

**ANDREWS**



**PRICE**

# SPECIAL EDUCATION ALERT

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## SPECIAL POINTS OF INTEREST:

- Pennsylvania enacted the Medical Marijuana Act, legalizing the use of medicinal marijuana for qualifying patients.
- Despite the legalization of medical marijuana, federal law still considers marijuana as a Schedule I drug, leaving school districts unsure in how to respond to special education students in need of the drug while complying with federal law.
- School districts should be mindful of its compliance with federal laws to receive funding, while at the same time consider the IDEA and Section 504.

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## Medical Marijuana Use in PA Schools and Special Education

Pennsylvania enacted the Medical Marijuana Act (35 P.S. § 10231.101 et seq.) on April 17, 2016. This law was enacted based on scientific evidence that medical marijuana is a potential therapy that may mitigate suffering in patients who suffer from various serious medical conditions.

Under this law, a qualified patient may use marijuana. To be a qualified patient, a person must (1) have a serious

medical condition, (2) meet the requirements for certification under the Act, and (3) be a resident of Pennsylvania. The Act does not allow the use of marijuana through smoking or incorporation into an edible form.

The Act tasked the Department of Education with the promulgation of regulations regarding the use of medical marijuana by students and school employees on school grounds. Despite the

statute requiring the regulations to be in place by late 2017, there have been no such regulations enacted as of the date of this article. In the interim, PDE issued "temporary" guidance that will remain in effect until the promulgation of permanent regulations.

This article will outline the challenges school districts may face in light of the Medical Marijuana Act as it relates to special education.

Read More about the Medical Marijuana Act on page 3.

## Rights of Employees

The Medical Marijuana Act also provides protection for employees that are qualified patients by prohibiting employers from terminating or otherwise disciplining an employee based on his or her status as a medical marijuana user. As a result, an employee who is a certified patient must be subject to the same standard of discipline in the same manner as any and all other employees. However, employers are permitted to comply with federal law and discipline employees who fail to meet the standard of care while under the influence. It does not require schools to allow use of marijuana on school property.

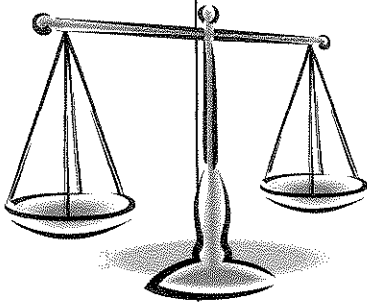
## CASE LAW UPDATE—Special Education

(Continued from page 1)

### **K.D. v. Downingtown Area School District Third Circuit Weighs in on FAPE and IEPs**

**FACTS:** K.D. attended preschool through half of third grade at Downingtown. She started receiving additional support in kindergarten, and after kindergarten, she was evaluated and diagnosed with attention-deficit/hyperactivity disorder with deficiencies in several academic areas.

The district developed an IEP for K.D. that included measurable goals and specially designed instruction to meet the goals. The district obtained an occupational therapy screening and revised the IEP to include extended school year services to prevent regression, retained her placement in the regular education classroom for part of the day and the other part of the day in a learning support classroom, increased baselines, and added “an evidence based multi sensory reading and writing program” for two and a half hours a day. Before her second grade year, the parents requested that the district use the Wilson reading program. At the time, the program was not yet available in the district for that grade level, but when K.D. started second grade, Downingtown switched to the Wilson program. At the end of second grade, Downingtown updated the student’s IEP to reflect second grade progress and increased her goals or baselines, while maintaining similar specially designed instruction. Before starting third grade, the parents hired an independent evaluator that diagnosed K.D. with dyslexia, ADHD, mathematics disorder, organizational deficits, and memory and executive function impairments and attributed K.D.’s poor achievement to the district’s programming. Two months after the IEE, the parents informed the district, which conducted more evaluations, provided visions services, and offered a one-on-one aide. The student advanced in all aspects of reading and writing and an IQ test showed that K.D.’s IQ rose into the average range. In the middle of third grade, the IEP team met and offered an IEP with several modifications based on the IEE and its own evaluations. However, the



parents rejected the program and unilaterally placed K.D. in a private school.

**PROCEDURAL HISTORY:** The parents filed a complaint with the Pennsylvania Office of Dispute Resolution, seeking reimbursement for private-school tuition, claiming a denial of a free appropriate public education (FAPE) under the IDEA. The administrative officer found that the IEPs provided a FAPE to K.D. The parents then filed a complaint in District Court, which affirmed the administrative officer’s finding.

**THIRD CIRCUIT:** Before this case arrived in the Third Circuit court, the Supreme Court ruled in *Endrew F.* that the IDEA “requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” The Third Circuit, in consideration of *Endrew F.*, held that the Supreme Court’s language mirrored Pennsylvania’s longstanding standard that an educational program “must be reasonably calculated to enable the child to receive meaningful educational benefits in light of the student’s intellectual potential and individual abilities.”

Using this standard, the Third Circuit held that Downingtown met its obligation in developing IEPs reasonably calculated and formulated in light of the K.D.’s circumstances, which enabled her to make progress. K.D.’s circumstances required the district to develop and reinforce foundational work, and given those circumstances, fragmented progress was reasonably expected. While the Supreme Court held that grade level achievement is indicative of adequate progress for fully integrated students, the Third Circuit stated that because K.D. received supplemental learning support, it is unreasonable to expect that she would perform at the same pace as her grade-level peers.

Therefore, the Third Circuit held that Downingtown provided K.D. with FAPE by individualizing the education programs to help her make progress in light of the circumstances.

# Medical Marijuana Use in PA Schools and Special Education

*(Continued from page 1)*

The Pennsylvania Departments of Health (PDH) and Education support the administration of medical marijuana to students with serious medical conditions while on school property. PDH has provided recommended guidance:

A parent, legal guardian or caregiver may administer medical marijuana to their child/student on school premises provided that the parent, legal guardian or caregiver: (1) provides the school principal with a copy of the Safe Harbor Letter; and (2) notifies the school principal, in advance, of each instance in which the parent or caregiver will administer the medical marijuana to the child/student. The school principal shall provide notification to the school nurse in each instance a parent or caregiver will be administering medical marijuana to the child/student as well. The parent/caregiver shall follow all school protocols applicable to visitors to the school during the school day. A parent, legal guardian or caregiver shall bring to the school and administer the medical marijuana to their child/student without creating a distraction, and shall promptly remove any excess medical marijuana and related materials from the school premises after the administration of medical marijuana is complete. The school shall provide a secure and private location for the parent/legal guardian/caregiver to administer the medical marijuana to the student. Students themselves shall not be permitted to possess any form of medical marijuana at any time on school property or during any school activities on school property.

This guidance allows for a parent or legal guardian to administer medical marijuana to a student provided that proper protocol is followed and a Safe Harbor Letter is provided. However, the Act, along with the provided guidance, presents many challenges to school districts in Pennsylvania because it leaves many questions unanswered, especially how to handle situations where a child with a disability is being treated with the drug. These issues arise because despite legalization of

medical marijuana at the state level, marijuana is still considered a Schedule 1 substance under federal law. Various federal laws, including the Every Student Succeeds Act (ESSA), require educational entities to maintain a drug-free environment in order to receive federal funding.

PDH's guidance states that only a parent, legal guardian, or caregiver may administer medical marijuana to the student; however, the guidance nor state laws address whether school nurses or other school personnel are permitted to administer medical marijuana, if a parent is unable to do so. This means that a school nurse or other personnel who administer medical marijuana on campus are violating federal law and may not have immunity. However, this raises the question of whether Section 504 which requires school districts to provide someone to administer medication to a student with a disability as an accommodation is being violated.

In sum, use of medical marijuana on school premises could risk federal funding. While the use and administration of medical marijuana on school property may be permitted under the guidance provided by the PDH, your District may want to ensure compliance with federal laws in order to avoid risk of losing federal funding. One alternate option some districts have considered is allowing parents to administer the drug to their child while off school property. Accordingly, a parent or guardian could provide a Safe Harbor Letter for their student to the Principal, and then be permitted to take the student off of school property in order to administer the medication. The parent would be required to notify the school nurse that the medication has been administered. However, further clarification, either through legislation or formal regulations specifically addressing administration in schools, is necessary to provide a clearer process for school districts in Pennsylvania.

## CASE LAW UPDATE—Medical Marijuana

Currently, there are no Pennsylvania cases under the IDEA or Section 504 that address the question of whether a school district is violating special education laws if it denies the administration of medical marijuana on school grounds in order to comply with federal law; however, other jurisdictions have seen several cases concerning the issue. Patients and families across the country are encouraging school districts to determine whether there is a place on school grounds for medicinal marijuana. Some schools are pushing back, and in some cases, legislators have intervened. Pennsylvania school districts should be aware of the legal issues surrounding medicinal marijuana and special education.

For example, in 2015, a New Jersey school district faced a lawsuit brought by a parent of a teenager with epilepsy and autism, who sought the right to use medicinal marijuana at school. *Maple Shade Township Bd. Of Educ.*, 115 LRP 54740 (SEA N.J. 2015). The teenage student experienced frequent and severe seizures as a result of her medical condition and was prescribed to take multiple doses of medical marijuana through the day.

The District argued that allowing the student to use medicinal marijuana in school would run afoul of the law because marijuana is considered a controlled dangerous substance under federal statutes. At the time, similar to Pennsylvania, New Jersey enacted a law allowing the use of medical marijuana but was silent as to whether students were permitted to use it on school grounds. On the other hand, the family argued that denying the right to use medical marijuana at school violated the student's legal right as a disabled person to receive an education.

The family of the student brought a suit in administrative court, and the judge ruled in favor of the school district. The administrative law judge pointed out that the New Jersey law was in conflict with federal law. The judge added that the only person permitted to administer the medicine is a designated caregiver, which was the student's mother, rather than a staff member at the school.

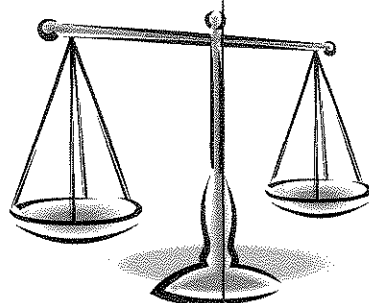
Prior to an appeal being filed, the Governor signed legislation requiring school boards to adopt policies

that permit a parent, guardian, or primary caregiver to administer medicinal marijuana to a qualified student on campus, school bus, or at school-sponsored events.

In January 2018, the parents of an 11-year-old girl sued an Illinois school district for the right to use medical marijuana at school to treat her seizure disorders. The district denied the family's request to administer and store the medication at school based on an Illinois state law prohibiting the use at schools, although otherwise legal. The law also specifically stated that school personnel are not required to be caregivers to administer the drug. The family argued that the school district's denial of the request to administer the medication at school violated the student's right to due process, the IDEA, and the ADA. A federal judge ruled that the student is permitted to use medicinal marijuana at school; however, it is limited in its application to this student based on an agreement between the judge and the attorney general.

School districts are also unsure of whether to discipline students with disabilities who bring medical marijuana to school. The Oregon Department of Education found that a school district did not violate the IDEA by suspending a student with a medical marijuana license from the state for bringing the substance to school. *Eugene Sch. Dist.*, 104 LRP 42399 (SEA OR 2004).

Currently, thirty states and D.C. have laws legalizing the use of marijuana for medicinal purposes. Despite the growing number of states, only Colorado, New Jersey, Maine, and Washington state specifically allow the administration of the medication at school. In Washington, the state grants school districts discretion in deciding whether to allow the administration of medicinal marijuana at school. However, most laws limit the administration of the medication only by parents or caregivers, rather than employees. This limitation complicates the issue for both school districts and working parents. Pennsylvania has not enacted laws or promulgated concrete regulations. Until the state provides more guidance about how schools should proceed when it comes to special education and medical marijuana, school districts are left to face an unresolved and murky issue and should contact their solicitor before any decision is made.



# MEDICAL MARIJUANA IN SPECIAL EDUCATION

## TIPS

What to expect in the future for federal law:

- President Trump has stated he supports state laws that permit the use of medical marijuana but the federal government can continue to go after those who use it.
- Attorney General Jeff Sessions has indicated an intent to pursue prosecution for marijuana use.
  - ◊ Despite Mr. Session's statements, Congress renewed the Rohrabacher-Blumenauer Amendment, which prohibits the use of federal funds in the interference with the implementation of state medical marijuana programs.
  - ◊ The renewal was in effect until September 30, 2018. Congress has questioned the amendment, and the Department of Justice has expressed it does not support it.
- Congress has been unclear on where it stands on the issue. It has made attempts to revise federal law to allow its use, while at the same time revising federal law to curb its use.
- Because there is a clear conflict between state and federal law regarding medical marijuana as it applies to students, it is recommended that districts refrain from adopting a formal procedure until further clarification PDE in the form of required formal regulations and/or from the federal government on the issue.
- Consider the options:
  - ◊ Have a parent administer medical marijuana on campus—the District runs the risk of violating federal law, under which medical marijuana is illegal, but it avoids the risk of violating federal law by school staff.
  - ◊ Have the parent take the child off campus—allow the student's parents to come to the school, check out the student, go off school property, and administer the drug somewhere else.
    - No matter what your school district's decide, **STAY CONSISTENT** to avoid potential discrimination. Make sure to respond in the same way for every student who makes the request.
- Be prepared to discuss the issue with the student's parents.
  - ◊ Explain the complex process and what all Pennsylvania school districts are facing—federal law does not allow for the legal use of medical marijuana, despite state law legalization.



## **“Serious Medical Condition” under the Act**

Under the Medical Marijuana Act, a qualified patient may use marijuana provided that the patient has a “serious medical condition.” School district should consider whether a student is eligible under the IDEA or Section 504, given the conditions that would permit someone to take the drug are likely indicative of a qualifying disability. The following includes “serious medical conditions” under the Act:

- Amyotrophic Lateral Sclerosis
- Autism
- Cancer
- Crohn’s Disease
- Damage to the nervous tissue of the spinal cord with objective neurological indication of intractable spasticity
- Epilepsy
- Glaucoma
- HIV (Human Immunodeficiency Virus) / AIDS (Acquired Immune Deficiency Syndrome)
- Huntington’s Disease
- Inflammatory Bowel Disease
- Intractable Seizures
- Multiple Sclerosis
- Neuropathies
- Parkinson’s Disease
- Post-traumatic Stress Disorder
- Severe chronic or intractable pain of neuropathic origin or severe chronic or intractable pain in which conventional therapeutic intervention and opiate therapy is contraindicate or ineffective
- Sickle Cell Anemia



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If you have a special education issue you would like to see addressed in subsequent issues of this newsletter, please write to or e-mail Trish Andrews at the above address.

Andrews & Price, LLP is the pre-eminent law firm in Western Pennsylvania in the practice of Public Sector Law. Our attorneys have more than 60 years of combined experience servicing School Districts. We provide a full range of legal services to our clients, including serving as Solicitor for various school districts, serving as special counsel for special education due process hearings, presenting seminars relating to the Reauthorization of IDEA and representing our clients in all types of litigation, including defense of numerous civil rights suits in federal and state Court.



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### TRI-STATE AREA SCHOOL STUDY COUNCIL

Tri-State Area School Study Council of the Administrative and Policy Studies Department of the School of Education of the University of Pittsburgh seeks ways to increase organizational capacity in schools through problem solving, technical service, and staff development so all students will be better prepared to make contributions to both our democratic society and the world community.

Tri-State was founded in 1948 by Dr. Maurice Thomas. Since its inception, Tri-State has provided a wealth of comprehensive technical assistance, strategic planning, and employment searches to school districts in the Western Pennsylvania region. Tri-State's vast knowledge and experience base draws upon a membership of 100+ school districts and a team of leaders and consultants with rich backgrounds in education, including former school superintendents and professors of education.

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### *Consult Your Solicitor!*

*The legal issues discussed herein are for the purpose of providing general knowledge and guidance in the area of special education. This newsletter should not be construed as legal advice and does not replace the need for legal counsel with respect to particular problems which arise in each district. As each child is unique, each legal problem is unique. Accordingly, when districts are faced with a particular legal problem, they should consult their solicitor or with special education counsel to work through the issues on a case by case basis.*

