



Legal “High”-lights in Medical and Recreational Marijuana Use by Students and Employees

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2016 SCHOOL LAW PRACTICE SEMINAR

***Legal “High”-lights in Medical and Recreational
Marijuana Use by Students and Employees***

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“[O]nly 44.1 percent of 12th graders believe regular marijuana use is harmful, the lowest level since 1973. That may explain why more than one third of high school seniors tried pot in 2012, and one in 15 smoked it daily.”

– National Institute on Drug Abuse's Monitoring the Future Study¹

“Admittedly, some high school students (including those who use drugs) are dumb. Most students, however, do not shed their brains at the schoolhouse gate, and most students know dumb advocacy when they see it. The notion that the message on this banner would actually persuade either the average student or even the dumbest one to change his or her behavior is most implausible.”

– Justice John Paul Stevens, Dissenting Opinion, *Morse v. Fredrick*²

“[A]dolescents described a number of benefits of using marijuana, including getting high stress relief and reducing pain. Adolescents also stated that e-cigarettes had a number of benefits, including looking good and being good for you. Adolescents described learning about these products from the media, their family and friends, and schools. Participants readily recalled media messages warning against conventional cigarette use but did not see warnings regarding e-cigarettes or marijuana . . .”

– Stanford University Study³

“Though they receive little attention in the legalization debate, the scientific studies showing an association between marijuana use and schizophrenia and other disorders are alarming.”

– Samuel T. Wilkinson, Yale School of Medicine⁴

“Some people go to high school. Others go to school high.”

- Unknown

¹ Wenner Moyer, “Record Numbers of Teens Think Marijuana Is Harmless,” *Scientific American*, March 1, 2013, available at: <http://www.scientificamerican.com/article/record-number-teens-think-marijuana-harmless/> (last accessed August 8, 2016).

² *Morse v. Frederick*, 551 U.S. 393, 444 (2007).

³ Roditis, “Adolescents' Perceptions of Risks and Benefits of Conventional Cigarettes, E-cigarettes, and Marijuana: A Qualitative Analysis,” *Journal of Adolescent Health*, Volume 57, Issue 2, 179 – 185.

⁴ Wilkinson, M.D., “Pot-Smoking and the Schizophrenia Connection,” *Wall Street Journal*, July 1, 2013; available at: <http://www.wsj.com/articles/SB10001424127887324637504578566094217815994> (last accessed August 8, 2016).

I. MARIJUANA & SIMILAR SUBSTANCES: THE BASICS

Marijuana is the most commonly used illicit drug in the United States.⁵ One in eight American adults say they currently smoke marijuana.⁶ Marijuana can be a sensitive and politically-charged topic. Some states have enacted laws to legalize the drug. Other states refuse to do so. Groups of doctors have released studies showing the positive effects of marijuana use.⁷ Other health groups have criticized the movement to legalize marijuana as a government-sponsored “gateway” drug.⁸ In any event, an understanding of “what” exactly is marijuana is crucial for any school administrator or attorney to understand the complexities inherent in the legal issues with marijuana facing schools.

To begin, the term “marijuana” refers to the dried leaves, flowers, stems, and seeds from the hemp plant, *Cannabis sativa*.⁹ The plant contains a mind-altering chemical, commonly known as “THC.”¹⁰ Marijuana can be consumed by smoking in hand-rolled cigarettes (or “joints”) or in pipes or water pipes (“bongs”).¹¹ Marijuana can also be smoked in blunts—emptied cigars that have been partly or completely refilled with marijuana.¹² To avoid inhaling marijuana smoke, a person could use a vaporizer.¹³ These devices pull the active ingredients (including THC) from the marijuana and collect their vapor in a storage unit. A person then inhales the vapor, not the smoke.¹⁴ Marijuana can also be consumed by mixing the same in food, such as brownies, cookies, or candy, or brewing it as a tea.¹⁵

In contrast to smoking marijuana or physically ingesting marijuana, marijuana edibles have exploded in popularity in recent years. Simply put, edibles are infused with marijuana so that no smoking is required to feel the effects of a marijuana “high.” The effects of edible marijuana can be much stronger because the body processes edible marijuana differently than smoking marijuana. In addition, the range of THC in edibles can vary dramatically. For example, at least one website

⁵ Center for Behavioral Health Statistics and Quality (CBHSQ). Behavioral Health Trends in the United States: Results from the 2014 National Survey on Drug Use and Health. Rockville, MD: Substance Abuse and Mental Health Services Administration; 2015. HHS Publication No. SMA 15-4927, NSDUH Series H-50.

⁶ Gallup Study, “One in Eight U.S. Adults Say They Smoke Marijuana,” August 8, 2016, available at: <http://www.gallup.com/poll/194195/adults-say-smoke-marijuana.aspx> (last accessed August 10, 2016).

⁷ Ingraham, “More and more doctors want to make marijuana legal,” *Washington Post*, (“A group of more than 50 physicians, including a former surgeon general and faculty members at some of the nation's leading medical schools, has formed the first national organization of doctors to call on states and the federal government to legalize and regulate the use of marijuana in the interest of public health.”) available at: <https://www.washingtonpost.com/news/wonk/wp/2016/04/15/more-and-more-doctors-want-to-make-marijuana-legal/> (last accessed August 8, 2016).

⁸ DuPont, “Marijuana Has Proven to Be a Gateway Drug,” *New York Times*, April 26, 2016, available at: <http://www.nytimes.com/roomfordebate/2016/04/26/is-marijuana-a-gateway-drug/marijuana-has-proven-to-be-a-gateway-drug> (last accessed August 8, 2016).

⁹ National Institute of Drug Abuse, “Drug Facts: Marijuana,” available at: <https://www.drugabuse.gov/publications/drugfacts/marijuana#references> (last accessed August 8, 2016).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

recommends 10 milligrams of THC as the “standard” dose.¹⁶ However, manufacturers of edibles have increased the THC amount to make the edible more “potent.” A more “potent” dosage produces more dramatic effects—similar to a higher alcohol-by-volume content in alcoholic beverages. The dangers of high potency edibles reached a breaking point after numerous teens died after unknowingly digesting edibles that were far too potent to safely consume.¹⁷ A CDC report on one teen’s experience highlights the underlying dangerous of edibles:

A police report indicated that initially the decedent ate only a single piece of his cookie, as directed by the sales clerk. Approximately 30–60 minutes later, not feeling any effects, he consumed the remainder of the cookie. During the next 2 hours, he reportedly exhibited erratic speech and hostile behaviors. Approximately 3.5 hours after initial ingestion, and 2.5 hours after consuming the remainder of the cookie, he jumped off a fourth floor balcony and died from trauma. . . . The only confirmed findings were [7.2 ng/mL delta-9 THC in the decedent’s system]. The legal whole blood limit of delta-9 THC for driving a vehicle in Colorado is 5.0 ng/mL. . . . According to the police report, the decedent had been marijuana-naïve, with no known history of alcohol abuse, illicit drug use, or mental illness.

In response to the number of naïve teens who were consuming edibles without a full appreciation of the risks, Colorado enacted regulations requiring greater detail on edibles’ packaging.¹⁸ The marijuana industry has continued to increase the supply of marijuana edibles with at least one major Colorado company aspiring to turn its edibles company into a “billion-dollar brand.”¹⁹

This brief overview of the numerous ways that marijuana can be consumed highlights the difficulty that school officials face in detecting marijuana. A significant number of court cases have involved students concealing marijuana in various “private” areas, such as a “butt crack,”²⁰

¹⁶ Leafy, Ingest or Inhale? 5 Differences Between Marijuana Edibles and Flowers, available at: <https://www.leafly.com/news/cannabis-101/ingest-or-inhale-5-differences-between-marijuana-edibles-and-flow> (last accessed August 8, 2016).

¹⁷ CDC Report: Notes from the Field: Death Following Ingestion of an Edible Marijuana Product — Colorado, March 2014; available at: http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6428a6.htm?s_cid=mm6428a6_w (last accessed August 8, 2016).

¹⁸ See, e.g., “Colorado’s Packaging and Labeling Requirements for Retail Marijuana for Consumer Protection and Child Safety,” available at: <https://www.denvergov.org/Portals/768/documents/Marijuan%20Packaging.pdf> (last accessed August 8, 2016).

¹⁹ Kaplan, “An Edible Marijuana Pioneer Is Ready for Billion-Dollar Cannabis Brands,” *Bloomberg Businessweek*, August 4, 2016; available at: <http://www.bloomberg.com/news/articles/2016-08-04/edible-marijuana-pioneer-is-ready-for-billion-dollar-cannabis-brands> (last accessed August 8, 2016).

²⁰ *Fewless v. Bd. of Educ.*, 208 F. Supp. 2d 806, 810 (W.D. Mich. 2002).

jacket,²¹ sock,²² underwear,²³ or bra.²⁴ To make matters worse, court cases have addressed students bringing marijuana-laced edibles to school, including brownies²⁵ and cookies.²⁶ Further, a basic internet search for “how to hide marijuana” reveals products marketed to and designed for the very purpose of concealing everyday items, such as Aquafina® and Dasani® water bottles (with a secret container hidden inside the bottle), soda cans, lint rollers, and many, many more items.²⁷

With so many increasingly sophisticated ways to conceal marijuana, it may prove impossible for school administrators to prevent marijuana from reaching school grounds. Indeed, without some form of dedicated detection (like drug-sniffing dogs) at school on a daily basis, a school district might otherwise be unable to detect marijuana-laced edibles or tea brought to school. In addition, without pat-downs or strip searches, students who bring marijuana or marijuana cigarettes to school could easily hide said drugs on their person.

To make matters more complicated, oftentimes, it can be a challenge for school personnel and their attorneys to understand and maintain slang terminology, especially as it relates to drugs like marijuana, which likely goes by different slang terminology depending on several factors, including geography. In fact, practical experience has revealed that different groups of students within the same school may use different terminology for the same drug. Thus, there is no possible way to know every slang term for marijuana. To complicate matters, once students detect that administrators have deciphered a particular slang term, students may develop and adopt new terminology altogether. With that being said, it might be helpful to set forth various slang terms for marijuana that have been recognized in court opinions:

- “Weed”²⁸
- “Dro” (hydroponically grown marijuana)²⁹
- “Fire” (marijuana that is high-quality for its grade)³⁰
- “G” (a gram of controlled substances)³¹
- “Green” (marijuana)³²
- “Bud” (marijuana)³³
- “Bowl” (marijuana smoking pipe)³⁴
- “Mota” (Spanish slang for marijuana)³⁵

²¹ *New Jersey Div. of Youth & Family Servs. v. J.B.*, 2012 N.J. Super. Unpub. LEXIS 1589, *6 (App.Div. July 3, 2012).

²² *Germani v. Commonwealth*, 2005 Va. App. LEXIS 406, *13 (Va. Ct. App. Oct. 11, 2005).

²³ *AD.H. v. Clayton County Sch. Dist.*, 52 F. Supp. 3d 1261 (N.D. Ga. 2014).

²⁴ *S.S. v. Turner Unified Sch. Dist.*, 2012 U.S. Dist. LEXIS 177316 (D. Kan. Dec. 14, 2012).

²⁵ *In re O. G.*, 2015 Cal. App. Unpub. LEXIS 3800 (Cal. App. 1st Dist. May 29, 2015).

²⁶ *Doe v. Superintendent of Schs. of Weston*, 461 Mass. 159 (Mass. 2011).

²⁷ To be clear, many of these items are described as products to hide “everyday items” (such as a key) in plain sight. However, these products regularly appear in internet searches on hiding marijuana.

²⁸ *United States v. Clifton Banks*, 628 F. Supp. 2d 811, 813 (N.D. Ill. 2009).

²⁹ *State v. Schaffer*, 2012 Iowa App. LEXIS 800, *3 (Iowa Ct. App. 2012).

³⁰ *Id.*

³¹ *Id.*

³² *State v. McDaniel*, 251 Ore. App. 345, 347 (Or. Ct. App. 2012).

³³ *Id.*

³⁴ *Morgan v. Snider High Sch.*, 2007 U.S. Dist. LEXIS 79103, *2 (N.D. Ind. Oct. 23, 2007).

³⁵ *United States v. Pillado*, 656 F.3d 754, 760 (7th Cir. 2011).

- "Reggae Boy" (marijuana brought in from Jamaica)³⁶
- "Kush" (marijuana)³⁷
- "Big bags" (marijuana)³⁸
- "Tree" (marijuana)³⁹
- "Food" (marijuana)⁴⁰
- "Tweed" (marijuana)⁴¹
- "Three rolls" (marijuana)⁴²
- "Chronic" (marijuana)⁴³
- "Herb" (marijuana)⁴⁴
- "Shake" (the leaves of the marijuana plant that can be sold more cheaply than the plant's bud)⁴⁵
- "Homegrown" (marijuana)⁴⁶
- "Baked" (under the influence of marijuana)⁴⁷
- "Tampon" (large marijuana cigarette)⁴⁸

With so much variety in even the nicknames for marijuana, school administrators and attorneys face an uphill battle in the war against drugs on school grounds. Still, to the extent that school administrators and their attorneys may be at a disadvantage by failing to keep up with current drug trends, lingo and equipment. To matters even more frustrating, school officials will likely feel even more "behind" with the advent and increasing popularity of "look-alike" drugs.

"Look-alike" drugs, or "synthetic" drugs as they are often called, are man-made mind-altering chemicals that are either sprayed on plant material so they can be smoked or sold as liquids to be vaporized and inhaled in e-cigarettes and other devices.⁴⁹ Recently, K2 (or "spice") has made national headlines as one of the most common types of synthetic marijuana. Unfortunately, these synthetic drugs have made headlines for their very dangerous consequences. According to a study by the U.S. Centers for Disease Control and Prevention, of the 456 synthetic marijuana hospitalizations from 2010 to 2015, three deaths were recorded during that period.⁵⁰ Further, the

³⁶ *United States v. Facey*, 244 Fed. Appx. 251, 255 (11th Cir. 2007).

³⁷ *United States v. Makkar*, 2016 U.S. Dist. LEXIS 62223, *28 (N.D. Okla. May 11, 2016).

³⁸ *State v. Michael R. (In re Michael R.)*, 11 Neb. App. 903, 905 (Neb. Ct. App. 2003).

³⁹ *Collins v. State*, 297 Ga. App. 364, 365 (Ga. Ct. App. 2009).

⁴⁰ *United States v. Scott*, 2009 U.S. Dist. LEXIS 844, *11 (S.D.N.Y. Jan. 7, 2009).

⁴¹ *State v. Isom*, 2000 Ohio App. LEXIS 3089, *2 (Ohio Ct. App., Lorain County July 12, 2000).

⁴² *United States v. Samuels*, 741 F.2d 570, 574 (3d Cir. Pa. 1984).

⁴³ *State v. Alvarado*, 219 Ariz. 540, 542 (Ariz. Ct. App. 2008).

⁴⁴ *Grimes v. Cain*, 2013 U.S. Dist. LEXIS 152296, *2 (E.D. La. Aug. 30, 2013).

⁴⁵ *United States v. Sherman*, 551 F.3d 45, 50 (1st Cir. Me. 2008).

⁴⁶ *State v. Story*, 646 S.W.2d 68, 69 (Mo. 1983).

⁴⁷ *In the Matter of the Certificates of David A. Clune*, New Jersey State Department of Education State Board of Examiners, Order of Revocation, Docket Number 1415-133, available at: <http://www.state.nj.us/education/legal/examiners/2016/jun/1415-133.pdf> (last accessed August 8, 2016).

⁴⁸ *Klump v. Nazareth Area Sch. Dist.*, 425 F. Supp. 2d 622, 631 (E.D. Pa. 2006).

⁴⁹ National Institute on Drug Abuse, "DrugFacts: Synthetic Cannabinoids," available at: <https://www.drugabuse.gov/publications/drugfacts/synthetic-cannabinoids> (last accessed August 9, 2016).

⁵⁰ Acute Poisonings from Synthetic Cannabinoids — 50 U.S. Toxicology Investigators Consortium Registry Sites, 2010–2015; available at: <http://www.cdc.gov/mmwr/volumes/65/wr/mm6527a2.htm> (last

number of synthetic marijuana hospitalizations is significantly higher than the hospitalizations for marijuana.⁵¹

K2 is especially popular among young people because of the low price. Specifically, while an ounce of real marijuana can go for upwards of \$350 on the street, K2 costs about \$50 online or about \$10 a bag in some corner stores or head shops.⁵² In addition, K2 is problematic from an enforcement perspective because synthetic marijuana does not show up in drug tests.⁵³ Further, as will be discussed later in this paper, a state law criminalizing “marijuana” may not be effective in guarding against K2.

As a result, school administrators and attorneys would be wise to look beyond the historical notion of marijuana use—that is, the image of an old hippie smoking a marijuana joint. Today, marijuana can be ingested through so many ways that it would prove difficult to list them all. In addition, as marijuana becomes more accepted and “legal” in various areas of the country, other methods of consumption have become more popular. In all likelihood, this newfound acknowledgement of marijuana could generate methods of consumption that may be more accepted than smoking a joint. Already, marijuana “gummies” and chocolate bars have “exploded” in popularity in Colorado.⁵⁴ Marijuana growers in Colorado have begun partnering with celebrities to market new strands of marijuana—a marketing strategy that seems highly likely to be targeted (at least indirectly) to young people.⁵⁵ This continuing evolution and expansion of the marijuana industry (and its current and prospective users) leaves schools in a difficult position of prohibiting and safeguarding against the drug that is not only the most commonly used illicit drug in the country, but also a drug that has been integrated into nearly every shape, size and edible (and non-edible) arrangement. As a result, school officials must be proactive and remain on the forefront of understanding marijuana trends.

accessed August 9, 2016).

⁵¹ Ingold, “Kids’ emergency room visits for marijuana increased in Colorado after legalization, study finds,” *Denver Post*, July 25, 2016; available at: <http://www.denverpost.com/2016/07/25/colorado-kids-emergency-room-visits-marijuana-increased/> (last accessed on August 8, 2016).

⁵² Garber-Paul, Synthetic Marijuana: Everything You Need to Know about the Drug K2, *Rolling Stone*, July 13, 2016; available at: <http://www.rollingstone.com/culture/features/synthetic-marijuana-everything-you-need-to-know-about-k2-drug-spice-20160713> (last accessed on August 8, 2016).

⁵³ *Id.*

⁵⁴ “Local marijuana edibles market expands, expected to grow state revenue,” *Statesman Journal*, June 27, 2016; available at: <http://www.statesmanjournal.com/story/news/2016/06/27/local-marijuana-edibles-market-expands-expected-grow-state-revenue/86317942/> (last accessed on August 8, 2016).

⁵⁵ “Celebrity-sponsored pot is the latest marketing strategy for the cannabis industry,” *Denver Post*, July 11, 2016; available at: <http://www.denverpost.com/2016/07/11/pro-model-pot-emerges-as-latest-marketing-strategy-for-cannabis-industry/> (last accessed on August 8, 2016).

II. THE HISTORY AND LEGALIZATION OF MARIJUANA

The history of marijuana provides a useful background to help understand the context of many of the issues, claims and defenses raised as it relates to “legalizing” the drug. Indeed, marijuana is one of humanity's oldest cultivated crops.⁵⁶ Marijuana can be traced back 12,000 years to hunter-gatherers who appreciated its nutritious and psychoactive properties.⁵⁷ Marijuana was used for medical purposes at least 6,000 years ago.⁵⁸ In Neolithic times, marijuana traveled from its roots in China and Siberia along the Silk Road to the Middle East and Europe.⁵⁹ In addition, around the fifth century B.C., travelers and traders spread knowledge of marijuana's properties westward to Persia and Arabia.⁶⁰ Physicians in the classical and Hellenistic eras listed marijuana as a remedy, and it became "used both industrially and medicinally" in Europe during the Middle Ages, despite a papal ban.⁶¹ The drug flourished in classical Greek, Roman, and Arab societies.⁶² European colonialism cemented marijuana as a global commodity, spreading its cultivation, trade, and use throughout the Western Hemisphere and into what is now the United States.⁶³

The history of regulating marijuana traces back to the regulation of the other major derivative of marijuana's taxonomic species: hemp.⁶⁴ Hemp strains are grown to produce food, textiles, paper, and other materials.⁶⁵ On the other hand, marijuana is primarily grown and used for its medicinal or recreational psychoactive properties.⁶⁶ In fact, Queen Elizabeth required large landowners throughout the British Empire to grow hemp to counter Britain's reliance on Russian hemp imports.⁶⁷ Subsequently, the Jamestown colonists in America were required by the Virginia Assembly to do the same.⁶⁸ Both George Washington and Thomas Jefferson were hemp growers, and the U.S. Constitution was written on hemp.⁶⁹ John Adams was a prominent supporter of hemp cultivation, writing frequently about its benefits,⁷⁰ including: "P.S. Seems to me if grate Men dont

⁵⁶ Barney Warf, *High Points: An Historical Geography of Cannabis*, 104 *Geographical Rev.* 414, 418-19 (2014).

⁵⁷ *Weed and Water Law: Regulating Legal Marijuana*, 67 *Hastings L.J.* 565, 572.

⁵⁸ *State Ballot Initiatives in the Federal Preemption Equation: A Medical Marijuana Case Study*, 40 *Wake Forest L. Rev.* 221, 274.

⁵⁹ *Id.*

⁶⁰ Declaration of Lester Grinspoon, M.D., In Support of Defendants' Response to Show Cause Order at 123a, *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483 (2001) (No. 00-151), available at 2001 WL 34093965.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Rowan Robinson, *The Great Book of Hemp: The Complete Guide to the Environmental, Commercial, and Medicinal Uses of the World's Most Extraordinary Plant* (1996).

⁶⁷ Barney Warf, *High Points: An Historical Geography of Cannabis*, 104 *Geographical Rev.* 414, 426 (2014).

⁶⁸ Martin A. Lee, *Smoke Signals: A Social History of Marijuana - Medical, Recreational, and Scientific* (2012).

⁶⁹ Corliss Knapp Engle, *John Adams, Farmer and Gardner*, 61 *Arnoldia* 9, 10 (2002).

⁷⁰ John Adams, *Humphrey Ploughjogger to the Boston Evening Post*, *Mass. Hist. Soc'y* (June 20, 1763), available at: <http://www.masshist.org/publications/apde2/view?& id=PJA01dg1> (last accessed on August

leeve off writing Pollyticks, breaking Heads, boxing Ears, ringing Noses and kicking Breeches, we shall by and by want a world of Hemp more for our own consumshon."⁷¹

The Virginia settlers not only used hemp as a cash crop, but also as legal tender in the Americas from 1631 until the early 1800's.⁷² Medical marijuana's role in the early United States was widespread. In the mid-to-late 1800's, medicinal marijuana was widely dispensed by physicians and pharmacists to treat a variety of illnesses.⁷³ Of note, from 1842 until the 1890's, medical marijuana was the second or third most prescribed medicine in the United States.⁷⁴ During this time, more than 100 published articles in the United States recommended marijuana to treat one disorder or another.⁷⁵

Throughout the nineteenth and early twentieth centuries, American farmers continued to grow hemp and marijuana.⁷⁶ By some accounts, it became the third largest cash crop in the United States by the mid-nineteenth century.⁷⁷ Ironically, the popularity of hemp and marijuana ultimately led to its downfall. Indeed, hemp and marijuana's widespread use catalyzed opposition to its legality from multiple angles. Marijuana's early popularity with immigrants and bohemian communities produced reactionary prejudices that prompted crude public campaigns to criminalize the drug.⁷⁸ As such, some legal scholars have argued that the movement in the early 20th century to criminalize marijuana was motivated by racist agendas.⁷⁹ In addition, hemp's industrial versatility was a threat to the cotton industry and other producers of textiles.⁸⁰

Despite strong support in the medical and pharmaceutical industries, twenty-nine states banned cannabis between 1914 and 1931.⁸¹ Interestingly, California and Colorado were two of the first three states to criminalize the use of marijuana.⁸² After several states enacted laws criminalizing marijuana use, the federal government enacted the Marihuana Tax Act of 1937 (the "Tax Act").⁸³ The Tax Act did not did not criminalize marijuana, but attempted to curb its use

8, 2016).

⁷¹ *Id.*

⁷² Rosalie Liccardo Pacula et al., *State Medical Marijuana Laws: Understanding the Laws and their Limitations*, 23(4) J. Pub. Health Pol'y, 413, 413-439 (2003).

⁷³ *Id.*

⁷⁴ Jack Herer, *The Emperor Wears No Clothes* (11th ed. 1998).

⁷⁵ Alan Bock, *Waiting to Inhale: The Politics of Medical Marijuana* (2000).

⁷⁶ Martin A. Lee, *Smoke Signals: A Social History of Marijuana - Medical, Recreational, and Scientific* (2012).

⁷⁷ *Id.*

⁷⁸ Barney Warf, *High Points: An Historical Geography of Cannabis*, 104 *Geographical Rev.* 414, 426 (2014).

⁷⁹ Kathleen Auerhahn, *The Split Labor Market and the Origins of Antidrug Legislation in the United States*, 24 *Law & Soc. Inquiry* 411, 418 (1999) (Because marijuana was associated with Mexican-Americans laborers, restrictions on its use arose in the Southwestern states with larger Mexican-American populations).

⁸⁰ *Id.*

⁸¹ Collin B. Walsh & Daniel T. Nau, *The History, Law, and Psychology of Criminalizing Marijuana: A Comparative Analysis with Alcohol and Tobacco* (Ind. Univ., Research Paper No. 274, 2013).

⁸² Richard J. Bonnie & Charles H. Whitebread, II, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, 56 *Va. L. Rev.* 971, 1010-20 (1970).

⁸³ Marihuana Tax Act of 1937, Pub. L. No. 75-238, 50 Stat. 551 (1937).

through a prohibitive tax by imposing transfer and excise taxes on marijuana growers, distributors, sellers, and buyers.⁸⁴ However, in *Leary v. United States*, the United States Supreme Court struck down the Tax Act, reasoning that compliance with the Tax Act would unconstitutionally violate a person's right against self-incrimination.⁸⁵

The *Leary* court's ruling then inspired Congress to repeal the Marijuana Tax Act and replace it with the Comprehensive Drug Abuse Prevention and Control Act of 1970 (now known as the Controlled Substances Act, or "CSA"). The CSA replaced more than fifty pieces of drug legislation.⁸⁶ Title II of the CSA established five schedules to classify controlled substances according to their potential for abuse.⁸⁷ Schedule I, the most restrictive category, includes "substances with no currently accepted medical use, high abuse potential, and a lack of demonstrated safety under medical supervision."⁸⁸ In enacting the CSA, Congress debated whether marijuana should even be included in Schedule I.⁸⁹ The legislative history for the CSA notes that marijuana is not narcotic, not addictive, and does not cause violence or crime.⁹⁰ In fact, marijuana was retained in Schedule I only because the U.S. Assistant Secretary of Health and Scientific Affairs recommended this classification "at least until the completion of certain studies now underway."⁹¹

More specifically, the CSA was enacted to address drug abuse and drug trafficking.⁹² Unsurprisingly, therefore, the Act addressed possession primarily in the context of drug

⁸⁴ *Id.*

⁸⁵ *Leary v. United States*, 395 U.S. 6 (1969).

⁸⁶ Martin Alan Greenberg, *Prohibition Enforcement: Charting a New Mission* (1999). As Greenberg states:

America's "drug war" has primarily focused upon opium-based substances since 1914 when the Harrison Act was adopted. For more than 50 years, this federal statute was the main basis of narcotics regulation in the U.S. as interpreted by the Supreme Court. The laws and various amendments related to the Harrison Act were consolidated in the Comprehensive Drug Abuse Prevention and Control Act of 1970. This legislation reflected a fundamental change in interpretation of the Commerce Clause of the Constitution, "thus eliminating the need to portray a police function as a revenue measure."

⁸⁷ *Id.* at note 20. See also Comprehensive Drug Abuse Prevention and Control Act of 1970, 84 Stat. at 1247-52.

⁸⁸ Annaliese Smith, Comment, *Marijuana as a Schedule I Substance: Political Ploy or Accepted Science?*, 40 Santa Clara L. Rev. 1137, 1137 (2000).

⁸⁹ *State Ballot Initiatives in the Federal Preemption Equation: A Medical Marijuana Case Study*, 40 Wake Forest L. Rev. 221, 279.

⁹⁰ H.R. Rep. No. 91-1444 (1970), reprinted in 1970 U.S.C.C.A.N. 4566, 4577-78.

⁹¹ *Id.* at 4579. The CSA lists marijuana in Schedule I as Tetrahydrocannabinols. 21 U.S.C. 812(c) (2000), Schedule I(c)(17).

⁹² 21 U.S.C. § 801(2), (3) (outlining Congress's concerns). These concerns primarily focus on two issues: (1) the "substantial and detrimental effect on the health and general welfare of the American people" from "improper use;" and (2) the interstate and international trafficking of illegal drugs. *Id.* In addition, the House committee report on the bill states as the "Principal Purpose of the Bill": "This legislation is designed to deal in a comprehensive fashion with the growing menace of drug abuse in the United States" H.R. Rep. No. 91-1444. Finally, the committee report notes that the general philosophy of the Commission was that "the illegal traffic in drugs should be attacked with the full power of the Federal Government" and that "the individual abuser should be rehabilitated." 1970 U.S.C.C.A.N. at 4575.

trafficking.⁹³ As such, the CSA made it a felony to "manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance."⁹⁴ Simple possession was a misdemeanor, and only violated the CSA if the possession was without "a valid prescription or order, from a practitioner, while acting in the course of his professional practice."⁹⁵ In 1988, Congress added a new section to the CSA addressing possession in "a personal use amount."⁹⁶ Critics argued that this added section "contains numerous ambiguities, inconsistencies, and internal contradictions that will make it virtually impossible to implement."⁹⁷

In 1995, both the American Medical Association and the American Public Health Association endorsed the medical use of marijuana.⁹⁸ At least two government reports since 1995 also have recognized a potential therapeutic value for marijuana.⁹⁹ Notwithstanding these reports, Congress has not amended the CSA to reclassify marijuana. In response to Congressional action (or inaction, depending on the point of view) in its refusal to reclassify marijuana, several states have enacted laws that provide protections for marijuana use under state law. As of the date of this article, twenty-five states and the District of Columbia have enacted laws in an attempt to "legalize" the use of marijuana—either recreationally or for medical purposes.¹⁰⁰ The United States Department of Justice has somewhat complicated the issue by distributing two memorandums suggesting that

⁹³ *State Ballot Initiatives in the Federal Preemption Equation: A Medical Marijuana Case Study*, 40 Wake Forest L. Rev. 221 at 279.

⁹⁴ 21 U.S.C. § 841(a)(1).

⁹⁵ *Id.* at § 844(a) ("It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice . . .")

⁹⁶ Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181, 4384 (1988).

⁹⁷ Jonathan J. Rusch, "*Consistency Is All I Ask*": *An Exegesis of Section 6486 of the Anti-Drug Abuse Amendments Act of 1988*, 41 Admin. L. Rev. 415, 416 (1989), arguing that none of the Congressional committee hearings or reports address the newly added section, which created civil penalties for possession of Schedule I drugs. When the section was introduced in Congress, some members argued that it might be used punitively to make "drug users accountable for their actions," while others objected that it "advocated decriminalization of possession of small quantities of drugs." *Id.* at 421-22.

⁹⁸ 141 Cong. Rec. E1374-01 (daily ed. June 30, 1995) (statement of Rep. Solomon) (referencing an article in the *Journal of the American Medical Association*, advocating the use of marijuana for medical purposes); See 141 Cong. Rec. E2365 (daily ed. Dec. 14, 1995) (statement of Rep. Frank) (referencing a resolution passed by The American Public Health Association supporting the medical use of marijuana); see also 143 Cong. Rec. E194 (daily ed. Feb. 10, 1997) (referencing an article by Jerome P. Kassirer, M.D. from the *New England Journal of Medicine*, entitled *Federal Foolishness and Marijuana*).

⁹⁹ See also U.S. General Accounting Office, *Marijuana: Early Experiences with Four States' Laws That Allow Use for Medical Purposes*, Rep. to the Chairman, Subcomm. on Criminal Justice, Drug Policy and Human Resources, House Comm. on Government Reform, at 7 nn.13, 14 (Nov. 2002) [hereinafter GAO Report] (citing Am. Med. Ass'n, Council on Scientific Affairs Rep.: *Medical Marijuana* (June 2001) [hereinafter AMA Report] and Nat'l Acad. of Sciences, Inst. of Med., *Marijuana and Medicine: Assessing the Science Base* (Janet E. Joy et al. eds., 1999), available at <http://www.nap.edu/books/0309071550/html> [hereinafter Institute of Medicine Report]). But see *Medical Marijuana Referenda Movement in America: Hearing before the Subcomm. on Crime, House Comm. on the Judiciary, 105th Cong. (1997)*; H.R. Rep. No. 105-451 (1998).

¹⁰⁰ Those states include: Alaska, Arizona, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Vermont and Washington.

the Department will not prosecute individuals who use medical marijuana prescribed by a doctor in a state with a medical marijuana statutory scheme.¹⁰¹

In response to the Department of Justice's decision against prosecuting certain types of marijuana cases, the states of Nebraska and Oklahoma sued their neighboring state of Colorado in the United States Supreme Court in an attempt to declare unconstitutional the Colorado constitutional amendment "permitting" marijuana use. The Supreme Court refused to hear the case.¹⁰² Subsequently, Nebraska and Oklahoma have joined in two separate lawsuits challenging Colorado's constitutional amendments. Both of these lawsuits were dismissed by the district court¹⁰³ and are now on appeal before the 10th Circuit Court of Appeals.¹⁰⁴

Of note, one of these two cases pending before the 10th Circuit (the *Safe Streets* case) involves perhaps the first claim against Colorado marijuana sellers and dispensaries for racketeering. Indeed, under the Racketeer Influenced and Corrupt Organization Act ("RICO"), "racketeering activity" is defined to include "dealing in a controlled substance or listed chemical (as defined in section 102 of the [CSA]) which is chargeable under State law and punishable by imprisonment for more than one year" or "the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the [CSA])."¹⁰⁵ The *Safe Streets* plaintiffs (Colorado land owners with real property adjacent to a future location of a marijuana cultivation factory) alleged that the defendants engaged in a pattern of racketeering by establishing, cultivating and contracting to grow and sell marijuana (in violation of federal law). The district court dismissed the plaintiffs' claims, finding that the plaintiffs lacked standing to bring a RICO claim because they failed to demonstrate that any plaintiff suffered "business or property" injuries as a result of defendants' marijuana-related activities and that they failed to "provide [a] factual support to quantify or otherwise substantiate their inchoate concerns as to the diminution in value of their property."¹⁰⁶

Although the *Safe Streets* case dismissed the plaintiffs' RICO claim for lack of standing, the court seemed to suggest that a RICO claim could be successfully pled by a different plaintiff with a more concrete harm. The same plaintiff in *Safe Streets* continued to pursue the RICO claim and filed a RICO lawsuit on behalf of a Holiday Inn hotel in Frisco, CO, against a proposed marijuana shop and the companies that did the shop's banking (Bank of the West), bonding (Merchants Bonding) and accounting work (Accounting Specialists, Inc.).¹⁰⁷ The shop never made

¹⁰¹ See generally United States Department of Justice Memorandum, dated October 19, 2009, available at: <https://www.justice.gov/opa/blog/memorandum-selected-united-state-attorneys-investigations-and-prosecutions-states> (last accessed August 8, 2016) & United States Department of Justice Memorandum, dated August 29, 2013, available at: <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> (last accessed August 8, 2016).

¹⁰² *Nebraska v. Colorado*, 136 S. Ct. 1034 (2016).

¹⁰³ *Safe Sts. Alliance v. Alternative Holistic Healing, LLC*, 2016 U.S. Dist. LEXIS 36115 (D. Colo. Feb. 8, 2016); *Smith v. Hickenlooper*; Civil Action No. 15-cv-00462-WYD-NYW (D. Colo. February 26, 2016).

¹⁰⁴ *Safe Streets Alliance, et al v. Alternative Holistic Healing, et al & Smith, et al v. Hickenlooper* at Case Numbers 16-1048, 16-1095 & 16-1266 (10th Circuit).

¹⁰⁵ 18 U.S.C. § 1961(1).

¹⁰⁶ *Safe Sts. All. v. Alt. Holistic Healing, LLC*, No. 15-cv-00349 (Feb. 8, 2016), ECF No. 128, at 17–24 (Recommendation Regarding Defendants' Motions to Dismiss).

¹⁰⁷ *Safe Sts. All. V. Med. Marijuana of the Rockies, LLC*, No. 15-cv-00350 (February 19, 2015).

the move and was “forced to close” its previous Summit County location as a result of the court case, according to a note on its website. Bank of the West was dropped from the lawsuit after it closed all bank accounts belonging to the shop and denied that it knew the nature of the shop’s business.¹⁰⁸ The bonding company settled for \$50,000 and the accounting company settled for \$20,000.¹⁰⁹ As a result, school districts facing challenges with marijuana entities in the community may consider exploring their options under RICO.

With the Congress and state legislatures at odds over the wisdom of “legalizing” marijuana, and the Department of Justice exercising its discretion in declining to prosecute certain users (and the Supreme Court refusing to weigh in), the courts have been caught in the middle of this debate. A number of cases have been filed, challenging the federal government’s ability to regulate marijuana growers who do not distribute their products across state lines. Ultimately, the United States Supreme Court addressed this issue and sided with the government. Indeed, the Supreme Court’s case of *Gonzales v. Raich*¹¹⁰ involved California residents who suffered from a variety of serious medical conditions. To assist with their pain, they sought medical marijuana pursuant to California’s Compassionate Use Act.¹¹¹ After an investigation, California county officials concluded that the respondent’s use of marijuana was entirely lawful under California law. Nevertheless, federal agents seized and destroyed all six of the cannabis plants. The Supreme Court held that the regulation of marijuana under the CSA was squarely within Congress’ commerce power because production of marijuana meant for home consumption had a “substantial effect” on supply and demand in the national market. The court also noted the enforcement difficulties in distinguishing between marijuana cultivated locally and marijuana grown elsewhere. As such, the Supreme Court concluded that Congress could regulate and criminalize home-grown marijuana.

Since the *Raich* case, the United States Supreme Court has addressed two drug-related issues that have involved school districts. In *Morse v. Fredrick*,¹¹² a student displayed a banner reading “BONG HiTS 4 JESUS” across the street from his high school during the school-supervised 2002 Olympic torch relay. The principal suspended the student and the student filed suit, alleging that the school infringed on his free speech rights. The Supreme Court upheld the school district’s decision, holding that a school can permissibly censor student speech that advocates illicit drug use.

Two years later, in *Safford Unified School District v. Redding*,¹¹³ the United States Supreme Court addressed the permissible scope of a student strip search. In that case, school officials suspected a student of having prescription-strength drugs on her person. The school officials searched her belongings, then had her strip to her underwear, pull her bra out and to the side and shake it, and pull out the elastic on her underpants" to see what might fall out. The

¹⁰⁸ “Anti-pot racketeering suit settles, opens door for future RICO claims,” *Denver Post*, June 8, 2016, available at: <http://www.denverpost.com/2015/12/30/anti-pot-racketeering-suit-settles-opens-door-for-future-rico-claims/> (last accessed August 9, 2016).

¹⁰⁹ *Id.*

¹¹⁰ 545 U.S. 1 (2005).

¹¹¹ Cal. Health & Safety Code § 11362.5 (2005).

¹¹² 551 U.S. 393 (2007).

¹¹³ 557 U.S. 364 (2009).

officials did not find any contraband on her person and did not contact her parents at any point during the investigation. The student sued, alleging that the school violated her Fourth Amendment rights. The Supreme Court agreed with the student, holding that the strip search was unreasonable and intrusive.

Overall, the history of marijuana and its utilization as a useful medical remedy, industrial product and agricultural crop is contrary to today's view of marijuana, at least to some. The difficulty in succinctly and sufficiently explaining the current state of marijuana in America results from the patchwork regulatory framework across the country: some states have laws prohibiting marijuana, other states have "legalized" marijuana for medical purposes, while several states have "legalized" marijuana outright. Despite these various state laws, the federal government has yet to repeal or modify the federal law that bans marijuana as a controlled substance. Yet, the federal government has also informed citizens that it will not prosecute marijuana use in certain circumstances. For those keeping track at home, the current state of the "legality" of marijuana is as confusing as it is contradictory. As we will see later in this paper, the courts have similarly struggled with these inconsistent rules and enforcement thereof. It is therefore no wonder why so many differing views exist as to the benefits or harms of marijuana.

To make matters even more complicated, the marijuana-related penalties vary from state-to-state and, in some cases, the consequences for possession of marijuana are so lenient (relative to the punishments imposed for other types of drugs) that some state laws effectively "legalize" marijuana. For example, in Nebraska (a state without a law explicitly "decriminalizing" marijuana), a person convicted of possession of 1 ounce or less of marijuana will face no jail time, a maximum fine of up to \$300, and will be guilty of an "infraction."¹¹⁴ On the other hand, in Nebraska, a minor convicted of possession of alcohol could face up to three months in jail, a maximum fine of up to \$500, and will be guilty of a "misdemeanor." Similarly, in Minnesota (another state without a law "decriminalizing" marijuana), a person convicted of possession of marijuana in the amount of 42.5 grams or less would face a maximum fine of \$200, with no jail time.¹¹⁵ On the other hand, a minor convicted in Minnesota for possession of alcohol could face up to 90 days in jail and a fine of not more than \$1,000.¹¹⁶

The discrepancies in punishments not only vary by states, but also by the method of consumption. For instance, a person convicted of possession of marijuana likely faces a more lenient punishment than a person who consumes the marijuana to avoid a law enforcement officer's search. Such consumption could be construed as tampering with evidence or obstruction of justice.¹¹⁷ Thus, in certain areas of the country, it would seem better to admit to possessing marijuana than to try and conceal said marijuana.

¹¹⁴ Neb. Rev. Stat. § 28-416.

¹¹⁵ Minn. Stat. §§ 152.02-15.027.

¹¹⁶ Minn. Stat. §§ 340A.503(3) & 609.03(3).

¹¹⁷ *Gates v. State*, Indiana Court of Appeals Memorandum Decision, dated December 18, 2013, available at: <http://www.in.gov/judiciary/opinions/pdf/12181301ebb.pdf>.

Therefore, over the course of thousands of years, the utilization, perception and consequences of marijuana have changed dramatically. Today, the drug that Virginia settlers were required to grow is outlawed (though the laws are not always enforced) by federal law, classified and penalized differently among the states, approved by some doctors and researchers as a valuable medical tool to combat pain, and decried by others as a “gateway” drug to other, more harmful drugs. Therefore, it is no surprise that, with a backdrop filled with inconsistencies, uncertainties and diverging points of view, the current slate of legal issues involving marijuana presents significant challenges. These concerns are, at times, amplified for school districts and their attorneys.

Of course, the state of marijuana could change entirely over the next several years with the upcoming changes in our country’s political landscape:

Notably, the current political climate may also affect state marijuana laws and those seeking to challenge them. The recent Supreme Court vacancy and upcoming presidential election create uncertainty for the future of state marijuana laws. When a new administration settles in office in January 2017, the DOJ’s enforcement priorities and the Supreme Court’s prior unwillingness to hear a state case challenging a neighboring state’s marijuana laws could swiftly change, affecting how these issues are shaped prospectively. In addition, the Drug Enforcement Administration (DEA) recently announced that it will soon decide whether to remove marijuana as Schedule I drug under the CSA. If the DEA reclassifies marijuana to either a Schedule II or a Schedule III drug, it would certainly be a game changer. However, it remains to be seen what the DEA will decide. No doubt, there is more to come as Colorado’s legalization of marijuana continues to develop and both sides of the debate refuse to acquiesce to the status quo.¹¹⁸

III. STUDENT ISSUES

The ability of a school district to discipline a student caught possessing marijuana on school property is probably so obvious that we do not devote any attention to such a scenario. Additionally, the precise authority for discipline (such as the permissible severity of such a punishment) likely depends in large part on specific state statutes. Instead, the focus of this section of the paper aims to discuss nuanced issues related to students and marijuana, as well as provide practical suggestions for education practitioners.

¹¹⁸ Carboni, *Litigation Update—Legal Recreational Marijuana*, ABA Litigation, May 24, 2016, available at: <http://apps.americanbar.org/litigation/committees/womanadvocate/articles/spring2016-0516-litigation-update-legal-recreational-marijuana.html> ; (last accessed on August 9, 2016).

A. THE IMPORTANCE OF STUDENT HANDBOOK LANGUAGE

Oftentimes, a district's ability to discipline a student depends on the rules published in the school's student handbook or code of conduct. Several cases provide helpful reminders of why a school's handbook language should be carefully drafted and reviewed frequently to avoid potential marijuana-related issues. For instance, in *D.T. v. Harter*,¹¹⁹ a Florida school's code of conduct included the following rules:¹²⁰

Illegal use, possession, or sale of controlled substances . . . by any student while on school property or in attendance at a school function is grounds for disciplinary action and may also result in criminal penalties being imposed.

. . .

In order to comply with the State Board of Education Rule for Zero Tolerance for school-related violent crimes and for the Gun-Free School Act, families and students must understand that certain criminal acts, violent acts and disruptive behavior occurring on School Board property . . . must be reported to local law enforcement. These acts include but are not limited to: . . . possession or sale of illegal drugs

As we will see, the issue in this case focused on the term "possession."

The case began when a drug-sniffing dog alerted to a car parked in the high school lot. The car was identified as belonging to D.T., who was then called out of class. D.T. unlocked the car and gave permission for his car to be searched. A leafy substance was found in the bottom of the passenger door storage compartment. A field test conducted on the leafy substance was positive for marijuana.

After the school held a disciplinary hearing, D.T. was suspended for ten days and the assistant principal sent a letter to the superintendent requesting that D.T. either be expelled or alternatively placed. The day after the school-based hearing, D.T. was drug tested and the results were negative for marijuana. Pursuant to Florida state law, the superintendent filed a petition seeking the alternative placement of D.T. D.T. then requested a due process hearing.

At the due process hearing, D.T.'s mother testified that she had owned the car for nine years and, on occasion, her two brothers and sister would use it. She stored items in the door storage compartments. Items removed from the passenger storage compartment shortly after the incident included nail polish, a hair clip, napkins, fast food wrappers, a June 2000 water bill, and a June 2000 Winn-Dixie receipt. All of these items belonged to D.T.'s mother. D.T. confirmed that he had been driving the car primarily to school. Other members of the family had keys to the car. D.T. did not have any friends in the car. D.T. testified that, from the moment the substance was

¹¹⁹ 844 So. 2d 717, 718 (Fla. Dist. Ct. App. 2d Dist. 2003).

¹²⁰ *Id.* at 719.

found and throughout the process, he repeatedly told the assistant principal that it was not his marijuana and he had never seen it before.

The due process hearing officer found that D.T. had no knowledge of the presence of the marijuana and no reason to believe that it was likely to be present in the car. The hearing officer concluded that "possession," as used in the school's code of conduct, included "knowledge of the possession." The hearing officer explained this conclusion:

To find that the student must, at the very least, have knowledge that the contraband exists or have a reasonable belief that it could exist within his or her dominion and control is very reasonable. To find otherwise would apply such a strict standard that no student would ever have a fair hearing because the student would automatically be guilty without hearing the other side.

Because the hearing officer concluded that D.T. had no knowledge of the marijuana in the vehicle, the hearing officer recommended that D.T. be returned to the high school.

The Board adopted the hearing officer's factual findings but rejected the conclusion of law concerning the definition of possession "because the Hearing Officer has improperly applied a criminal law definition to the term 'possession.'" The Board then reasoned:

The Board has discretion to define the term possession as it is used in the [code of conduct] and does not define the term to include a requirement that a student have 'knowledge' of the substance that they possess.

The Board concluded that D.T. violated the code of conduct and ordered D.T. reassigned to an alternative learning center.

On appeal, the Florida Court of Appeals held in favor of D.T., concluding that the Board's interpretation of the term "possession" conflicts with the plain language of the code of conduct:

References in the [code of conduct] to the "illegal" possession of drugs and controlled substances and contemplation of not only a school-based sanction but also possible criminal prosecution support the hearing officer's interpretation of the term possession and render the Board's interpretation unreasonable. . . . While we can envision a rational basis for such a regulation as the Board seeks to impose in this case, the [code of conduct], *as written*, does not explicitly contain such a regulation.¹²¹

(Emphasis supplied).

¹²¹ *Id.* at 720.

Thus, the district’s downfall in the *D.T.* case falls squarely on the language that it adopted in its code of conduct.

Practice Pointer: Do not restrict handbook or policy language to terms defined by criminal law. Instead, make sure that a district’s language is broad enough to expand beyond the otherwise-strict criminal law standards. In the disciplinary context, a school should define the term “possession” to address the following scenarios:

- Three students are driving around in a car with a marijuana joint. The Principal talks to all three students. Two admit they had been smoking. The third denies it. How does the school “prove” that the third student is not telling the truth?
- Fifty students attend an un-chaperoned party at a student’s house at which marijuana edibles are being consumed. A student athlete was at the party. She tells the Athletic Director that she was not consuming any of the edibles. Instead, she says she was only in attendance to drive her friend’s home after the party. The Athletic Director believes that the student is lying, but can’t otherwise “prove” it.

To address these issues, a “constructive possession” rule (see below for more detail) allows the school to establish that the students committed a drug violation by simply being in the car or at the party where marijuana was present.

The *D.T.* case also raises the issue of whether a ban on “illicit substances” or “illegal drugs” would include a prohibition on “look-alikes” or other synthetic drugs, like K2. In states without laws on synthetic drugs, a district may risk a court concluding that a student could not be punished for possessing a substance like K2 that is not proscribed by federal or state law, if the code of conduct only proscribes “illegal drugs.”

Practice Pointer: A school rule or policy prohibiting drug use or possession by students should include a “look-alike” clause to ensure that synthetic or similar substances are also forbidden. Such a clause should be drafted broadly enough to include all potential future synthetic drugs, rather than specifically listing each synthetic or similar substance available today.

B. CONSTRUCTIVE POSSESSION RULE

In *Farver v. Board of Education of Carroll County*,¹²² about 150-200 students attended an un-chaperoned party at which alcohol was being consumed. A number of students were suspended from activities as a result of their attendance at the party. The suspensions were based on an activity rule that prohibited the “constructive possession of alcohol.” (No further definition of “constructive possession” was provided.) The federal court rejected constitutional challenges to the suspensions, ruling that while there might be questions as to “what ‘constructive possession’ means, these are issues to be settled through state law, not through the federal constitution.”

¹²² 40 F. Supp. 2d 323 (D. Md. 1999).

The Maryland State Board of Education addressed the “state law” issues involving the same suspensions. The Board found the “constructive possession” rule to be reasonable (although it suggested that the school clarify the phrase “constructive possession”) and upheld the students’ suspensions.¹²³

Similarly, in *Bush v. Dassel-Cokato Bd. of Educ.*,¹²⁴ Keri Bush, a high school swimmer, went to a party at a lake on the last day of school. At the party, alcohol was being consumed. Keri was at the party for approximately 15 minutes, when the Sheriff arrived. The Sheriff cited three of the students for minors in possession of alcohol. Keri was not criminally cited because the Sheriff found no evidence that she had possessed or consumed alcohol. Nonetheless, the school suspended Keri from two swim meets based on a school policy that prohibited:

Any civil/criminal law infraction (such as . . . attending parties where alcohol and/or illegal drugs as defined by state law are present) . . . (Exception: Wedding receptions or parties where accompanied by the student's parent/legal guardian).

The court held that the suspension did not violate Keri’s First Amendment right of association. The court also upheld the policy and the application of the policy to Keri’s conduct. “Disciplining of a student for attending a party at which alcohol is consumed by minors is a reasonable means of deterring alcohol consumption among students, a goal which is not only legitimate, but highly compelling.”

Along these same lines, in *Clements v. Board of Education*,¹²⁵ Rhonda, a softball player, went to Danny’s home after work to meet two female friends, and then to leave. She did not know that beer was to be served at Danny’s home. Rhonda admitted that, shortly after her arrival, she saw “a beer” on a table but did not see anyone drinking. Rhonda stayed at Danny’s house for no more than 15 minutes, when police arrived and stopped the party. Rhonda was questioned and released. Evidence indicated that there was a keg of beer in the basement and that about 40 minors were present in the house, some of whom were drinking the beer.

The next day, Rhonda told her softball coach about Danny’s party. Rhonda was suspended for the remainder of the season for violating the Athletic Code provision that prohibited “anti-social behavior.” The rule specified:

Insubordination, poor sportsmanship, violation of an individual coach’s rule, or *anti-social behavior* exhibited by athletes is considered detrimental to the team and to school spirit. The participant shall receive not less than a reprimand and not greater than suspension for the season." (Emphasis supplied.)

¹²³ *Arnold v. Carroll County Board of Education*, Opn. 99-41 (Md. State Board of Education Sept. 22, 1999).

¹²⁴ 745 F. Supp. 562 (D. Minn. 1990).

¹²⁵ 478 N.E.2d 1209 (Ill. App. Ct. 1985).

The principal determined that Rhonda's presence at the party constituted "anti-social behavior." The court addressed Rhonda's appeal and openly questioned the vagueness of the "anti-social rule" but ultimately upheld Rhonda's suspension:

The dimensions of the phrase "anti-social behavior" are obviously rather indefinite. Ordinarily, the phrase would refer to conduct by which one person injures others. While the presence of minors at a party where other minors are illegally consuming alcoholic beverages is highly undesirable, it is not fully apparent that the conduct would be considered "anti-social." . . . we do not determine the imposition of the suspension to be sufficiently egregious to come within the narrow concept of arbitrary or capricious official conduct which justifies the extraordinary intervention by the court in the operation of the public schools of the State.¹²⁶

Finally, the Iowa Supreme Court's decision in *Bunger v. Iowa High School Athletic Assn.*,¹²⁷ makes it clear that a "constructive possession" rule must not be extended too broadly. During the summer, William Bunger was in a car with three other minors. A case of beer was in the car. William knew the beer was in the car, but denied that he was in possession of the beer. Subsequently, William was suspended from the football team under the following rule:

Any student whose habits and/or conduct, both in and out of school during the school year or during the summer months, are such as to make him unworthy to represent the ideals, principles and standards of his school and this Association shall be ineligible and it shall be the duty of the superintendent or his delegated principal to exclude him from interscholastic athletic participation until reinstated to eligibility by the local school administration. . . .

A boy shall lose at least 6 weeks of interscholastic competition if he is found guilty of possession, consumption or transportation of alcoholic beverages or dangerous drugs, or if he admits to a school administrator, the coach or an officer of the law that he has possessed or consumed such beverages or drugs. A boy is also subject to the same loss of eligibility if he is in a vehicle stopped by a law officer and alcoholic beverages and/or dangerous drugs are found in the vehicle.

The Iowa Supreme Court held that this rule was unlawful:

¹²⁶ *Id.* at 537.

¹²⁷ 197 N.W.2d 555 (Iowa 1972).

This particular rule is not confined to the consumption of beer or even to the acquisition, disposition, possession, or transportation of beer. It imposes ineligibility for mere occupation of a car containing beer with knowledge of the presence of the beer, when the beer is discovered by an officer. School authorities may make reasonable beer rules, but we think this rule is too extreme. Some closer relationship between the student and the beer is required than mere knowledge that the beer is there. The rule as written would even prohibit a student from accepting a ride home in a car by an adult neighbor who had a visible package of beer among his purchases. We realize that the rule has been made broad in an effort to avoid problems of proving a connection between the student and the beer, but rules cannot be so extended as to sweep in the innocent in order to achieve invariable conviction of the guilty. We hold the rule in question is invalid as unreasonable.

Practice Pointer: Consider the following definition of “possession” to attempt to include a student’s “constructive possession” of marijuana:

Possession includes having control of the substance and also includes being in the same area where the substance is present and no responsible adult is present and responsible for the substance. Possession includes situations where, for example:

- (1) Marijuana is in a vehicle in which the student is present. The student is considered to be in possession if the student is aware that the marijuana is in the vehicle, even though the student has not touched or consumed the marijuana; and
- (2) Marijuana is present at a party attended by the student. The student is considered to be in possession if the student is aware that marijuana is at the party and fails to immediately leave the party, even though the student has not touched or consumed the marijuana.

In these situations, a violation would not exist if the marijuana is in the control of a parent or guardian or other responsible adult such that students are not allowed to access the marijuana. A violation would also not exist if the student did not know or have a reasonable basis to know that marijuana would be present, and the student leaves the location where the marijuana is present as soon the student could safely do so. (Students are expected to leave immediately, but are not to do so in a manner that would endanger them. For example, a student should not leave in a car being driven by a person who has been drinking or consuming marijuana just to get away from the party immediately when there is no other way to get home. Instead, the student should call for a safe ride home and, while waiting, clearly distance himself from the marijuana).

C. DISCIPLINE FOR THE ODOR OF MARIJUANA

As the aforementioned cases suggest, the prohibition on the “possession” or “constructive possession” of marijuana can raise thorny legal issues with potentially unintended consequences. Specifically, if a student smokes marijuana at his house before coming to school, but does not physically bring any marijuana to school grounds, does the student “possess” or “constructively possess” marijuana? Does the marijuana in his body constitute “possession?” Fortunately, a school rule banning the odor of marijuana could altogether resolve these dicey questions.

In *Rinker v. Sipler*,¹²⁸ the assistant junior high school principal requested that Chad Rinker, a student, come to his office. Earlier that day, another student told the principal "a kid" had marijuana on his school bus. That student and Chad rode the same bus to school. Once in the principal's office, Chad denied that he had marijuana on the bus. During their conversation, the principal found Chad to be somewhat incoherent, he looked stoned and smelled of marijuana. The school resource officer also smelled marijuana on Chad. The principal told Chad that he smelled like marijuana and that, based on his smell, he was going to be searched. The SRO searched him. Nothing was found in the search. The school nurse then checked Chad's vital signs. The nurse observed that Chad looked stoned. The assistant principal then decided to suspend Chad for 10 days. However, the school district decided not to expel Chad. After this decision, Chad's parents filed suit against the district, alleging violations of the Fourth and Fourteenth Amendments and the common law torts of assault and battery.

The court granted summary judgment in favor of the district. Specifically, the court assessed the search of Chad under the *T.L.O.* standard. The court found that Chad's appearance of looking stoned and the odor of marijuana raised an “individualized suspicion that Chad may have been in possession and/or under the influence of marijuana.”¹²⁹ In fact, the court's findings relied almost exclusively on Chad's appearance and odor, reasoning that Chad's appearance and odor alone justified the search.

Similarly, in *Widener v. Frye*,¹³⁰ a high school teacher detected what she described as a strong odor of marijuana on the student while administering an examination in her classroom. The teacher then contacted the administration. A school security guard arrived at the classroom and instructed the student to proceed to the dean of students' office. The security guard, a former detective with the Cincinnati Police Department, also detected an odor of marijuana on the student. The security guard described the student as having dilated pupils and as acting "sluggish." When the student arrived at the dean's office, the dean noticed that the student reeked of marijuana and was "lethargic." The security guard searched the student's bag and jacket and “patted-down” the student underneath the student's arms. School officials ultimately decided not to suspend the student.

¹²⁸ 264 F. Supp. 2d 181 (M.D. Pa. 2003).

¹²⁹ *Id.* at 188.

¹³⁰ 809 F. Supp. 35, 35 (S.D. Ohio 1992).

The student filed suit against the school, arguing that the search violated his constitutional rights. The district court granted summary judgment in favor of the student, noting that the school officials “had reasonable grounds to believe that a search would turn up evidence that the [student] was violating the law or the rules of the school. Several of the [staff members] detected what they believed to be the odor of marijuana emanating from the [student’s] person.”

Practice Pointer: To discipline a student for the odor of marijuana, make a determination that the student’s odor of marijuana has caused a material and substantial disruption in the educational environment. The school can then impose discipline on the student. The school should then send the student home (assuming that the student has a safe method of transportation) with the qualification that, if the student obtains proof of his sobriety from a credible, third party testing service, the school *may* reconsider its disciplinary decision.

D. CASES INVOLVING MARIJUANA AND SPECIAL EDUCATION STUDENTS

As is often the case, disciplinary actions involving special education students should be given careful analysis. Numerous districts have litigated marijuana-related discipline imposed on special education students. Thus, even in scenarios when districts completely abide by the law, parents of special education students may nonetheless drag districts into the bruising and costly litigation process. In addition, as noted above, the introduction and acceptance (in some areas of the country) of medical marijuana may only further cloud the guidance of schools in this area. On this latter point, it is helpful to note that the IDEA does not prohibit a substance or drug “that is legally possessed or used under the supervision of a licensed health-care professional or that is legally possessed or used” under applicable federal law.¹³¹ In any event, at this point, court opinions provide good examples of how districts should handle special education students found to have violated the district’s marijuana rules.

1. INDIVIDUALS WITH DISABILITIES EDUCATION IMPROVEMENT ACT OF 2004 (“IDEA”), GENERALLY

The IDEA’s complex statutory language has resulted in extensive litigation relating to disciplinary actions against disabled children by public schools. Although this paper is intended for experienced practitioners, a quick summary of existing special education law might be helpful for readers less familiar with special education rules and nuances. Generally, Congress enacted the IDEA¹³² to ensure that children with disabilities receive a “free appropriate public education” (“FAPE”). A FAPE generally consists of special education and related services that are provided to children with disabilities at public expense and under public supervision in the preschool, elementary and secondary school setting. States and local education agencies carry out the provisions of the IDEA in order to receive funds from the federal government. Under the IDEA, a disabled student receives an “individualized education program” (“IEP”) created by a collaborative team, usually consisting of the student’s parents, teachers, school administrators, and/or others who know the student well.

¹³¹ 20 U.S.C. § 1415(k)(7)(B).

¹³² 20 U.S.C.S. §§ 1400 et seq.

Student discipline is strictly regulated under the IDEA. A disabled student can be suspended for up to 10 days without providing the child with an “alternative educational setting.”¹³³ Additionally, the school may suspend the student up to an additional forty-five days if the student brings drugs or weapons to school.¹³⁴ However, for a suspension beyond ten days, the school must provide an “interim alternative educational setting.”¹³⁵ The IDEA also permits a school to discipline a child with a disability for more than ten days as it would discipline a non-disabled child (including for reasons beyond strictly drugs or weapons), provided the disabled child's misbehavior was not a "manifestation" of his disability.¹³⁶ A school district's ability to "long-term suspend" a disabled student comes into play when a disabled student commits an offense that is not covered by the IDEA's forty-five day suspension provisions (that is, that do not involve drug or weapon possession), or in cases in which the forty-five day suspension is not adequate punishment.

In addition, on the issue of special education student discipline, whenever a disabled student's discipline results in the student being suspended for more than ten consecutive days, either pursuant to the IDEA or generally applicable school rules, a "change of placement" has occurred.¹³⁷ If a change of placement occurs, the child's parents must be notified, including written notice of their procedural rights, no later than the day the decision is made.¹³⁸ Within ten days of the change of placement, the IEP team must meet to determine if the student's behavior that violated the school code of conduct was “caused by, or had a direct and substantial relationship to, the child's disability,” or if it was “the direct result of the local educational agency's failure to implement the IEP.”¹³⁹ If the IEP team determines that either of the aforementioned causes occurred, then the student's behavior is considered a “manifestation” of his disability.¹⁴⁰ This determination affects whether or not a school can treat the disabled child as they would a non-disabled child under similar circumstances. Regardless of the manifestation determination, the IEP team must also perform a “functional behavior assessment” to develop “behavioral intervention services” aimed at “guiding the student towards more appropriate behavior.”¹⁴¹

Disabled students and their parents are also guaranteed a number of procedural rights intended to ensure their participation in the development of the child's program and placement, including a due process hearing to address “the adequacy of [the] child's IEP, the result of a manifestation hearing, or the school's decision to take disciplinary action.”¹⁴² The local education

¹³³ 20 U.S.C. § 1415(k)(1)(B).

¹³⁴ 20 U.S.C. § 1415(k)(1)(G)(ii).

¹³⁵ *Id.*

¹³⁶ 20 U.S.C. § 1415(k)(1)(C).

¹³⁷ 34 C.F.R. § 300.536.

¹³⁸ 20 U.S.C. § 1415(k)(1)(H).

¹³⁹ 20 U.S.C. § 1415(k)(1)(E)(i)(I) and (II).

¹⁴⁰ 20 U.S.C. § 1415(k)(1)(E)(ii).

¹⁴¹ 20 U.S.C. § 1415(k)(1)(D)(ii).

¹⁴² 20 U.S.C. 1415(f).

agency conducts an informal preliminary meeting prior to the hearing, but if the issue is not resolved within thirty days of initial complaint, the hearing will proceed.¹⁴³

From these rules, there have been many arguments made in favor of reducing or eliminating a special education student's discipline, including the following:

2. "THE STUDENT'S INVOLVEMENT WITH MARIJUANA WAS A MANIFESTATION OF HIS DISABILITY"

In *Farrin v. Me. Sch. Admin. Dist. No. 59*,¹⁴⁴ an eighth-grade student ("Jacob") "masterminded" a marijuana sale at school, including a middleman and several stages of interaction. When Jacob was later confronted about the incident by the school principal, he admitted his involvement and was immediately suspended for ten school days. His parents claimed that his involvement in the marijuana scheme was due to his "impulsivity," stemming from his disability. Subsequently, he was expelled by the school board for the remainder of the school year. When the board expelled the student for the remainder of the school year, the board "did not specifically vote to suspend Jacob under the IDEA's forty-five day suspension provision for drug offenders."¹⁴⁵ The student's parents were upset about the discipline and proved difficult in arranging for the manifestation determination meeting. The parents also demanded that the IEP team itself conduct the functional behavioral assessment, rather than an outside professional. The parents further requested two due process hearings—one to "contest Jacob's expulsion" and the other to "challenge the legality and results of the manifestation review," including its timing.¹⁴⁶ The Farrins primarily relied on Jacob's "impulsivity" as the reason for his drug sales and contended that said impulsivity was a manifestation of his disability.

After the hearing, the due process hearing officer concluded that the school district's determination that Jacob's actions were not related to his disability was proper, because there was no credible connection established "between Jacob's previously identified language disability and the 'impulsivity' that the Farrins insist Jacob exhibits."¹⁴⁷ The hearing officer also found that the IEP which the IEP team decided during Jacob's expulsion provided FAPE as he would still be able to "appropriately progress in the general curriculum."¹⁴⁸

The District Court of Maine affirmed the hearing officer's decision on appeal. "There is plainly no explicit provision [of the IDEA] . . . for when a manifestation review should be held for a child with a disability who commits a drug or weapon offense and whose placement is changed pursuant to generally applicable school disciplinary rules."¹⁴⁹ Further, the parents did not demonstrate "that drug selling and 'impulsivity' are related."¹⁵⁰ In contrast, the court found the

¹⁴³ *Id.*

¹⁴⁴ 165 F. Supp. 2d 37, 40 (D. Me. 2001).

¹⁴⁵ *Id.* at 46-47.

¹⁴⁶ *Id.* at 47-48.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 49.

¹⁵⁰ *Id.* at 52.

defendant school district's argument—"that the tendency to make impulsive decisions and the resolve to peddle narcotics at school are not at all synonymous"—convincing.¹⁵¹

3. "THE IDEA GUARANTEES A STUDENT'S RIGHT TO A FAPE"

In *Doe v. Board of Educ.*,¹⁵² John Doe ("John") was a 13-year-old freshman when he was accused of possession of a pipe and a small amount of marijuana at a freshman dance. John was a special education student who had been identified as having a learning disability. Based on John's possession of the marijuana and pipe, the Board of Education issued a ten-day suspension in accordance with its Code of Conduct and thereafter expelled John for the remainder of the fall semester. The Does were upset, demanding that John was entitled to a FAPE no matter what happened.

The Does requested a due process hearing, alleging that the Board's decision was incorrect. The procedural history of the case is complicated and not entirely relevant to the district court's ultimate conclusion: that the IDEA does not require the school district to continue to provide educational services to a student who has been expelled for reasons unrelated to his disability and that, by his actions, John forfeited his right to the "free appropriate public education" required by the IDEA.

The 7th Circuit heard the case and affirmed the district court:

When a child's misbehavior does not result from his handicapping condition, there is simply no justification for exempting him from the rules, including those regarding expulsion, applicable to other children. Therefore, when a handicapped child is properly expelled, the school district may cease providing all educational services—just as it could in any other case. To do otherwise would amount to asserting that all acts of a handicapped child, both good and bad, are fairly attributable to his handicap. We know that is not so.

...

The plain language of the IDEA does not, even implicitly, condition the receipt of IDEA funding on the continued provision of educational services to disabled students who are expelled . . . due to serious misconduct wholly unrelated to their disabilities."

...

The [IDEA] only require[s] the State to provide "all" handicapped children with the "right" (i.e., access) to a free appropriate public education, and, as with any other right, that right of access to educational services may be forfeited by criminal or other conduct antithetical to the right itself. . . . Neither the text of section 1412(1),

¹⁵¹ *Id.*

¹⁵² 115 F.3d 1273 (7th Cir. Ill. 1997).

the legislative history, nor the purpose of the IDEA even suggests, much less mandates with the clarity necessary to confirm that the Congress actually confronted and deliberately decided, that a state must continue to provide education services to disabled children after expulsion for misconduct unrelated to their disabilities.

4. “THE DISTRICT FAILED TO HOLD A MANIFESTATION CONFERENCE AFTER A 45-DAY SUSPENSION”

The case of *A.P. v. Pemberton Twp. Bd. of Educ.*,¹⁵³ provides a useful reminder of the importance of following the IDEA’s procedural requirements. The case centered on A.P., a multiply disabled high school student. One day at school, a student informed the school guidance counselor that A.P. had been smoking marijuana before school. The school's substance abuse counselor subsequently found A.P. in the school bathroom, appearing to be snorting a controlled substance. School administrators completed a substance abuse evaluation form, noting that A.P. had glassy eyes and a runny nose, and was nervous, uncooperative, and paranoid. A.P. refused to submit to a drug test, and, pursuant to the district’s policy, was suspended from school for ten days. The district held a manifestation conference and determined that the drug use and refusal to take the drug test was not a manifestation of A.P.'s disability.

Three days after A.P. returned from her suspension, a student observed A.P. smoking marijuana in the school bathroom. A security officer also observed A.P. smoking in the bathroom. A substance abuse evaluation revealed that A.P. was trembling, nervous and paranoid, had sudden outbursts, was crying, had drastic mood swings, was defensive, and was physically and emotionally out of control. A.P. again refused to submit to a drug test, and was suspended for twenty days in accordance with the district’s substance abuse policy.

Shortly thereafter, A.P.’s parents filed an expedited due process hearing request to request A.P.’s return to school and an injunction preventing the district from suspending Plaintiff for drug use in the future. A manifestation conference was scheduled, but was adjourned because A.P.'s mother refused to participate. The conference was not rescheduled.

The hearing officer determined that the district erred in removing A.P. from her educational placement for over ten days without providing a manifestation determination. A.P.’s parents filed suit for attorney fees and costs as a prevailing party pursuant to 20 U.S.C. § 1415. The district cross appealed, challenging the hearing officer’s decision.

The district court found itself in the awkward position of agreeing with both sides. On the one hand, the court agreed with A.P.’s parents that the IDEA required the district to hold a manifestation conference after the school suspended A.P. for more than ten days. However, the court also agreed with the district that, under the IDEA’s provision on suspensions of up to 45 days for drugs or weapons, the suspension would not otherwise be subject to the results of the manifestation conference. “Consequently, while [the district] erred in failing to make a

¹⁵³ 2006 U.S. Dist. LEXIS 32542 (D.N.J. May 15, 2006).

manifestation determination within ten days of A.P.'s suspension, the outcome of the hearing would have had no bearing on A.P.'s right to return to her school placement.”¹⁵⁴

In adopting a “no harm-no foul” outcome, the district court declined to award any damages, fees or costs to A.P.’s parents, reasoning:

Here there is no indication that [the district]'s failure to provide a manifestation hearing within ten days of [A.P.]'s suspension “caused a deprivation of educational benefits.” . . . Under 20 U.S.C. § 1415(k)(1)(G), [the district] could have suspended [A.P.] for up to forty-five days for using drugs at school, regardless of whether her drug use was a manifestation of her disability. [A.P.]'s twenty day suspension therefore could not have amounted to a wrongful removal from educational placement, because the suspension would have remained in force without regard to the outcome of a manifestation hearing.

Nothing in the record indicates any harm to A.P. ensuing from [the district]'s failure to provide a timely manifestation hearing. A.P. has therefore failed her burden of establishing any injury that would entitle her to relief.¹⁵⁵

Although the district ultimately prevailed, the district would have been better off holding the manifestation conference, regardless of whether A.P.’s mother attended.

Practice Pointer: In instances when the IDEA requires that a meeting occur, a district should move forward with the meeting, even if a student’s parent refuses to attend the meeting. A district should not put itself in a position of failing to comply with the IDEA by virtue of a parent’s unilateral “veto.” Instead, if the parent has notice of the meeting, but chooses against attending, the district should move forward with the meeting.

5. “THE DISTRICT IS DISCRIMINATING AGAINST THE STUDENT BASED ON HIS DISABILITY”

In *Benedict v. Cent. Catholic High Sch.*,¹⁵⁶ Timothy, a high school student, was a disabled student, having a specific learning disability. Timothy and his mother filed suit alleging disability discrimination under Section 504 of the Rehabilitation Act, as well as state law.¹⁵⁷

During the second semester of Timothy’s second year, Timothy’s parents and the school were unable to agree on an IEP for Timothy. Timothy’s parents believed that the disagreement stemmed from the school’s desire to avoid having to provide any special education services to Timothy. Prior to the disagreement over Timothy’s IEP, Timothy “began experiencing problems

¹⁵⁴ *Id.* at *9-10.

¹⁵⁵ *Id.* at *12-13.

¹⁵⁶ 511 F. Supp. 2d 854 (N.D. Ohio 2007).

¹⁵⁷ 29 U.S.C. § 794.

unrelated to his classes.”¹⁵⁸ Specifically, Timothy admitted that he accepted marijuana from Fred Brown (another student) after Brown had pressured him to help sell the drugs. A couple of hours after taking the marijuana, however, Timothy decided he made a mistake and claimed to have thrown away the drugs. Then, when Timothy began receiving threats from Brown to produce money for the marijuana, Timothy went to his mother for help. Subsequently, Timothy’s mother informed the high school dean of the threats made in relation to the marijuana. At that time, the dean initiated disciplinary proceedings against both students for violation of the school’s drug policy. Timothy’s mom reported her concerns to the administration, and the administration’s disciplinary proceedings were instituted after the aforementioned disagreements over Timothy’s IEP. As a result of the disciplinary proceedings, Brown and other students involved in the purchasing of marijuana were expelled.

The disciplinary actions against Timothy included an immediate two-day suspension and, after a hearing before a disciplinary board, a recommendation for expulsion pursuant to the school’s drug policy. On appeal, the administration decided that Timothy should be allowed to remain in school until the end of the school year. At the end of Timothy's second year, his mother executed a voluntary withdrawal form and did not attempt to re-enroll him for the following school year.

Subsequently, Timothy’s mother, on his behalf, filed suit against the school, alleging disability discrimination. Specifically, Timothy’s mother claimed that:

Plaintiffs claim that when an agreement could not be reached regarding an update to Timothy's annual IEP, [the school] discriminated against Timothy by refusing to accommodate his learning disability. Furthermore, Plaintiffs claim that when they insisted on accommodation, [the school] discriminated against Timothy by precluding him from re-enrolling for his junior year. Conversely, [the school] claim[s] that any action taken with regard to Timothy's enrollment at [the school] resulted from his violation of the school's drug policy, and that Plaintiffs voluntarily withdrew Timothy and did not seek re-enrollment. Plaintiffs claim that [the school]'s reference to the drug policy violation is a pretext for discrimination.

The court determined that, in order to advance, the plaintiffs must establish a prima facie case of discrimination under Section 504. The court found that the plaintiffs met this test by showing that the district was “reluctant or opposed to accommodating [Timothy’s] learning disability when they could not reach an agreement on re-enrollment accommodation at [the school] when Plaintiffs insisted on accommodation with regard to the [upcoming] school year[.]”¹⁵⁹

¹⁵⁸ 511 F. Supp. 2d at 856.

¹⁵⁹ 511 F. Supp. 2d at 859.

The burden then shifted to the school to articulate a legitimate, non-discriminatory reason for its decision. The school met its burden by proving that Timothy was recommended for expulsion in accordance with the school's drug policy and that the other students involved in this incident were expelled for violating the drug policy.

Finally, the burden rested with the plaintiffs to show that the school's explanation was not the true reason for its actions, but that it was instead a pretext for discrimination. Simply put, the plaintiffs could not meet this burden. The fact that all other similarly situated students (including those without disabilities) were expelled for violating the school's drug policies convinced the court that the decision to discipline Timothy was not made for discriminatory reasons.

6. "THE DISTRICT VIOLATED THE IDEA'S STAY-PUT PROVISIONS"

The IDEA's "stay-put" provision is perhaps one of the common points of litigation in these cases. As way of background, during the pendency of any proceedings conducted pursuant to 20 U.S.C. § 1415 of the IDEA, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement.¹⁶⁰ This has become known as the "stay-put provision" of the IDEA.¹⁶¹

The stay-put provision is often litigated, in part, due to the statute's fee-shifting framework, as was the case in a 7th Circuit case.¹⁶² In that case, Nathan, a special education student, was expelled for possession of marijuana on school grounds. The parents appealed the decision, eventually reaching the district court. At the district court level, Nathan asked for attorneys' fees under the IDEA, claiming that their invocation of "stay-put placement"—which allowed Nathan to stay in school until the final disposition of the matter—entitled them to such an award. The district court denied the request for relief, holding that Nathan was not the prevailing party.

The 7th Circuit agreed with the district court. The 7th Circuit noted that:

[To receive an award of attorneys' fees under the IDEA] [t]he relief granted must "materially alter[] the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." . . . The relief the Parents received, and the basis of their claim here, was the application of the stay-put provision. They argue that, because the [] hearing officer granted the emergency order of stay-put placement and because Nathan stayed in school until he graduated, without expulsion, they are the prevailing party. However, this de facto "win" does not rise to the level of an enforceable judgment, consent decree, or settlement that materially alters the relationship between the parties. The relief the Parents received was only interim in nature, and this circuit

¹⁶⁰ 20 U.S.C. § 1415(j).

¹⁶¹ See, e.g., *St. Tammany Parish Sch. Bd. v. Louisiana*, 142 F.3d 776 (5th Cir. 1998) (discussing the liability for failing to follow the IDEA's stay-put provision).

¹⁶² *Board of Educ. v. Nathan R.*, 199 F.3d 377 (7th Cir. Ill. 2000).

previously has held that the receipt of interim relief does not qualify a party for attorneys' fees. Indeed, we also have stated explicitly that invocation of the stay-put provision of the IDEA does not entitle the party to attorneys' fees.¹⁶³

The 7th Circuit's rationale was followed in a recent case from the 5th Circuit Court of Appeals.¹⁶⁴

Practice Pointer: In dealing with a special education student being suspended or expelled for marijuana-related reasons, be very diligent in advising a district as it relates to the IDEA's "stay-put" provision. By failing to abide by the "stay-put" provision, a school district could be forced to pay tens of thousands of dollars in attorneys' fees.

7. "THE IDEA'S 'STAY-PUT' PROVISION VIOLATES THE EQUAL PROTECTION CLAUSE"

Of note, at least one plaintiff has alleged that the IDEA's provisions requiring that a school continue providing education to a disabled child during a suspension or expulsion violates a non-disabled student's right to equal protection. In *RM v. Washakie County Sch. Dist. No. One*,¹⁶⁵ the Supreme Court of Wyoming evaluated this claim. The plaintiff (who was not disabled), another non-disabled student and a disabled student were all caught selling marijuana on school grounds. All three students were expelled for one year. The disabled student continued to receive the educational services mandated by his IEP.

After determining that the school's actions must be viewed under the standard of strict scrutiny, the Wyoming Supreme Court held that "[t]he fundamental right to an opportunity for an education did not guarantee that a student could not temporarily forfeit educational services through his own conduct."¹⁶⁶ Further, the court concluded that the state had a compelling interest "in providing for the safety and welfare of its students," and "temporary deprivation of constitutional rights does not require the protection that a permanent deprivation would."¹⁶⁷ The court went on to explain that "[t]he history of discrimination and inadequate educational services for disabled children, compounded with the hardship disabled children face in overcoming their disability presents a compelling interest. . . Providing services to a disabled student covered by IDEA, without providing the same services to non-disabled students is narrowly tailored in rectifying the long history of disparity that existed for disabled students."¹⁶⁸ As such, the *RM* court found no equal protection violation.

¹⁶³ *Id.* at 382.

¹⁶⁴ *Tina M. v. St. Tammany Parish Sch. Bd.*, 816 F.3d 57 (5th Cir. 2016).

¹⁶⁵ 2004 WY 162 (December 10, 2004).

¹⁶⁶ *Id.* at ¶ 1.

¹⁶⁷ *Id.* at ¶ 16.

¹⁶⁸ *Id.* at ¶ 28

E. STUDENT SEARCHES AND STUDENT TRIPS

For student trips, it is essential that schools require students and parents to sign a consent form, agreeing to allow the trip supervisors to search a student's possessions. This point is best made in a New York case involving students staying in hotel rooms.¹⁶⁹ In that case, a class took a school-sponsored trip to Disney World in Florida. Several parents attended the trip to chaperone. Prior to leaving for Florida, students were informed that their hotel rooms may be subject to a search. The students also signed pledges to refrain from consumption of drugs and alcohol on the trip. During the trip, one chaperone smelled marijuana in the hotel hallway. The chaperone then entered each student's hotel room and searched for marijuana. The chaperone's search revealed marijuana in one student's room and alcohol in another student's room. The students filed suit, alleging that the chaperone's search of their rooms was not constitutional. Applying the *TLO* standard, the court quickly dismissed the students' arguments and upheld their discipline. In so holding, the court held that:

The Fourth Amendment rules for students, clearly do not abate when the students leave school property. Indeed, it is clear that "government's need for effective methods to deal with breaches of public order," is even greater beyond the closely supervised school premises.

In addition, in *Desilets v. Clearview Regional Bd. of Educ.*,¹⁷⁰ the court upheld the school's search of a student's handbag before a field trip, noting that "parental permission slips specifically noted search policy."

F. STUDENT DISCIPLINE FOR MARIJUANA OFF OF SCHOOL GROUNDS

A number of states have laws that prohibit a school district from imposing a certain level of discipline for conduct that occurs *off of* school grounds.¹⁷¹ The following cases illustrate how difficult this fine line can be from a school enforcement perspective:

1. MARIJUANA POSSESSION OFF SCHOOL GROUNDS

In *J.P. v. Millard Pub. Sch.*,¹⁷² a student ("J.P.") drove his truck to his high school. The majority of students parked their vehicles on school property, but about 15 percent parked along a bordering street.¹⁷³ On the day in question, J.P. parked on the bordering street, across the street from the high school. That morning, J.P. tried to leave the high school building to access his vehicle, but a hall monitor prevented J.P. from leaving the school. Later that day, a parking lot security guard saw J.P. walk from the school building with a female student to J.P.'s car. The security guard questioned J.P. When J.P. re-entered the building, the hall monitor questioned why

¹⁶⁹ *Rhodes v. Guarricino*, 54 F. Supp. 2d 186 (S.D.N.Y. 1999).

¹⁷⁰ 627 A.2d 667 (1993).

¹⁷¹ See, e.g., N.J.A.C. 6A:16-7.6; Neb. Rev. Stat. § 79-267; Indiana Law IC 20-33-8-15.

¹⁷² 285 Neb. 890 (2013).

¹⁷³ *Id.* at 893.

J.P. was outside. J.P. responded that the security guard gave him permission. The hall monitor then asked the security guard, who denied giving J.P. permission to leave the building.

After the hall monitor reported J.P.'s conduct to an assistant principal, the assistant principal met with J.P. The assistant principal became suspicious and decided to search J.P.'s person and his truck. When the assistant principal and J.P. reached the truck, J.P. stood in front of the driver's side door and refused to allow the search, but eventually, he moved away from the door. The search of J.P.'s truck revealed drug paraphernalia and contraband.

Subsequently, the administration recommended that J.P. be suspended. The hearing officer found that a 19-day suspension was appropriate. The hearing officer also noted that:

"[t]echnically, the search of the [truck] by the assistant principal was beyond school jurisdiction, since the school boundary, in this situation, ended at the curb."

However, the hearing officer found that the search was not simply justified, but required, based on the truck's proximity to the school and the school's obligation to protect the learning environment.¹⁷⁴

The student appealed the suspension to the Nebraska Supreme Court. On appeal, the Nebraska Supreme Court held in favor of the student, concluding that there is no "right of school officials to conduct off-campus searches of a student's person or property which are unrelated to school-sponsored activities. To the contrary, courts have held that school officials lack authority to conduct such searches."¹⁷⁵

2. MARIJUANA SALE OFF SCHOOL GROUNDS

*Giles ex rel. Giles v. Brookville Area Sch. Dist.*¹⁷⁶ provides a different twist on *J.P. v. Millard*. In *Giles*, while at school, Giles, a ninth grade student, offered to sell marijuana to another student. The other student agreed. The students arranged for the sale to occur at Giles' home. Subsequently, on school property but unknown to Giles, the other student resold some of the marijuana to two other students who were ultimately caught smoking on campus. The investigation ultimately revealed Giles as the original source of the marijuana. Giles confessed.

The school board held a hearing on Giles' disciplinary matter. The board found that, although the ultimate sale between Giles and the other student occurred off school premises, Giles facilitated the resale on-campus and was an accessory thereto, and Giles should be expelled for the remainder of the current and next academic years. Giles then filed suit.

¹⁷⁴ *Id.* at 896.

¹⁷⁵ *Id.* at 901.

¹⁷⁶ 669 A.2d 1079 (Pa. Comm. Ct. 1995).

The district court held that the board could not discipline Giles for his off-campus conduct. On appeal, the Commonwealth Court of Pennsylvania reversed the district court's conclusion. In doing so, the high court reasoned that Giles could be disciplined for the conduct that occurred on school grounds:

Giles' offer to sell marijuana to [the other student] and [the other student]'s acceptance thereof in school constituted "conduct . . . during such time as they were under the supervision of the board of school directors and teachers," . . . and, therefore, subject to the District's "reasonable rules and regulations Certainly the transaction between Giles and [the other student] while in their German class on school property was an integral part of the subsequent sale and distribution of the drugs at Giles' home. Accordingly, we conclude that the Board acted within its discretion in interpreting its policy prohibiting the sale of drugs on school property as also proscribing the agreement for the sale of drugs on school property, and that the Board had the authority to impose sanctions on Giles in the instant case."¹⁷⁷

Practice Pointer: Your state law may prohibit you from disciplining a student for off-campus conduct. A crafty student may realize this and, like Giles, plot to sell marijuana off of school grounds. As such, the *Giles* case highlights a useful rule: students can be disciplined for marijuana-related activities planned on school grounds. A school board policy or rule to this effect could be helpful for a district like that in *Giles*.

G. A SCHOOL'S ASSURANCE OF NO DISCIPLINE

Schools have a strong interest in preventing marijuana from reaching school grounds. However, as *Krawez v. Stans*¹⁷⁸ shows, school administrators must be careful in handling investigations into reports of marijuana. The case involved two students who were found to have used marijuana on campus. When the school received information that students might have been using marijuana on campus, school investigators assured the plaintiff-students at the beginning of the interview that they could be "frank" and "speak freely" since nothing they said would be used against them. The investigators did not distinguish between potential criminal penalties and possible school disciplinary proceedings. The investigators further noted that only a failure to cooperate and speak truthfully would result in a report to the school. The investigator later confirmed that nothing that was said "would leave the room."¹⁷⁹ The plaintiffs then admitted to using marijuana on school grounds.

¹⁷⁷ *Id.* at 1082.

¹⁷⁸ 306 F. Supp. 1230 (E.D.N.Y. 1969).

¹⁷⁹ *Id.* at 1232.

The plaintiffs were formally suspended because they admitted to using marijuana on campus. On appeal, the board issued its findings that the plaintiffs had used marijuana. The board recommended that both students be dismissed from the school. The Superintendent, acting upon the board's recommendation, dismissed the plaintiffs from the school.

On appeal to the federal district court, the district court determined that the school was precluded from disciplining the students. The court reasoned that the school's assurance of secrecy resulted in a contract. "As agents, the questioners were authorized to make promises to the students concerning the use of their statements. They told plaintiffs that if they spoke freely nothing they said would be used against them. Plaintiffs, by speaking freely, accepted this offer, and a contract was made. The [school] is bound by this agreement. It cannot use as evidence in disciplinary proceedings admissions made by the plaintiffs to the agents."

The facts presented in the *Krawez* case do not explain why the questioners promised the students that their confessions would not be used against them. This case provides a helpful reminder that, if a school undertakes an investigation into potential disciplinary conduct, school officials must be careful in offering "concessions" to students who participate in the interviews. If the school intends on disciplining a student involved in inappropriate conduct, the school should, at the very least, avoid any assurances or inferences of immunity in favor of the student.

H. SCHOOL SEARCH OR POLICE SEARCH?

A school district has a strong interest in ensuring that any search of a student complies with the applicable legal standards, not only to avoid exposure to possible liability for an unlawful search, but also to ensure that discipline imposed on a student found to be in possession of marijuana will be upheld in a subsequent legal challenge. To this end, there has been some confusion as to when a search of a student constitutes a search by school officials, as opposed to a search by police officers. As a general rule, the mere fact that a police officer is present during a school-initiated search does not make the search a police search.¹⁸⁰ The following cases help illustrate an exception to this general rule.

The case of *M.J. v. State*¹⁸¹ began when three high school students told the assistant principal that they had seen M.J. with a bag of marijuana in his underwear. The assistant principal called the police. Officer York then came to the assistant principal's office at the school. M.J. was called to Mr. Black's office. The assistant principal, along with Officer York, questioned M.J. about his marijuana possession for ten minutes. During this questioning, Officer York told M.J. that he would be "taken down" and arrested, and that his uncle, a police officer, would be called. M.J. said, "Don't call my uncle," and at or about the same time, he indicated that the assistant principal could search him. Immediately thereafter, M.J. produced a marijuana cigarette from his coat pocket. Officer York then told M.J. to turn over any other marijuana that M.J. possessed. The assistant principal told M.J. to pull down his trousers. M.J. did so. The principal then told him to "go further," and M.J. pulled a bag of marijuana from his underwear. "During this time, Officer York strongly suggested that the appellant turn over the cannabis."¹⁸²

¹⁸⁰ Rapp, 3-9 Education Law § 9.08.

¹⁸¹ 399 So. 2d 996 (Fla. Dist. Ct. App. 1981).

¹⁸² *Id.* at 997.

Ultimately, M.J. filed a motion to suppress the marijuana. The trial court denied the motion, finding that the appellant intelligently and voluntarily consented to producing the marijuana cigarette. The court also found that, even without consent, there was a reasonable suspicion to justify a warrantless search, and thus, all of the marijuana was properly admissible as evidence. M.J. appealed to the Florida Court of Appeals.

The appeals court concluded that M.J. did not voluntarily consent to the search. The court reasoned that M.J. relented only after he was threatened with his arrest and contacting his uncle. The court further held:

In the case at bar, probable cause was required for Officer York's search of [M.J.]. Such cause was lacking. . . . Here, the record does not show that Officer York indicated or knew that [the assistant principal] saw the cannabis or had good reason to believe that [M.J.] had it. The only information relayed by [the assistant principal] to Officer York was that a student had "some marijuana on his person." This statement, without any elaboration, cannot be the basis for probable cause on the part of Officer York.

There was no probable cause for the police search which produced the cannabis cigarette. That search was unlawful, and the bag of cannabis was procured as a direct result of the search.

The fatal flaw in *M.J.* centered on the fact that the court deemed that the police officer conducted the search. Had the assistant principal conducted the search, the marijuana would, in all likelihood, not have been suppressed.

I. RECENT STUDENT STRIP SEARCH CASE

The United States Supreme Court's *Redding* decision addressed the issue of strip searches in school. However, a July 29, 2016, decision from the 11th Circuit Court of Appeals suggests that strip searches may still be percolating in the lower courts. In *D.H. v. Clayton Cty. Sch. Dist.*,¹⁸³ a student informed a school resource officer that D.V., a 13-year-old student in the 7th grade, possessed marijuana and was passing it around to other students. D.V. had been suspected of bringing drugs and weapons to school on several prior occasions. The assistant principal retrieved D.V. from class and searched his book bag. No marijuana was found in D.V.'s book bag. Instead, D.V. said that R.C. had marijuana. The assistant principal retrieved R.C. from class and searched his book bag. No marijuana was found in R.C.'s book bag. Instead, R.C. said that T.D. had marijuana. The assistant principal retrieved T.D. from class and told him, "[y]ou know what we're looking for so you might as well just give it to us." In response, T.D. voluntarily unbuttoned his pants, faced away and pulled a small plastic bag containing marijuana out of what appeared to be his underpants.

¹⁸³ Case Number 14-14960 (11th Cir. July 29, 2016).

The assistant principal was surprised to see T.D. pull marijuana from his underpants, so she called a male assistant principal to become involved. During this time, the SRO found two blunts and a small bag of marijuana in R.C.'s sock. After T.D. and R.C. were found to possess marijuana, the assistant principal and SRO determined that they should search D.V. As such, D.V. removed his shoes and socks, removed his polo shirt, turned his pockets inside-out, and pulled down his pants. At that point, D.V. was standing in an undershirt and basketball shorts. The male assistant principal then instructed D.V. to pull down his shorts and pull the elastic band of his underpants away from his person, which D.V. did, briefly exposing his genitals to the male assistant principal. They found no drugs on D.V.'s person. However, the assistant principal performed another search of D.V.'s backpack and found a small mint canister containing marijuana. After the marijuana was discovered in D.V.'s backpack, D.V. stated that D.H., his 7th grade classmate, had marijuana. R.C. denied that D.H. had marijuana.

D.H. was brought into the office. The assistant principal searched D.H.'s backpack, instructed him to take off his shoes, empty his pockets, take off his pants. The parties disputed what, exactly, happened next. D.H. contended that he was instructed to then pull his underwear down to his ankles so that he was completely nude. During this search, the other students found with marijuana were present. D.H. further alleged that he was then instructed to "bend over" for "a little bit." The assistant principal testified that he only instructed D.H. to pull the front waistband of his underpants down and away from his person, and that was all D.H. did. After no drugs were found, D.H. was instructed to put his clothes back on. No marijuana was found on D.H.

D.H. filed suit. On appeal, the 11th Circuit noted that "there is no question that marijuana, a controlled substance, presents a greater danger to school safety than even a 'prescription strength' ibuprofen pill [as was the case in *Redding*]." The 11th Circuit held that the search of D.H. was reasonable in light of the drugs found on other students and at least one other student implicating D.H. However, the 11th Circuit concluded that a jury needed to decide whether the assistant principal instructed D.H. to remove his underpants. If the jury concluded that he did, the 11th Circuit concluded that such action was "unconstitutionally excessive in scope." However, the 11th Circuit also reasoned that if the assistant principal only asked D.H. to pull the waistband of his underpants away from his person, then the assistant principal cannot be held liable.

Aside from its holding on the legal issues raised in the case, the *D.H.* court sent a clear warning to school administrators and attorneys across the country:

We do pause to note, however, that there will rarely, if ever, be a circumstance in which performing a strip search of a student in front of his or her peers, whether involving partial or full exposure of intimate parts, will bear a rational relationship to the purpose of the search itself. As such, it is best practice for school administrators to perform student strip searches of any kind outside the presence of other students.

Similarly, we can think of no circumstance where it would be permissible for a school administrator to escalate a strip search of a student by forcing him to remove his underwear when—as here—due to the design of the underwear, an exhaustive search could be performed through [pulling out the underwear away from his person].

Practice Pointer: If a school official wants to perform a strip search on a student, advise against it. If there is a credible belief that student has drugs on his or her person, call the police.

IV. PERSONNEL ISSUES

A. IS THERE A DUTY TO ACCOMMODATE?

Must a school district accommodate an employee’s marijuana use? Does it matter whether the “use” is for recreational or medicinal purposes? What if the employee only desires to use marijuana during off-duty (or after work) time? At least for now, the answer to these questions is “it depends.” However, as a general matter, courts across the country have mainly rejected an employee’s demands for accommodating marijuana usage.

1. CHALLENGES UNDER THE AMERICANS WITH DISABILITIES ACT

A. REFUSING TO ACCOMMODATE UNDER THE ADA

Over the past several years, plaintiffs have proffered a number of creative arguments to bring medical marijuana use under the protections of anti-discrimination laws. For instance, in *Barber v. Gonzales*,¹⁸⁴ the plaintiff alleged that “Congress intended to limit the application of the Controlled Substances Act to non-disabled individuals who engage in unlawful use of drugs and, thus, Congress intended the Americans with Disabilities Act to protect individuals utilizing drugs for medical purposes.” Although the court ultimately dismissed the plaintiff’s claim, the court appeared to struggle with the decision. Specifically, the *Barber* court acknowledged that the plain language of the ADA “appears to support [the plaintiff’s] position that he had a right under the ADA to possess medical marijuana if prescribed by a Washington physician.” This provision of the ADA referenced by the court provides that:

“the term ‘individual with a disability’ does not include an individual who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.”¹⁸⁵

The ADA defines the term “illegal use of drugs” as:

“The use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act [21 U.S.C.A. §801 et seq.]. Such term *does not include the use of a drug taken under supervision by a licensed health care professional*, or other uses

¹⁸⁴ 2005 U.S. Dist. LEXIS 37411 (E.D. Wash. July 1, 2005).

¹⁸⁵ 42 U.S.C. §12210(a).

authorized by the Controlled Substances Act [21 U.S.C.A. §801, et seq.] or other provisions of Federal law.”¹⁸⁶

As the *Barber* court noted, the emphasized provision of the ADA seems to conclude that the consumption of marijuana, if taken under the supervision of a licensed health care professional, is not an “illegal use of drugs.” If the use of marijuana is not an illegal use of drugs, the ADA would arguably protect an employee’s use of medical marijuana. Ultimately, the *Barber* court sidestepped this otherwise-problematic language by referring to the second part of the “illegal use of drugs” statute: “*or other uses* authorized by the Controlled Substances Act . . .”¹⁸⁷ Under the Controlled Substances Act, medical marijuana may only be used under a strictly regulated research program.¹⁸⁸ The court also reasoned that “the purpose of the ADA is not to expand the scope of permissible drug use, but rather to eliminate the discrimination against individuals with disabilities who lawfully utilize prescription medicines in connection with their disability.”¹⁸⁹

Subsequently, in *James v. City of Costa Mesa*,¹⁹⁰ the 9th Circuit upheld the *Barber* court’s rationale and decision.

B. REFUSING TO ACKNOWLEDGE AN EMPLOYEE AS “DISABLED” UNDER THE ADA

In *Washburn v. Columbia Forest Prods.*,¹⁹¹ the employer’s workplace policy prohibited employees from reporting to work with drugs (defined as “all forms of narcotics, depressants, stimulants, hallucinogens, and cannabis, whose sale, purchase, transfer, use or possession is prohibited by law”) in their system.¹⁹² One day at work, the plaintiff-employee tested positive for marijuana. The employee explained that he suffered from diagnosed muscle spasms and used medical marijuana to assist him in sleeping. The employee claimed that the medical marijuana was more effective than his previous prescription medications.

In response to the employee’s positive test, he asked his employer to administer a different drug test—one that tested whether the employee’s marijuana in his system rendered him as “impaired.” The employer refused to implement the suggested test and terminated the plaintiff’s employment. The employee sued, claiming the employer failed to accommodate the employee’s reasonable request.

¹⁸⁶ 42 U.S.C. §12210(d)(1) (emphasis supplied).

¹⁸⁷ *Id.*

¹⁸⁸ 21 U.S.C. §§ 822-23, 844(a), & 872.

¹⁸⁹ *Barber*, 2005 U.S. Dist. LEXIS 37411 at *5.

¹⁹⁰ *James v. City of Costa Mesa*, 700 F.3d 394, 403 (9th Cir. 2012) (“We recognize that the federal government’s views on the wisdom of restricting medical marijuana use may be evolving. . . . But for now Congress has determined that, for purposes of federal law, marijuana is unacceptable for medical use. . . . We decline to construe an ambiguous provision in the ADA as a tacit qualifier of the clear position expressed in the CSA. Accordingly, we hold that federally prohibited medical marijuana use does not fall within § 12210(d)(1)’s supervised use exception.”).

¹⁹¹ 340 Or. 469 (2006).

¹⁹² *Id.* at 472-73.

The Oregon Supreme Court held that the employee was not “disabled” and, as a result, could not claim protections under Oregon’s anti-discrimination law.¹⁹³ The court explained that a “disabled person” is someone having an impairment that “substantially limits” a major life activity. The court noted that “the legislature did not intend to categorize an impairment as substantially limiting if, for example, *medication could ameliorate the effects of impairment* such that the individual would be capable of performing the otherwise affected major life activity.”¹⁹⁴ The court also found persuasive the statute’s use of the term “substantially limits,” which led the court to conclude that the “legislature’s use of present tense indicates that, to be considered disabled under the statutory definition, a person must possess a substantial limitation that operates *presently*, as opposed to potentially or hypothetically.”¹⁹⁵ The court held that the statute’s “present” requirement undermines the employee’s claim that he *would have* a substantial limitation if he was forced to stop consuming medicinal marijuana.

Practice Pointer: The *Washburn* case highlights a workplace policy that all school districts should adopt: employees shall not have any trace of marijuana in their system when they report for work. Although (as we will discuss later) districts may face challenges enforcing this rule, districts are better off with this bright-line rule on its books rather than not having such a policy and wishing they did.

C. CALIFORNIA’S FAIR EMPLOYMENT AND HOUSING ACT

Since the state of California contains many of the largest school districts in the nation, it is worthwhile discussing California’s state employment statute and the Compassionate Use Act (California’s law “legalizing” marijuana)¹⁹⁶. In *Ross v. RagingWire Telecommunications, Inc.*,¹⁹⁷ the California Supreme Court rejected a plaintiff’s claim that he was terminated from his employment in violation of the California Fair Employment and Housing Act (“FEHA”). The case involved a plaintiff who suffered a back injury while serving in the United States Air Force, and was “a qualified individual with a disability under the FEHA.”¹⁹⁸ Apparently, the plaintiff tried several medications in an attempt to obtain relief for his back pain, but none were successful. As a result, the plaintiff turned to marijuana on his physician’s recommendation.

When the plaintiff began working at his new job, his employer required him to take a drug test. On the same date that the plaintiff took the drug test, the plaintiff gave the testing facility a copy of his physician’s recommendation for marijuana. Despite the physician’s recommendation, the employer terminated the plaintiff. The plaintiff then sued under the FEHA and as a violation of public policy.

¹⁹³ Oregon’s anti-discrimination law is patterned after the ADA. “ORS 659A.112 to 659A.139 shall be construed to the extent possible in a manner that is consistent with any similar provisions of the federal Americans with Disabilities Act of 1990, as amended.” *Id.* at 477.

¹⁹⁴ *Id.* at 478 (emphasis supplied).

¹⁹⁵ *Id.* (emphasis in original).

¹⁹⁶ Cal Health & Safety Code § 11362.5.

¹⁹⁷ 42 Cal. 4th 920, 70 Cal. Rptr. 3d 382, 174 P.3d 200 (2008).

¹⁹⁸ *Id.* at 924.

Under the FEHA, “it shall be an unlawful employment practice ... (a) For an employer, because of the . . . physical disability [or] medical condition . . . of any person, to refuse to hire or employ the person . . . or to bar or to discharge the person from employment . . .” An employer may discharge or refuse to hire a person who, because of a disability or medical condition, “is unable to perform his or her essential duties even with reasonable accommodations.”¹⁹⁹ The FEHA thus inferentially requires employers in their hiring decisions to take into account the feasibility of making reasonable accommodations.²⁰⁰

The *Ross* court did not buy the plaintiff’s theory: “No state law could completely legalize marijuana for medical purposes because the drug remains illegal under federal law . . . even for medical users.”²⁰¹ Further, the “FEHA does not require employers to accommodate the use of illegal drugs.”²⁰² Finally, the court held that an employer could require a prospective employee to submit to a marijuana test *prior to* beginning his employment and refuse to hire the employee if the employee did not pass the drug test.²⁰³

It is also worth noting that, after the *Ross* decision, the California Legislature enacted Cal Health & Safety Code § 11362.785(a), which provided that “Nothing in this article shall require any accommodation of any medical use of marijuana on the property or premises of any place of employment or during the hours of employment or on the property or premises of any jail, correctional facility, or other type of penal institution in which prisoners reside or persons under arrest are detained.” Note, however, that this statute does not make any reference to marijuana use off of an employer’s property or premises or outside of the hours of employment.

D. IS A PHYSICIAN ACTUALLY SUPERVISING THE MARIJUANA USE?

In certain cases, an arm of a state has advocated for marijuana use on behalf of an employee. In one case, *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*,²⁰⁴ the plaintiff consulted with a physician for the purpose of obtaining a registry identification card under the Oregon Medical Marijuana Act. (Under the Oregon Medical Marijuana Act, medicinal marijuana is not treated as criminal activity under Oregon state law.) In 2003, the employer hired the plaintiff on a temporary basis. While working for the employer, the employee used medical marijuana one to three times per day, although not at work.

¹⁹⁹ *Id.* at 925-926.

²⁰⁰ *Id.* at 926.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.* (“In conclusion, given the Compassionate Use Act's modest objectives and the manner in which it was presented to the voters for adoption, we have no reason to conclude the voters intended to speak so broadly, and in a context so far removed from the criminal law, as to require employers to accommodate marijuana use. As another court has observed, ‘the proponents' ballot arguments reveal a delicate tightrope walk designed to induce voter approval, which we would upset were we to stretch the proposition's limited immunity to cover that which its language does not.’”).

²⁰⁴ 348 Or. 159, 230 P.3d 518 (2010).

Eventually, the employer was considering hiring the plaintiff on a permanent basis. The employee knew that he would have to pass a drug test as a condition of permanent employment. As such, the employee told his supervisor that he was using medicinal marijuana pursuant to a registry identification card from his physician. Neither the employee's supervisor nor anyone else in management engaged in any other discussion with the employee regarding alternative treatments for the employee's condition. One week later, the supervisor discharged the employee.

After the employee was terminated from employment, he filed an employment discrimination complaint with the Oregon Bureau of Labor and Industries ("BOLI"). The BOLI then filed formal charges against the employer, alleging that the employer had discharged the employee because of his disability and that the employer failed to reasonably accommodate the employee's disability.

The case ultimately reached the Oregon Supreme Court. The Oregon Supreme Court held for the employer, reasoning that the state law requirement that employers engage in a "meaningful interactive process" with disabled employees did not apply to drugs that are illegal under federal law. The court explained:

Congress did not intend to enact a limited prohibition on the use of marijuana—*i.e.*, to prohibit the use of marijuana unless states chose to authorize its use for medical purposes. . . . Affirmatively authorizing a use that federal law prohibits stands as an obstacle to the implementation and execution of the full purposes and objectives of the Controlled Substances Act.

Interestingly, the court also addressed the Oregon statute's requirement that the medicinal marijuana be used "under the supervision of a licensed health care professional." The court seemed to go out of its way to note that, to satisfy this requirement, "it must be shown that 'the health care professional is monitoring or overseeing the patient's use of what would otherwise be an illegal drug[,]'" and that "the Controlled Substances Act authorize[s] [the supervising physician] to [administer said controlled substance]."²⁰⁵ The employee could not satisfy this requirement for two reasons: (1) the employee's marijuana use was only at the recommendation of the physician and not supervised by a physician; and (2) physicians are not authorized under the Controlled Substances Act to administer medical marijuana.

As a practical concern, a school district may want to avoid questioning a physician's involvement with an employee who claims medical marijuana use. The EEOC may take the position that such a line of questioning constitutes an impermissible "medical inquiry." The much safer approach would be to maintain and enforce a policy banning marijuana in the employee's system during duty time.

²⁰⁵ *Id.* at 187.

E. CLAIMS THAT MARIJUANA IS A PRETEXT FOR DISCRIMINATION

Perhaps the most common claim in recent years has been that an employer has fired an employee for medicinal marijuana use as a pretext for discrimination. As can be expected, most of these cases are fact specific. In these cases, one of the key questions is whether the employer has consistently treated marijuana usage the same for all employees, or whether the employer has selectively enforced its anti-marijuana rules against a disabled or elderly employee. The following cases provide insights into these types of claims.

i. GENERAL

In *EEOC v. Pines of Clarkston*,²⁰⁶ the EEOC, on behalf of an employee, filed suit against the employer. (Before we delve any farther into this case, we hope the irony is not lost on you that an arm of the federal government actually filed suit against an employer for terminating an employee for using marijuana—a drug proscribed by federal law. In a further twist of irony, we located no criminal charges brought by the federal government against the employee for her admitted marijuana use.)

The *Pines of Clarkston* case illustrates the increasingly common fact pattern underlying these “pretext” claims. The case involved a nursing home that required all employees to pass a drug test after they were hired. On the second day of her employment, an employee submitted to the drug test. The test came back positive for marijuana. The employer met with the employee to discuss the test’s results. During that meeting, the employee explained that she has epilepsy and uses medical marijuana to ease her pain. Shortly thereafter, the employer terminated the employee.

The employee subsequently filed a discrimination complaint with the EEOC, alleging that her employer terminated her because of her epilepsy. The employer countered that the employee was terminated because she used marijuana, in violation of company policy. The federal court found that there was a genuine issue of material fact as to whether the employee was terminated because of her marijuana use or her epilepsy.

The parties ultimately settled the case. The nursing home paid \$42,500 and agreed to adopt anti-discrimination policies and provide training on the ADA.²⁰⁷

Practice Pointer: To avoid the issue of an employee’s claim that she was terminated because of her disability, school districts would be wise to adopt a zero-tolerance policy and practice for marijuana. Rather than allowing employees to explain why their marijuana use is necessary or beneficial to their medical condition, employers would be better off immediately terminating any employee who comes to work with marijuana in their system.

²⁰⁶ 2015 U.S. Dist. LEXIS 55926 (E.D. Mich. Apr. 29, 2015).

²⁰⁷ EEOC Press Release, “The Pines of Clarkston to Pay \$42,500 to Settle EEOC Disability Discrimination Lawsuit,” August 6, 2015, available at: <https://www.eeoc.gov/eeoc/newsroom/release/8-6-15a.cfm> (last accessed on August 9, 2016).

ii. KNOWING, THEN HIRING, THEN FIRING

In a recent New Mexico case,²⁰⁸ an employee disclosed to his employer during his initial interview that he had HIV/AIDS and was enrolled in New Mexico's Medical Cannabis Program. Despite the employee's admission that he used medical marijuana, the employer hired him. The employer then required him to submit to a drug test. The drug test, of course, came back positive for marijuana use. The employer then terminated the employee.

The employee sued, alleging that such termination, without any effort to accommodate the employee's drug use, was a pretext for disability discrimination. Under the New Mexico Human Rights Act, a person with HIV/AIDS was considered a person with a "serious medical condition." The Human Rights Act requires an employer to reasonably accommodate an employee with a "serious medical condition."

Calling it "an issue of first impression," the New Mexico federal court assessed whether the employer's termination of the employee for marijuana use was permissible as a matter of law, or whether the employee made a claim for discrimination based on his status as a person with HIV/AIDS. The court, in citing to other states who have considered similar issues, concluded that the employee "was not terminated because of or on the basis of his serious medical condition. Testing positive for marijuana was not because of [the employee's] serious medical condition (HIV/AIDS), nor could testing positive for marijuana be seen as conduct that resulted from his serious medical condition. Using marijuana is not a manifestation of HIV/AIDS."

Was the New Mexico court's decision the correct outcome? One could argue that the court should have allowed the case to proceed, given that, during the employee's initial interview, the employee disclosed to the employer that he suffered from HIV/AIDS and was using medicinal marijuana. Why would an employer knowingly hire a person who discloses marijuana use, if the employer then requires the employee to submit to a drug test and fires an employee who tests positive? The explanation may be that the hiring manager did not understand the company's zero-tolerance drug policy. In any event, in a case like this, the employer comes across looking unorganized (at best).

Practice Pointer: Say what you mean, and mean what you say. If your district has a zero-tolerance marijuana policy, make sure that all employees involved in the hiring process understand that any employee who uses or consumes marijuana will not be allowed to work for the district. By educating employees involved in the hiring process, your district may be able to avoid an embarrassing scenario and subsequent lawsuit.

²⁰⁸ *Garcia v. Tractor Supply Co.*, 2016 U.S. Dist. LEXIS 3494 (D.N.M. Jan. 7, 2016).

iii. LAWFUL ACTIVITIES STATUTES

What about states with statutes that provide affirmative protections for employees using marijuana off of the employer's premises? The Colorado Supreme Court answered this question in *Coats v. Dish Network, L.L.C.*²⁰⁹ The plaintiff was a quadriplegic. He had a license to use medical marijuana, pursuant to the Medical Marijuana Amendment to Colorado's Constitution. Eventually, the plaintiff tested positive for marijuana and Dish terminated his employment. The plaintiff alleged that he was terminated because of his disability. He claimed that he used marijuana within the limits of the license, never used marijuana on Dish's premises, and was never under the influence of marijuana at work.

The plaintiff filed suit under Colorado's Lawful Activities Statute, a statute that prohibits an employer from discharging an employee for "engaging in any lawful activity off the premises of the employer during nonworking hours," subject to certain exceptions. Dish responded by alleging that marijuana use is a violation of state and federal law. (Dish pointed out that Colorado's constitutional amendment did not establish state constitutional right to state-licensed medical marijuana use, but rather only created an affirmative defense from prosecution for such use.)

The case made it to the Colorado Supreme Court. The Supreme Court easily dismissed the employee's arguments. The Colorado Supreme Court determined that the term "lawful" in Colorado's Lawful Activities Statute means "permitted by, and not contrary to, both state and federal law."²¹⁰ The court then concluded that, since marijuana use is not lawful under federal law, the plaintiff's call for protections under the Lawful Activities Statute could not prevail as a matter of law. Indeed, the Colorado Supreme Court did not even address whether Colorado's Lawful Activities Statute protected an employee for marijuana use under Colorado state law.

As a result, school districts in states with "affirmative protections" embedded in state statutes or local ordinances should continue to utilize the preemptory nature of federal law. However, as noted above, districts in "marijuana-friendly" states should act consistently after a violation of its marijuana policies.

F. THE "PUBLIC POLICY" ARGUMENT

In *Roe v. TeleTech Customer Care Mgmt. (Colo.) LLC*,²¹¹ Washington's Medical Use of Marijuana Act ("MUMA") was put to the test. The MUMA provided that:

The people find that humanitarian compassion necessitates that the decision to authorize the medical use of marijuana by patients with terminal or debilitating illnesses is a personal, individual decision, based upon their physician's professional medical judgment and discretion.²¹²

²⁰⁹ 2015 CO 44 (2015).

²¹⁰ *Id.*

²¹¹ 171 Wn.2d 736 (Wash. 2011).

²¹² R.C.W. 69.51A.005(b).

...

Nothing in this chapter requires any accommodation of any on-site medical use of marijuana in any place of employment, in any school bus or on any school grounds, in any youth center, in any correctional facility, or smoking medical marijuana in any public place.²¹³

Roe, the plaintiff, “suffered from debilitating migraine headaches that caused chronic pain, nausea, blurred vision, and sensitivity to light.”²¹⁴ Roe began using marijuana under the MUMA to help ease his pain. Roe applied for a job with the defendant-employer and disclosed his marijuana use. The employer advanced Roe to the “drug testing” phase of the job application. As expected, Roe failed the drug test, testing positive for marijuana.

The case made its way to the Washington Supreme Court. The Washington Supreme Court refused to hold that the MUMA required private employers to accommodate marijuana use.²¹⁵ The court then turned to Roe’s public policy argument. Roe pointed the court’s attention to Washington’s precedent for an action for wrongful termination in violation of public policy under the following circumstances:

- (1) where employees are fired for refusing to commit an illegal act;
- (2) where employees are fired for performing a public duty or obligation, such as serving jury duty;
- (3) where employees are fired for exercising a legal right or privilege, such as filing workers' compensation claims; and
- (4) where employees are fired in retaliation for reporting employer misconduct, i.e., whistleblowing.²¹⁶

Roe argued that he was protected under the third prong of the public policy test: that he was fired for exercising a legal right or privilege. The MUMA, he argued, established the legal right and privilege to use marijuana and, as such, set forth Washington’s public policy on this issue. Unfortunately for Roe, the Washington Supreme Court was not convinced, holding that the public policy exception “must be clear and truly public; it does not exist merely because the plaintiff can point to legislation or judicial precedent that addresses the relevant issue.”²¹⁷

(Note: At the risk of sounding repetitive, the *Roe* case reiterates the point that job applicants who disclose marijuana use during the initial application stage should not be allowed to advance if the employer truly has a zero-tolerance marijuana policy. Although the *Roe* case did not address the issue of disability discrimination, it seems highly likely that terminating an applicant for

²¹³ R.C.W. 69.51A.060(4).

²¹⁴ 171 Wn.2d 736 at ¶ 2.

²¹⁵ *Id.* at ¶ 17 (“The language of MUMA is unambiguous—it does not regulate the conduct of a private employer or protect an employee from being discharged because of authorized medical marijuana use.”).

²¹⁶ *Id.* at ¶ 32.

²¹⁷ *Id.* at ¶ 35.

marijuana use after allowing the applicant to advance, despite knowing of his marijuana use, could be viewed as a pretext for discrimination.)

G. DISPUTES OVER EMPLOYMENT BENEFITS

Even though, as a general rule, an employer need not accommodate an employee's marijuana or medical marijuana use, and can thus terminate them for noncompliance with a drug-free workplace policy, a terminated employee may still be eligible for benefits from the employer under certain situations.

i. UNEMPLOYMENT BENEFITS

In the area of unemployment benefits, courts have arrived at different conclusions as to whether an employee should be entitled to unemployment benefits after the employee's termination for a failed drug test. As an example, in *Braska v. Challenge Mfg. Co.*,²¹⁸ a Michigan Court of Appeals acknowledged that an earlier Sixth Circuit Court of Appeals case²¹⁹ refused to require that a private employer accommodate medical marijuana use under the Michigan Medical Marijuana Act ("MMMA"). However, despite the Sixth Circuit's holding, the Michigan Court of Appeals held that an employee *is* entitled to unemployment benefits if the employee is terminated for marijuana use pursuant to the MMMA.

The Michigan Court of Appeals' reasoning stems from its reading of the MMMA's text: that, under the MMMA, an individual who uses medical marijuana in accordance with the MMMA "shall not . . . [be denied any] right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau." The court then analyzed whether unemployment benefits constitute a "right" or "privilege" under Michigan state law. Ultimately, the court concluded that "denial of unemployment benefits . . . constitutes a penalty under the MMMA that was imposed upon claimants for their medical use of marijuana. . . . The only reason claimants were disqualified . . . from receiving benefits was because they tested positive for marijuana. In other words, absent their medical use of marijuana—and there was no evidence that claimants, all of whom possessed a medical marijuana card, failed to abide by the MMMA's provisions in their use—claimants would not have been disqualified . . . Thus, because claimants used medical marijuana, they were required to forfeit their unemployment benefits."

The Michigan Department of Licensing and Regulatory Affairs (the defendant) set forth two arguments in opposition to the plaintiff's contention (and the court's ultimate conclusion): that (1) the plaintiff was never "entitled" to unemployment benefits and, therefore, could not have been denied any right or privilege; and (2) the MMMA includes a provision that excludes employers from accommodating the use of medical marijuana in the workplace. The court was not persuaded by the Department's arguments. On the Department's first contention, the court relied on circular reasoning: that the plaintiff would not have been denied unemployment benefits but for their failed drug test, and so they were "penalized" for their failed drug test. As for the Department's second contention, the court side-stepped addressing the statute's protections for employers by reasoning

²¹⁸ 307 Mich. App. 340 (2014).

²¹⁹ *Casias v Wal-Mart Stores, Inc*, 695 F.3d 428 (6th Cir. 2012).

that it the MMMA only relates to marijuana consumed *on* the employer's premises. The court noted that it was undisputed that the plaintiff ingested marijuana off of the employer's premises and not during working hours and, as such, the MMMA's employer-protection provision did not apply.

As of the time of this article being published, there has not been a Michigan Supreme Court or other appellate court case that has revisited or reconsidered the *Braska* court's holding. As a result, it appears that Michigan employers are liable for unemployment benefits for employees who are terminated for medical marijuana use in compliance with the MMMA. This outcome seems problematic for several reasons, including the fact that the *Braska* outcome seems to contradict the plain language of the MMMA and a well-reasoned Sixth Circuit opinion. Nonetheless, until a subsequent Michigan appellate court opinion alters the *Braska* outcome, Michigan employers are likely "stuck" with the outcome.

Unlike in Michigan, in Colorado, an employee's termination for medical marijuana use disqualifies the employee from unemployment benefits. In *Beinor v. Ind. Claim Appeals Office*,²²⁰ the claimant was an operator assigned to sweep the 16th Street Mall in Denver with a broom and dustpan. He was eventually discharged for violating the employer's zero-tolerance drug policy after testing positive for marijuana in a random drug test ordered by the employer. The employer's policy states: "[I]f a current employee is substance tested for any reason . . . and the results of the screening are positive for . . . illegal drugs, the employee will be terminated."

Neither the claimant nor the employer disputed that the claimant's marijuana use was in compliance with Colorado's Constitutional Amendment that allowed individuals to consume medical marijuana and provided an affirmative defense for criminal prosecution of using the same. Relying on the Constitutional Amendment, the claimant argued that his marijuana use was "legal" and that he should be entitled to unemployment benefits. The court's reasoning was somewhat complicated by a Colorado unemployment benefits statute that provided that an employee would be disqualified from receiving unemployment benefits for:

[t]he presence in an individual's system, during working hours, of not medically prescribed controlled substances . . . as evidenced by a drug . . . test administered pursuant to a statutory or regulatory requirement or a previously established, written drug . . . policy of the employer and conducted by a medical facility or laboratory licensed or certified to conduct such tests.²²¹

In the case at bar, the claimant claimed that a physician provided him with a medical prescription for his marijuana. To avoid this statute, the Colorado Court of Appeals instead looked to the text of Colorado's Constitutional Amendment that stated that a physician may only provide "written documentation" stating that the patient has a debilitating medical condition and might benefit from the medical use of marijuana. The court also cited federal law, which prohibited a physician from prescribing controlled substances illegal under federal law, such as marijuana. The court relied on

²²⁰ 262 P.3d 970 (Colo. Ct. App. 2011).

²²¹ C.R.S. § 8-73-108(5)(e) (IX.5).

federal law, despite the claimant pointing to the United States Department of Justice’s position that it may not prosecute “individuals with cancer or other serious illnesses who use marijuana as part of a recommended treatment regimen consistent with applicable state law, or those caregivers in clear and unambiguous compliance with existing state law who provide such individuals with marijuana”²²²

Overall, similar to the Michigan Court of Appeals’ rationale in *Braska*, the *Beinor* case does not provide the most well-reasoned opinion on this subject. It remains difficult to understand how Colorado’s Constitutional Amendment referencing “written documentation” does not include or even contemplate a written prescription. This is especially so given the unemployment benefits statute’s specific reference to a “medically prescribed controlled substance.” In relying on federal preemption, the *Beinor* court also seemed to struggle with the federal government’s relaxed position on marijuana prosecutions. In turn, although the *Beinor* case can be used as a useful case for Colorado employers, we will be interested to see if a subsequent Colorado appellate court will revisit this issue.

Practice Pointer: If your district is in a state that awards unemployment benefits to employees terminated for lawful medical marijuana use, consider lawful safeguards to prevent hiring employees who currently use medical marijuana.

ii. WORKERS’ COMPENSATION BENEFITS

Perhaps the most illustrative case on the interaction between workers’ compensation benefits and medical marijuana use comes from New Mexico.²²³ In *Vialpando v. Ben's Auto. Servs.*, the claimant sought marijuana pursuant to the Lynn and Erin Compassionate Use Act²²⁴ (“CUA”)—New Mexico’s medical marijuana law. The claimant was an injured worker who underwent several spinal surgeries was suffering from “high intensity multiple-site chronic muscle, joint and nerve pain.”²²⁵ Though the claimant had reached maximum medical improvement, he had a 99 percent permanent partial disability. One doctor opined that the claimant was suffering “from some of the most extremely high intensity, frequency, and duration of pain, out of all of the thousands of patients I’ve treated within my 7 years practicing medicine.”²²⁶ When that doctor gave his opinion, the claimant was taking “multiple narcotic based pain relievers and multiple anti-depressant medications.”²²⁷ Eventually, the doctor referred the claimant to another doctor who began treating the claimant’s symptoms with medical marijuana, pursuant to the CUA.

The case eventually went before the Workers’ Compensation Court. The court found that the marijuana-based treatment was “reasonable and necessary medical care.”²²⁸ The employer appealed to the New Mexico Court of Appeals on the issue of whether the employer should be

²²² Memorandum from Deputy Attorney General David W. Ogden to Selected United States Attorneys, Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana (Oct. 19, 2009).

²²³ 2014-NMCA-084, 331 P.3d 975 (N.M. Ct. App., May 19, 2014).

²²⁴ N.M. Stat. Ann. §§ 26-2B-1 to 26-2B-7.

²²⁵ *Vialpando*, at ¶ 2.

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.* at ¶ 4.

required to pay for the medical marijuana. The employer relied on several New Mexico statutes and regulations, arguing that (1) the New Mexico Medical Cannabis Program was not a “health care provider” as defined in the workers’ compensation statute, and (2) medical marijuana is not a “prescription drug” as defined by the workers’ compensation regulations. The New Mexico Court of Appeals dismissed both of these arguments. In refuting the employer’s first argument, the court reasoned that New Mexico law “requires only that a health care provider have the responsibility for the provision of the reasonable and necessary services, not that each and every service must be provided by a health care provider.”²²⁹ The court also refuted the employer’s second argument, noting that “certification by a health care provider to the Medical Cannabis Program is the ‘functional equivalent’ of a prescription. . . . The control that underlies the dispensing of a prescription drug in the regulations, requiring either a licensed pharmacist or a recognized health care provider, is present because of the Department of Health licensing provisions mandated by the Compassionate Use Act.”²³⁰

The New Mexico Court of Appeals’ justification is contrary to many other courts which have refused to recognize marijuana as a “prescription drug” (or other equivalent concept) since federal law prohibits a physician from prescribing an illegal controlled substance. To address this conflict with federal law, the court contrasted the United States Department of Justice’s position on declining to place medical marijuana on a priority list for enforcement as supportive of its decision against the CUA’s public policy of “allow[ing] the beneficial use of medical cannabis in a regulated system for alleviating symptoms caused by debilitating medical conditions and their medical treatments.”²³¹

Since the *Vialpando* case, the New Mexico appellate courts have considered the medical marijuana issue in the context of workers’ compensation cases, and have twice upheld the *Vialpando* decision.²³²

It is worth noting that the *Beinor* court (discussed above) and *Vialpando* court both considered the Department of Justice’s memos on discretionary prosecution for medical marijuana use, and arrived at opposite conclusions.

²²⁹ *Id.* at ¶ 9.

²³⁰ *Id.* at ¶ 12.

²³¹ *Id.* at ¶ 15.

²³² *Maez v. Riley Indus.*, 2015-NMCA-049, 347 P.3d 732 (N.M. Ct. App., January 13, 2015) (“[W]e cannot accept the contention, albeit implied, that [the health care profession] would certify Worker for medical marijuana use solely on Worker’s request regardless of whether it was appropriate for Worker’s medical care.”); *Lewis v. Am. Gen. Media*, 2015-NMCA-090, 355 P.3d 850 (N.M. Ct. App., June 26, 2015) (“We reach the same conclusion that we did in *Vialpando*. In view of the equivocal federal policy and the clear New Mexico policy as expressed in the Compassionate Use Act, we decline to reverse the WCJ’s amended compensation order.”).

H. TERMINATION FOR AN EMPLOYEE’S SPOUSE’S MARIJUANA INVOLVEMENT

What if a district employee’s spouse is involved with medical marijuana? Can the district take any action against its employee? The case of *Zamudio v. Cty. of L.A.*²³³ is a case that touches on this issue.

Zamudio was the Development Director of the Los Angeles Sheriff’s Department’s (“LASD”) Sheriff’s Youth Foundation, a charity run by the Sheriff. Zamudio held her position as Director for ten years, without any disciplinary action taken against her. At some point, Zamudio was fired. Zamudio claimed that she was terminated on the basis of sex discrimination. She also claimed that she was terminated because “[the Sheriff] and other LASD agents and employees learned that [her] husband . . . ran a legal medical marijuana dispensary,” and “[the Sheriff] has been a vocal critic of pot dispensaries.” In response, the LASD commented that Zamudio “had ‘withheld’ the ‘shocking’ information from the LASD and [the Sheriff].”

The parties proceeded to challenge various proceedings on technical and procedural grounds, including whether the plaintiff correctly named individual defendants. Approximately two years after the case was filed, the parties apparently entered into a settlement agreement and agreed to dismiss the case.²³⁴

B. USING MARIJUANA IS “NEGLECT OF DUTY”

1. TEACHERS AS ROLE MODELS

In an interesting case analogous to teacher conduct, *Morrison v. State Pers. Bd.*,²³⁵ a police officer was fired after testing positive for marijuana. In her appeal, the officer testified that she told her supervisor that she had a prescription for medicinal marijuana. She was terminated anyway and filed suit against the police department. The court dismissed her case, holding that an officer’s use of medical marijuana constituted inexcusable neglect of duty and “[w]hile public policy might otherwise disfavor punishment of an ordinary citizen who satisfies the conditions of the CUA, plaintiff is a correctional officer and, as such, is required to act in a manner that is above reproach.”

One could easily draw parallels between the importance of a police officer and teacher acting “above reproach.”

2. IS THE POSSESSION OF MARIJUANA AN “INHERENT WRONG?”

In *Adams v. State*,²³⁶ the police discovered that a teacher was in possession of 52 marijuana plants. The marijuana plants were discovered when a police officer, in response to a call from one of the teacher’s neighbors, was pursuing two young vandals. In his pursuit, the officer was informed by the neighbor that the two vandals had proceeded in the direction of the teacher’s backyard. In his effort to apprehend the vandals, the officer crossed the teacher’s backyard and, in

²³³ 2013 U.S. Dist. LEXIS 88625 (C.D. Cal. May 16, 2013).

²³⁴ Case Number 2:13-cv-00895-AB-PJW (C.D. Cal.).

²³⁵ 2013 Cal. App. Unpub. LEXIS 4131, at *29 (Ct. App. June 13, 2013).

²³⁶ 406 So. 2d 1170; 1981 Fla. App. LEXIS 21656.

the process, saw two silhouettes in a greenhouse in the yard. He stopped at the open door to the greenhouse to inquire of the people therein about the vandals. As he looked inside the greenhouse, he observed the 52 marijuana plants. He thereafter seized the plants.

After concluding that the police officer's warrantless seizure of the marijuana plants fell within the "plain view" exception, the Florida Court of Appeals turned its focus on the teacher's argument: "that possession of marijuana is not an inherent wrong and, therefore, cannot be classified as gross immorality or 'moral turpitude' for purposes of the revocation proceedings."²³⁷ In dismissing the teacher's argument, the court explained:

By virtue of their leadership capacity, teachers are traditionally held to a high moral standard in a community . . . Further, the record contains substantial evidence that [the teacher's] possession of marijuana received widespread newspaper publicity in the Lee County area and that many people were aware of the facts involved. The evidence indicates that possession of marijuana is considered a very serious and morally wrong offense in the Lee County Community and that [the teacher's] involvement with marijuana had seriously impaired [her ability] to remain [an] effective teacher[.]. The [Board] was justified in determining that, by being in possession of 52 marijuana plants, [the teacher] had not fulfilled [her] duties of providing leadership and had lost [her] effectiveness as [a] teacher[.].

C. CONDUCT DURING SUMMER MONTHS

If a teacher engages in marijuana-related activities off-campus and during the summer months, can the district terminate the teacher for immoral conduct or conduct unbecoming a teacher? A Kentucky case²³⁸ provides an interesting fact pattern that answers this question.

In 1983, a Kentucky grand jury was investigating a murder that recently occurred. During the grand jury investigation, two 15-year old girls testified. As part of their testimony, both of the girls explained that, two days before the murder, they had purchased ten marijuana cigarettes and taken them to a teacher's apartment. The girls further testified that they and their teacher smoked the marijuana at the apartment.

Based on this testimony, the county attorney filed charges against the teacher and the teacher eventually plead guilty to unlawful transaction with a minor, a misdemeanor. Word of the teacher's alleged conduct reached the school district. The district took statements from the two girls and, shortly thereafter, suspended the teacher for "immoral character and conduct unbecoming of a teacher." The Board of Education held a hearing on whether the teacher should be terminated from the district's employment.

²³⁷ *Id.* at *4.

²³⁸ *Board of Education v. Wood*, 717 S.W.2d 837 (Ky. 1986).

At the hearing, the teacher's guilty plea was presented, as well as testimony from the two girls. In response, the teacher denied smoking marijuana and three other witnesses testified that they did not see any marijuana smoking. Ultimately, the Board voted unanimously to terminate the teacher.

The teacher filed suit, claiming that the Board could not lawfully terminate the teacher. The trial court sided with the Board of Education but the Court of Appeals actually reversed the trial court, holding that the Board has no right to terminate a teaching contract by reason of acts committed during off-duty hours, during the summer months before the school year began and in the privacy of their own apartment. The Board then appealed to the Kentucky Supreme Court.

The Kentucky Supreme Court reversed the Court of Appeals and held for the Board. A Kentucky statute that required documentation in a teacher's personnel file of the teacher's misconduct proved to be one of the complicating factors for the Supreme Court's analysis. Nevertheless, the Supreme Court held that such a statutory requirement does not handcuff administrators from disciplining teachers who engage in inappropriate behaviors off-campus. The Supreme Court explained that:

A teacher is held to a standard of personal conduct which does not permit the commission of immoral or criminal acts because of the harmful impression made on the students. The school teacher has traditionally been regarded as a moral example for the students. . . .

Conduct unbecoming a teacher or immoral conduct, unless limited to behavior occurring on the school premises during school hours, could not possibly be documented by a record of school supervisory personnel in a manner that is probative or appropriate as contemplated by the statute. Such records relate to in-school professional performance, not off-school activities.

D. THE "SELF-PROCLAIMED MARIJUANA EXPERT" EMPLOYEE

A case out of Arizona perfectly demonstrates how absurd drug-related employment matters can unravel. The case of *Barrow v. Arizona Bd. of Regents*²³⁹ involved a college professor who held his final evaluation off campus. During this off-campus evaluation, the professor brought cookies that he baked. The cookies contained marijuana. The professor offered the cookies to his students. A student recognized that the cookies appeared discolored and saved a cookie in her purse. The student then broke one-third of the cookie off and brought it to the university's administration. Somehow, the administration lost that part of the cookie. The student then broke off another portion of the cookie and again brought it to the administration. The administration and police tested the cookie and found a trace amount of marijuana. The university then terminated the tenured professor's employment.

²³⁹ 158 Ariz. 71; 761 P.2d 145 (1988).

In his lawsuit against the Board of Regents, the professor relied on two general arguments: (1) the university did not have jurisdiction to punish him for off-campus conduct; and (2) the trace amounts of marijuana were essentially ineffective. The Arizona Court of Appeals easily dismissed the professor's first argument, noting that the professor required all students to take the final evaluation off-campus.

The court's disregard for the professor's second argument proved much more entertaining. In rejecting the professor's argument, the court noted:

In the process of denying that the cookies contained marijuana, Barrow testified that he was *completely knowledgeable about marijuana* and that he "didn't read it in a book." He then said:

For that reason, I would not give anybody who did not do marijuana a cookie because this sort of thing would be -- a cookie quite often will get them so high that they could have personal problems. This is a heavy way to begin and it is a bad way to, you know --

So, I wouldn't do that to anybody under any circumstances.

Q. Because cookies as opposed to smoking isn't self-regulating?

A. Yeah, it is not

In view of the fact that Barrow, a *self-proclaimed expert on the subject*, testified that a single cookie could produce a substantial effect on a person and that the criminalist had available for testing only a third of a cookie selected at random from an entire bag of cookies, we find that substantial evidence was presented from which the trier of fact could determine by a preponderance of the evidence in the administrative proceeding that the marijuana in the cookie was a usable amount.²⁴⁰

E. PLEADING THE FIFTH

What about an employee suspected of marijuana use who refuses to respond to questions and pleads the Fifth? A Pennsylvania decision provides an important lesson for school districts. In *Harmon v. Mifflin County Sch. Dist.*,²⁴¹ a school custodian was suspended and later terminated for allegedly conspiring with a coworker to buy marijuana. The district alleged that the custodian gave money to a coworker to buy marijuana from a third party.

²⁴⁰ *Id.* at 76.

²⁴¹ 552 Pa. 92 (1998).

At a hearing before the Board, the district revealed that it received a copy of a criminal complaint for conspiring to purchase marijuana and an accompanying arrest warrant against the custodian. After receiving these documents, several members of the school's administration met with employees alleged to have participated in the conspiracy. The employees identified the custodian as a member of the conspiracy.

When the administrators questioned the custodian about what others had told them about the custodian's involvement in the conspiracy, the Superintendent told the custodian that he need not respond. However, the Superintendent said nothing about any consequences for the custodian's failure to respond. In turn, the custodian did not respond. The Superintendent then continued to investigate the matter.

The following day, the custodian agreed to meet with the Superintendent for a second time. During this meeting, the custodian neither admitted nor denied his involvement. At that meeting, the Superintendent advised the custodian that he was suspended for the time being. The district then moved to terminate the custodian.

At the hearing before the Board of Education, the coworkers that previously testified against the custodian gave less than compelling testimony. One witness authenticated the criminal information and affidavit but refused to answer any questions. Another witness denied having any personal knowledge of the custodian using or trafficking in marijuana. The custodian refused to answer questions, instead invoking the Fifth Amendment privilege against self-incrimination. The Board ultimately voted to terminate the janitor and the janitor filed suit.

The case snaked through the Pennsylvania appellate court system for some time before eventually reaching the Pennsylvania Supreme Court. At the Pennsylvania Supreme Court, "the District ask[ed] [the court] to uphold the termination based solely on the fact that [the custodian] invoked the Fifth Amendment in response to several specific questions."²⁴² The court refused:

The inference discussed in *Baxter* is akin to the well-established rule in civil proceedings that a party's failure to testify can support an inference that whatever testimony he could have given would have been unfavorable to him. . . . Our case law indicates that the inference to be drawn from a party's failure to testify serves to corroborate the evidence produced by the opposing party. . . . Also, the failure to testify to facts within one's presumed knowledge permits an inference that can erase the equivocal nature of other evidence relating to a disputed fact. . . . However, *we have never suggested that a party could satisfy its burden of proof in a civil cause solely through reliance on the defendant's failure to testify.*

(Emphasis supplied).

²⁴² *Id.* at 98 (emphasis supplied).

The court held that the Board did not have the authority to terminate the custodian based on the custodian's invocation of his Fifth Amendment rights, given the district's inability to provide any independent, probative evidence of the custodian's role in the alleged conspiracy.

Practice Pointer: There are several crucial takeaways from the *Harmon case*. First, the administration's case seemed to rely only on the testimony of other coworkers involved in the alleged conspiracy. The district should have had the coworkers sign sworn statements to assure the administration that the coworkers' testimony would not change at the Board hearing. In addition, the district apparently did not view the custodian as insubordinate for refusing to answer the administration's questions about his involvement in the alleged conspiracy. Viewing the custodian as insubordinate is consistent with caselaw requiring public employees to answer potentially incriminating job-related questions. *Spielbauer v. County of Santa Clara*, 45 Cal.4th 704 (2009).

The *Harmon* Superintendent also committed an egregious error by advising the custodian that he need not answer any of his questions. School districts in these situations should, at the very least, invoke a *Garrity* warning, based on the United States Supreme Court decision in *Garrity v. New Jersey*, 385 U.S. 493 (1967). A *Garrity* warning generally informs an employee that she must cooperate in an internal investigation and answer questions honestly, so long as said questions are narrowly tailored to focus on her official conduct. However, subject to certain exceptions, statements made pursuant to a *Garrity* warning cannot be used against the employee in a criminal proceeding.

F. EVIDENCE OF MARIJUANA WAS UNDER COURT SEAL

Can a school proceed to discipline a teacher without any evidentiary documents underlying the teacher's criminal case? The answer is yes. In *Walton v. Turlington*,²⁴³ an annual contract high school teacher was given notice of possible suspension of his teaching license for his possession of marijuana and marijuana paraphernalia. At the Board hearing, two police officers testified. Both officers admitted that, prior to their testimony, they had refreshed their recollections by reading their copies of police reports prepared in connection with the marijuana prosecution. The teacher's criminal case had been dismissed and the records of the case had been ordered to be expunged. The hearing officer concluded that the testimony of the police officers was inadmissible, since the records were to be expunged. Since it was essential to proof of the charges, the hearing officer recommended that the Board dismiss the administrative complaint against the teacher.

The Board rejected the hearing officer's conclusions and concluded that the evidence proved that the teacher was in possession of marijuana and was therefore guilty of gross immorality and an act involving moral turpitude; further, that the teacher's conduct reduced his effectiveness as a school board employee as a matter of law.

²⁴³ 444 So. 2d 1082; 1984 Fla. App. LEXIS 11430 (1984).

On appeal, the Florida Court of Appeals clarified that a statute that merely seals a teacher's criminal record does not expunge his "criminal conduct." Indeed, the court held that the Board was justified in disciplining the teacher because "it was his misconduct, rather than the existence of a record of a judgment of conviction."²⁴⁴

G. EVIDENCE OF MARIJUANA USE OBTAINED THROUGH UNLAWFUL SEARCH

What happens when the police conduct an unlawful search and find a district employee in possession of marijuana? That was the case in *Deshields v. Chester Upland School Dist.*,²⁴⁵ in which a custodian was arrested while off-duty on criminal charges relating to possession and attempt to deliver illegal substances. In fact, the custodian was found to be in possession of 115 grams of marijuana. In the custodian's criminal case, the criminal court found that the police conducted an unlawful search and seizure, that the marijuana was to be suppressed, and that the criminal charges were to be dismissed, with the arrest and prosecution expunged from the court's records.

By the time the criminal court dismissed the case, school officials had learned of the custodian's possession of marijuana. In turn, the school terminated the custodian. The custodian filed suit against the district, alleging that "his termination was in violation of his constitutional and civil rights because it was based on illegally seized evidence which had been suppressed in a criminal trial."²⁴⁶ Ultimately, the Pennsylvania appellate court did not find the custodian's argument persuasive, reasoning that:

Thus, the suppression of the evidence in the School District's termination hearing will have little effect in deterring the police department from future illegal conduct. In addition . . . the police department has already been "punished" by the exclusion of the evidence in the criminal proceeding. On the cost side, the School District's interest in protecting its students and insuring a safe school environment would be jeopardized by the exclusion of evidence concerning serious misconduct by its employees. On the balancing scale therefore, it is clear that what slight deterrent effect an exclusion of evidence would have is far outweighed by the costs to society in restricting a school district in its efforts to secure the safety of our public schools. Thus, we must conclude that . . . the evidence was properly admitted into evidence despite the fact that it had been illegally seized.²⁴⁷

²⁴⁴ *Id.* at *5.

²⁴⁵ 505 A.2d 1080; 1986 Pa. Commw. LEXIS 1961 (1984).

²⁴⁶ *Id.* at 416.

²⁴⁷ *Id.* at 417.

H. EMPLOYEE REFUSES TO SUBMIT TO DRUG TEST

A teacher in a Chicago school district refused to abide by the district's drug testing policy and, as a result, provides a good example of how a school district should respond in such a scenario. In *Younge v. Bd. of Educ.*,²⁴⁸ a principal noticed a very strong odor of marijuana coming from the teacher, observed that her eyes were hazy and glazed over and were not as clear or focused as they were normally. The principal later observed the teacher "had most of her body slumped across the table" and that she was wearing dark glasses and was being somewhat disruptive by talking to the person sitting next to her.²⁴⁹

Pursuant to Board policy, the administration concluded that a drug screen was appropriate and made arrangements to have the teacher escorted by security forces to a nearby hospital for a drug screen. The teacher initially refused to leave. Hours later, the teacher relented and went to the hospital for testing. On the nurse's notes at the hospital, the employee certified to administer the drug screenings noted that the teacher drank a large quantity of water while she was in the waiting room. She drank approximately 30 ounces, cup after cup, until she vomited into the waste can. Unsurprisingly, the teacher failed the drug test.

The administration moved to terminate the teacher's contract. In her defense, the teacher explained that "she had been exposed to passive inhalation of marijuana smoke exhaled by her HIV-positive sister, but also admitted that she had smoked marijuana two days before her drug test."²⁵⁰ Nonetheless, the court agreed with the hearing officer's conclusion that the teacher's refusal to submit immediately to a drug test amounted to insubordination:

The hearing officer later noted that this refusal was in direct violation of the Administrators' Guidelines and Procedures for Reasonable Suspicion Testing and Fitness for Duty Examination (the Guidelines), which was adopted by the Board on June 2, 1997, and which explicitly states that "the potentially affected employee should not be allowed to proceed alone to the collection site or from the collection site." The hearing officer found that Higgs went for testing six hours after the assistant principal signed the reasonable suspicion document and four hours after the principal signed it. After considering Higgs' excuse that she had to pick up her children, he noted that the Guidelines provide that an "employee's failure to submit to reasonable suspicion testing will be considered insubordination and will subject the employee to discipline, up to and including discharge."

²⁴⁸ 338 Ill. App. 3d 522; 788 N.E.2d 1153 (2003).

²⁴⁹ *Id.* at 527-528.

²⁵⁰ *Id.* at 529.

I. DISCRIMINATION BASED ON DISPARATE TREATMENT

The school district in *Daniels v. Alcoa*²⁵¹ learned the importance of applying consistent disciplinary rules. The case involved an African-American music teacher who attended a high school music competition held in a nearby town to get ideas for his own band projects. During an intermission in the program, the teacher went to a rest room where he inadvertently discovered two students smoking marijuana. He confronted the students, informing them of who he was, and confiscated two marijuana cigarettes from them. Instead of destroying these cigarettes, however, he placed them in his shirt pocket and returned to watch the remainder of the program, forgetting about the cigarettes. He did not report the incident to anyone. On his way home, he was stopped by a police officer, who smelled alcohol on his breath and accused him of driving under the influence. The teacher was arrested and charged with driving under the influence. A search incident to his arrest produced the two marijuana cigarettes. As a result, he was also charged with possession of a controlled substance. However, a toxicology examination performed after his arrest showed that he was neither intoxicated nor had he used marijuana. (The court in the teacher's employment lawsuit actually noted that "the evidence at trial demonstrates that the [teacher] does not use marijuana."²⁵²) The teacher plead guilty to a misdemeanor charge of possession of a controlled substance.

After the teacher's arrest, the administration moved to dismiss the teacher as a result of his arrest and possession of marijuana cigarettes. After the school dismissed the teacher, the teacher filed a discrimination suit, alleging that the school discriminated against him because of his race. The teacher pointed to two white teachers who were recently arrested: (1) a teacher who was convicted of shoplifting; and (2) a teacher who was convicted of driving under the influence. In the former case, the school initially suspended her but allowed her to return to teaching. In the latter case, the school did not suspend the teacher.

The school's justification for imposing a harsher penalty on the African-American teacher was less than persuasive:

Clearly, the plaintiff was treated differently from other teachers in similar circumstances and this disparate treatment is not adequately justified or explained by the defendants on the record before this Court. The Court concludes that the defendants failed to apply the same criteria to the plaintiff as they did to the other two teachers in making the decision to discharge him.

...

²⁵¹ 732 F. Supp. 1467; 1989 U.S. Dist. LEXIS 16951 (E.D. Tenn. 1989).

²⁵² *Id.* at 1469.

When the Court considers all of the evidence before it concerning the conduct of the defendants toward the plaintiff, the conclusion that racial discrimination motivated the defendants' decision to discharge him is compelling. The reasons offered by the defendants were unpersuasive and the plaintiff's proof adequately demonstrates that they were a mere pretext for intentional racial discrimination.

Practice Pointer: The *Daniels* case provides an important reminder of why discipline should be imposed uniformly across your district's staff. By failing to treat all misdemeanor convictions equally, the school district in *Daniels* was required to pay back pay and prejudgment interest to the teacher, as well as the teacher's reasonable attorneys' fees. Had the district applied its disciplinary rules uniformly, the district may have never had to defend a lawsuit in the first place.

J. BUS DRIVERS

The Federal Motor Carrier Safety Administration's regulations generally require testing procedures and impose prohibitions on a driver's use of controlled substances.²⁵³ These regulations include:

Controlled substance use.²⁵⁴

(a) No driver shall report for duty or remain on duty requiring the performance of safety sensitive functions when the driver uses any drug or substance identified in 21 CFR 1308.11 Schedule I.

(b) No driver shall report for duty or remain on duty requiring the performance of safety-sensitive functions when the driver uses any non-Schedule I drug or substance that is identified in the other Schedules in 21 CFR part 1308 except when the use is pursuant to the instructions of a licensed medical practitioner, as defined in § 382.107, who is familiar with the driver's medical history and has advised the driver that the substance will not adversely affect the driver's ability to safely operate a commercial motor vehicle.

(c) No employer having actual knowledge that a driver has used a controlled substance shall permit the driver to perform or continue to perform a safety-sensitive function.

(d) An employer may require a driver to inform the employer of any therapeutic drug use.

Of note, part (d) of the aforementioned regulation seems to anticipate drivers using medical marijuana.

²⁵³ 49 C.F.R. § 382.101, et seq.

²⁵⁴ 49 C.F.R. § 382.213.

Without a board policy or handbook provision that imposes a more stringent requirement, can a bus driver who uses medical marijuana while off duty be disciplined? *Cherry v. Dep't of Educ.*²⁵⁵ helps answer this question. The case involved the Oregon Department of Education revoking the petitioner's certificate to operate a school bus. While she was on medical leave from work, the driver smoked marijuana. Four days later, she reported for work and drove her assigned morning bus route. After completing her route, she was selected for a random drug test and tested positive for marijuana. Based on the drug-test results, the Department notified her that it intended to revoke her school bus driver's certificate.

The driver argued at the hearing that she had not violated any state or federal rules applicable to her as a school bus driver and that, consequently, the agency could not revoke her certificate. Specifically, she contended that the applicable federal rules only prohibit a driver from using, possessing, or being under the influence of marijuana while on duty.

In upholding the revocation, the Department cited to 49 C.F.R. § 382.215, which provides:

No driver shall report for duty, remain on duty or perform a safety-sensitive function, if the driver tests positive or has adulterated or substituted a test specimen for controlled substances. No employer having knowledge that a driver has tested positive or has adulterated or substituted a test specimen for controlled substances shall permit the driver to perform or continue to perform safety-sensitive functions. (Emphasis supplied.)

However, the driver contended that the Department's interpretation and enforcement of said regulation has not been consistently applied, given that drivers who self-report are placed on a "second chance plan." How then, the driver argued, could 49 C.F.R. § 382.215 be a hard-and-fast rule if other drivers are not disciplined, despite reporting for duty after using a controlled substance? The Oregon Court of Appeals struggled with this distinction, but upheld the Department's discipline anyway:

The nature of the department's policy is unclear from the record and the department's final order. We will assume, for the sake of our analysis, that the department has a policy of discontinuing revocation proceedings when a school bus driver who has violated the applicable federal rules on controlled substances is employed by a district that has a second-chance policy. . . . We are not persuaded that the department's policy is outside the range of its delegated discretion.

²⁵⁵ 253 Ore. App. 90; 289 P.3d 344 (2012).

Practice Pointer: Think carefully about whether your district should foster a “second chance policy” for drivers who self-report drug use. Absent a compelling reason, is it really in your students’ best interests to employ a school bus driver who has used a banned substance (whether they test positive or self-report)? In addition, as noted by other case illustrations in this paper, a district that fosters a second-chance policy must do so consistently or could face a claim of discrimination. As a result, depending on how your policy is worded, if your district employs a second-chance policy, your district must be prepared to apply the same treatment consistently for all employees who self-report. For instance, absent policy language specifying specific consequences for certain types of drugs, does your district truly want to grant a second chance to a driver who self-reports use of methamphetamines?