sup>40</sup>

The second case, *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Industry* (2010), dealt with a drill press operator who used marijuana daily for medical purposes to help alleviate pain, which was legal in the state of Oregon. When he was scheduled to take a drug test, the employee informed his supervisor that he would not pass the test due to his legal use of medical marijuana. The employee was fired. The case was first argued in front of an administrative law judge (ALJ) who ruled in favor of the employee. The ALJ ruled that the employer violated Oregon state law by failing to engage in a meaningful interactive process with the employee to find a reasonable accommodation. The Oregon Supreme Court ruled that federal law superseded state law and that the termination was permissible.

3. *Coats v. Dish Network* (2015)<sup>41</sup>

The final case, *Coats v. Dish Network* (2015), began on June 7, 2010, when Dish Network fired Brandon Coats for violating the company’s drug policy. Coats, who is a quadriplegic and is confined to a wheelchair, started working for Dish Network as a customer service agent in 2007. In 2009, Coats applied for and received a Colorado license allowing him to use marijuana to treat painful muscle spasms he experienced due to his quadriplegia. In May 2010, Coats tested positive for THC during a random drug test and, even after he informed his employer that he was a registered medical marijuana patient, was fired.

Coats filed a wrongful termination lawsuit against Dish Network, citing state law that prohibit employers from terminating an employee based on engagement in “lawful activities.” Dish filed a motion to dismiss the claim and the trial court granted the defendant’s motion. Coats appealed the trial court’s decision, and, on a split decision, the appellate court affirmed the lower court’s decision. On

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<sup>39</sup> *Id.* at 202.

<sup>40</sup> *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Industry*, 230 P.3d 518 (2010).

<sup>41</sup> *Coats v. Dish Network*, 350 P.3d 849 (2015).

appeal to the Colorado Supreme Court, Coats lost a third time. The rationale for siding with the defendants given by the Colorado Supreme Court was that lawful activities only included those activities that were lawful under both state and federal law. “In sum, because Coats’s marijuana use was unlawful under federal law, it does not fall within section 24-34-402.5’s protection of ‘lawful’ activities.”<sup>42</sup>

#### IV. LEGAL ANALYSIS

In the case study presented at the start of this analysis, Dr. Potter, the high school principal, identified a range of potential legal issues that focused on individuals – from the student requesting to have marijuana-based medical products administered at school to the other students in the school. In addition, Dr. Potter recognized that either decision, to accommodate or deny the request from students, will impact the overall culture of the school. Finally, there are potential legal issues with individual employees who might object to administering marijuana-based medical products in school. These legal issues will be further developed in the discussion section, which follows the legal analysis. The focus of this section is to highlight the factors contributing to the dilemma practitioners face when asked by students and their families to have marijuana-based medical products administered to them at school.

##### *A. Conflict Between Federal and State Law*

As has been established in this examination of statutes related to the administering of marijuana-based medical products at schools, federal and state laws provide school officials with conflicting directives. When state and federal laws conflict, the federal law always supersedes state law.<sup>43</sup> However, federal authority is predicated upon the will of the federal government to intervene in the actions of the state. When the federal government does not intervene, states receive quasi-permission to violate federal law.

Thus far, the federal government has chosen not to intervene in the actions of the 33 states related to medical marijuana use, in general, and in schools, in particular. In 2013, the US Department of

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<sup>42</sup> *Id.* at 853.

<sup>43</sup> Kern Alexander & M. David Alexander, *AMERICAN PUBLIC SCHOOL LAW* 91–93 (9th ed. 2019).

Justice announced an update to its enforcement policies and clearly reiterated the federal government's position that marijuana remains illegal under federal law as a Schedule I drug under the CSA. However, the department also announced it would defer the right to challenge state legalization at this time while reserving the right to do so at a later time.<sup>44</sup> As a result of this announcement from the Justice Department as well as continued inaction from the federal government, Colorado or all other states with laws legalizing marijuana use for medical and/or recreational purposes have not lost federal funding and there is no indication that such punitive measures will occur in the near future.<sup>45</sup> In addition, the U.S. Department of Education has failed to provide state and local school district officials with clear direction on the issue of administering marijuana-based medical products at schools.

#### *B. Ambiguity Related to Marijuana-based Medical Products*

What is not clear for school officials and state-level policymakers is whether THC or CBD products are still considered marijuana after the compounds have been extracted. In 2018, the U.S. Drug & Food Administration (FDA) moved certain CBD products to a Schedule V drug while leaving marijuana as a Schedule I drug.<sup>46</sup> This governmental action clearly distinguishes between marijuana and the compounds which can be extracted from marijuana and used in a variety of forms which are considered less harmful and less addictive. This change has created confusion of the definition of what constitutes medical marijuana and what is a marijuana-based or marijuana-derived product. The evolution of medical marijuana products has outpaced the law and the FDA has made adjustments to the Schedule of Controlled Substances creating confusion for many medical marijuana users and school officials.

In Colorado, marijuana-based medical products were exclu-

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<sup>44</sup> Department of Justice, *Justice Department Announces Update to Marijuana Enforcement Policy* (2013), <https://www.justice.gov/opa/pr/justice-department-announces-update-marijuana-enforcement-policy>.

<sup>45</sup> See US Department of Justice, *Guidance Regarding Marijuana Enforcement* (2013), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

<sup>46</sup> Kristi Wolf, *DEA Moves CBD Drugs to Schedule V; Follows FDA's Lead*, FOOD & DRUG LAW ACCESS (2018), <https://www.fooddruglaw.com/2018/10/02/dea-moves-cbd-drugs-to-schedule-v-follows-fdas-lead/>.

sively available through dispensaries as opposed to pharmacies. However, the FDA recently approved the first prescription pharmaceutical comprised of a marijuana-derived ingredient to treat a severe form of epilepsy.<sup>47</sup> As a result of the FDA approval, this product will not be considered medical marijuana but a pharmaceutical that can be prescribed by a physician and sold at a regular pharmacy. This decision by the FDA, while subtle, is significant since it provides access to marijuana-derived products to people in states where medical marijuana remains illegal and could alter perceptions concerning marijuana-based medical products. As medical marijuana becomes mainstream with widespread application, school boards are more likely to create policies that normalize its use.

#### V. DISCUSSION

Highlighted in this legal analysis are the areas of ambiguity Colorado school administrators have to navigate when students with prescriptions to use medical marijuana-based products seek to have these products administered at school. The scope of the analysis is limited to the state of Colorado, but there are 32 other states with similar legislation. The issues raised here may not be unique to Colorado and could have applications to educators, policymakers, and legal scholars in other states as well. At the end of the case study, we posed four questions that Dr. Potter should consider related to the issues of administering marijuana-based medical products at schools. The focus of the discussion section will be to answer those four questions.

##### *A. Are Marijuana-based Medical Products an Illegal Form of Marijuana?*

Most marijuana-based medical products contain CBD, which are used for therapeutic applications to alleviate a variety of symptoms. Very few marijuana-based medical products contain THC, the compound primarily responsible for any psychoactive “high” derived from marijuana, and these products have limited therapeutic applications. Due to the recent changes in definition by the FDA related to the different Schedule classifications, there is greater understanding

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<sup>47</sup> *Id.*

that certain CBD marijuana-based medical products are distinguished from marijuana and are not subject to the Schedule I restrictions.

*B. Would the School District Lose Federal Funding as a Result of Administering Marijuana-based Medical Products to Students?*

From school leaders' perspectives, the overarching concern with introducing marijuana-based medical products in schools is that such an action could result in the loss of federal funding. The federal government's contribution to public education is greater than \$56 billion, which is roughly 9% of the total funding of P-12 education.<sup>48</sup> Given the fact that funding for public education in many states continues to lag behind pre-Great Recession (2008-2013) levels,<sup>49</sup> it should come as no surprise that educators can ill afford to lose federal funding. Although there has been no indication from the U.S. Department of Education, the Executive Branch, or the Legislative Branch that funding will cease in states or schools where marijuana-based medication is being administered to students, we acknowledge the validity of this concern that must be taken into consideration. If state policymakers genuinely see value in having students access marijuana-based medical products at schools, then we argue state legislatures should provide local school district officials, as agents of the state charged with carrying out the will of the legislature, with assurance that they will be held harmless for any potential loss of federal funding. Short of such assurance, educators will be forced to assume the worst while state and federal law are in conflict over the legality of marijuana-based medical products. And, based on the case law presented in this legal analysis, the courts have made it explicitly clear that federal law supersedes state law.

*C. Where would the medicine be stored and dispensed?*

Colorado state law places a potentially excessive burden on families that are striving to support a child with debilitating medical conditions that are alleviated through the use of marijuana-based

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<sup>48</sup> Spencer C. Weiler & Gabriel R. Serna, PRACTICAL STRATEGIES FOR APPLIED BUDGETING AND FISCAL ADMINISTRATION: WHAT WORKS FOR P-12 ADMINISTRATORS 15 (2016).

<sup>49</sup> William N. Evans, Robert M. Schwab & Kathryn L. Wagner, *The Great Recession and Public Education*, 14(2) EDUC. FIN. AND POL'Y, 298, 299 (2019).

medical products. Caregivers can be required to provide school officials with a daily dosage of the medication. This requirement assumes parents enjoy sufficient privilege in their daily schedules and are able to free themselves from other obligations, including work, to support their children. This assumption could represent a systemic barrier that negatively impacts the academic opportunities of certain students.<sup>50</sup> Our contention is if efforts are made to provide students with access to marijuana-based medical products at school, then educators and policymakers should work to ensure this access is afforded to all within the school community. To restrict access to a privilege provided to a subset of the student population could be interpreted as discriminatory in nature. As a remedy to this systemic barrier, if marijuana-based medical products are approved as appropriate therapeutic interventions, then they should be treated as all other medications. This would include following the same protocols already in place related to how the medication is stored and dispensed at school.

*D. Would school personnel administer the marijuana-based medical products?*

If marijuana-based medical products are normalized and treated as all other prescription medications, then school personnel have the responsibility to provide students with care under *in loco parentis*.

*E. Other Considerations*

Many of the marijuana laws at the federal and state levels are antiquated when compared to the evolution of marijuana-based medical products. Our preference would be for the federal government to offer a clear directive for state policymakers and educators on the issue of administering marijuana-based medical products at schools. However, the federal government has actually only served to provide confusion to states on this issue over the last 16 years.<sup>51</sup> There is no strong indicator to suggest school officials possess the expertise necessary to accurately determine permissible and im-

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<sup>50</sup> Glenn E. Singleton, COURAGEOUS CONVERSATIONS ABOUT RACE: A FIELD GUIDE FOR ACHIEVING EQUITY IN SCHOOLS 52 (2015).

<sup>51</sup> Bradley E. Markano, *Enabling State Deregulation of Marijuana through Executive Branch Nonenforcement*, 90 N.Y.U. L. REV. 289, 293 (2015).

permissible marijuana-based medical products to be administered at public schools. As a result, there is a compelling need for a clarity from either the FDA, US Department of Education, or Department of Justice.

#### VI. CONCLUSION

Medical marijuana use remains controversial and elicits strong emotional responses. However, compliance with the law related to therapeutic application of marijuana-based medical products moves the conversation from an emotional response to a legal obligation to provide care. The primary issue explored in this legal analysis is that school officials are currently being asked to comply with conflicting laws. The use of medical marijuana-based products continues to increase and more accepted within mainstream medicine – particularly the use of CBD products that have therapeutic applications without the psychoactive effects of THC. While the conflict between state and federal law related to the use of medical marijuana-based products may present a legal conundrum for public school officials, these products are becoming more normalized in school setting. As these products become more normalized and perceived as medications, it stands to reason that they will be treated like all other prescribed medication administered at schools by school personnel.