Legal Questions About CBD and Marijuana in Schools
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A majority of states have legalized medical marijuana to some extent, and numerous states also allow for recreational use. Federal laws also address marijuana. As new approaches continue to be tested in the ‘laboratories of democracy,’ the marketplace has responded with cannabis-related products such as cannabidiol (CBD), which can be purchased in any jurisdiction thanks to the Internet. School officials may be wondering how these products and legal developments impact Texas public schools.

What is CBD?

CBD, or cannabidiol, is one of many naturally occurring chemical compounds of Cannabis sativa L., the plant from which both marijuana and hemp are derived. Tetrahydrocannabinol, or THC, is another compound of the cannabis plant. The primary difference between hemp and marijuana is the amount of THC, which is the main component of marijuana that creates a “high” sensation. Both hemp and marijuana contain CBD, which is non-intoxicating. CBD has been shown to be effective in treating some forms of epilepsy. Preliminary research has also suggested that CBD may be used to treat other health conditions, including anxiety, insomnia, and chronic pain.1 Unlike whole-plant marijuana, which is usually smoked or vaporized, CBD is commonly consumed as an oil extract or a pre-mixed additive in food or beverages.

How do Texas and federal laws treat CBD and medical marijuana?

Both Texas and federal laws have decriminalized CBD that is extracted from hemp. Hemp is defined by law as the plant Cannabis sativa L. and any part of that plant with a THC concentration of no more than 0.3 percent. In 2019, the 86th Texas Legislature legalized hemp and mandated a regulatory framework for the manufacture and sale of consumable hemp products, defined as food, drugs, devices, or cosmetics containing hemp or a hemp-derived cannabinoid such as CBD.2

Despite these legal advances, distinguishing between legal and illegal CBD is complicated. A product may purport to be legal, but without standardized regulations or labeling requirements for CBD, vendors’ claims are unreliable. To make things even more complicated, interpretations and enforcement of the laws may vary in local jurisdictions.

1 Peter Grinspoon, MD, Cannabidiol (CBD)—what we know and what we don’t, Harvard Health Blog (Aug. 24, 2018).
Federal law

Federal law requires a school district to provide an educational environment and workplace that is free from controlled substances as a condition of receiving federal funds. In states that have legalized medical marijuana, state law typically prohibits possessing or administering marijuana in public places, including school districts, in order to avoid a conflict between state and federal law that could jeopardize federal funding for school programs.

Under federal law, CBD that is extracted from hemp and contains less than 0.3 percent THC is exempt from the Controlled Substances Act. Currently, the Federal Drug Administration (FDA) has approved one cannabis-derived medication, Epidiolex, which may be prescribed to treat seizures associated with severe forms of epilepsy, and several synthetic cannabis-related drug products that may be prescribed to treat common side effects of chemotherapy. The FDA has not approved CBD to be added to foods or other preparations to be consumed.

Many unlicensed manufacturers label CBD products as dietary supplements, rather than medication or food products, in an unsuccessful attempt to avoid FDA requirements. The FDA has stated that products containing THC or CBD do not qualify as dietary supplements and that selling them in interstate commerce is a violation of the Federal Food, Drug, and Cosmetic Act. The FDA has sent warning letters to companies selling “CBD products that claimed to prevent, diagnose, treat, or cure serious diseases, such as cancer”; however, the agency has discretion whether to initiate an enforcement action based on several factors, including whether a substance poses a threat to public health.

State law

In 2019, the 86th Texas Legislature followed the example of federal law by removing hemp from the state list of controlled substances. Hemp is defined as the plant Cannabis sativa L. and any part of that plant with a THC concentration of no more than 0.3 percent. If a product labeled CBD is derived from this type of hemp, it is legal to use and possess. Some products may contain greater amounts of THC, however. Until these products are fully regulated, it is...
impossible to verify the contents without chemical testing.\textsuperscript{11} Despite these complexities, CBD is widely available online and in retail stores across the state. Local law enforcement agencies have differing views on whether pursuing criminal charges related to CBD is an appropriate use of resources. As such, district officials should not assume that possession of CBD will be prosecuted as a crime.

\textbf{Texas Compassionate Use Act}

In 2015, the Texas legislature passed the Texas Compassionate Use Act, legalizing possession of low-THC cannabis under certain circumstances. A school district may not adopt or enforce any rule that prohibits a patient’s access to low-THC cannabis pursuant to the Act, which enables authorized physicians to prescribe low-THC, high-CBD cannabis to patients suffering from certain conditions. After the Texas legislature expanded the Act in 2019 and 2021, the eligible conditions are epilepsy, a seizure disorder, multiple sclerosis, spasticity, amyotrophic lateral sclerosis (ALS), autism, terminal cancer, an incurable neurodegenerative disease, post-traumatic stress disorder, and a medical condition approved for a research program.\textsuperscript{12} Valid patients, as well as their legal guardians, are exempt from criminal penalties for possession and the patient’s use of low-THC cannabis.\textsuperscript{13} Districts that have adopted TASB’s Model Student Code of Conduct can find this exception in their local codes.

\textbf{Can we ban CBD on district property?}

Given the difficulty of determining whether a substance is legal, school officials may want to adopt a general ban on CBD. Districts that wish to adopt a ban on use or possession of CBD on district property may likely do so under the school board’s general authority to adopt rules for the safety and welfare of students and employees.\textsuperscript{14} Provisions in state law prohibit local authorities from adopting or enforcing a rule that prohibits the handling, sale, or manufacture of hemp, but these provisions do not restrict local prohibitions on possession or use of hemp or hemp products.

Before adopting a local prohibition, district leaders would be wise to consult their school attorneys and coordinate with local law enforcement authorities.

\textbf{Can district employees possess CBD products at work?}

Unless employees are covered by the Texas Compassionate Use Act or prescribed Epidiolex, they should not use or possess at work any cannabis-related product with a THC concentration of more than 0.3 percent, including CBD. The Texas Educator’s Code of Ethics prohibits “illegal use,
abuse, or distribution of controlled substances, prescription drugs, and toxic inhalants.”\textsuperscript{15} TASB Model Policies DH(LOCAL) and DH(EXHIBIT) make this ethical rule applicable to all certified and uncertified employees. In addition, possession of a vape pen or other device containing a high amount of THC may be punishable as a felony, even if the substance is labeled as CBD.

Cracking down on employees’ use and possession of CBD may be difficult, however. In order to confirm that a product labeled CBD is a controlled substance, testing for trace amounts of THC would be required to determine if the product is legal hemp-based CBD or illegal marijuana.\textsuperscript{16} Districts should take care to communicate expectations to employees in advance. Many people use CBD for health-related issues. Even in states that have legalized medical marijuana, courts have determined that employers do not have to allow the use of medical marijuana because of federal law.\textsuperscript{17} Nonetheless, district officials should consider speaking to an attorney before taking specific disciplinary actions against an employee because of possessing or using CBD.

Does CBD use result in a positive drug test?

Possibly. Regular use of a commercially available CBD product containing even small amounts of THC can create a detectable buildup in a user’s body over time. Therefore, regular use may lead to a positive result for marijuana on urinalysis and other forms of drug testing.\textsuperscript{18} Districts should follow U.S. Department of Transportation guidelines and their local policies and procedures for testing students and employees (found in the district’s policy manual at FNF and DHE, respectively). Remember, CBD alone is not intoxicating. In order to justify a reasonable suspicion-based test, a district official should be able to identify specific observations of a student’s or employee’s speech, behavior, appearance, or body order that suggest the individual has or is under the influence of drugs or alcohol. District policy should also allow employees and students to provide relevant information about any factors that may influence a screening, whether based on reasonable suspicion or a law or policy requiring randomized testing.

What should we do if a student has CBD at school or a school-related activity?

The answer may depend on the product. CBD and THC products come in all varieties. If the product is designed to be smoked in an e-cigarette (vaping or Juuling), the answer is clear. Under state law, a minor under the age of 21 may not possess, purchase, consume, or accept

\textsuperscript{15} 19 Tex. Admin. Code § 247.2(1)(L).
\textsuperscript{16} See Gillian Flaccus, \textit{Is it hemp or is it pot? DEA seeks testing technology while look-alike leads to false arrests}, Associated Press (Mar. 28, 2019) (citing lack of field testing equipment sensitive enough to determine THC levels).
\textsuperscript{17} See \textit{Emerald Steel Fabricators, Inc. v. Bureau of Labor and Indus.}, 230 P.3d 518 (Or. 2010) (state law did not require accommodation of employee’s medical marijuana because possession of marijuana is unlawful under federal law); \textit{Ross v. Ragingwire Telecomm., Inc.}, 174 P.3d 200 (Cal. 2008) (employee fired for medical marijuana use did not have claim for wrongful termination); but see \textit{Barbuto v. Advantage Sales and Mktg., LLC}, 78 N.E.3d 37 (Mass. 2017) (permitting disability discrimination lawsuit by employee fired after testing positive for marijuana).
\textsuperscript{18} Karina Brown, \textit{A School Employee Was Assured He Could Use a CBD Tincture and Still Pass a Drug Test. He Didn’t.}, Willamette Week (Feb. 28, 2018).
an e-cigarette.\textsuperscript{19} The Texas Education Code requires a school district board of trustees to prohibit smoking or using e-cigarettes at school-related or school-sanctioned activities on or off school property.\textsuperscript{20} Effective September 1, 2023, a student at school (within 300 feet) or at a school-related activity is subject to mandatory placement in DAEP for any use, possession, sale, gift, or delivery to another person of an e-cigarette or any component, part, or accessory for an e-cigarette device.\textsuperscript{21} As such, a student’s possession or use of CBD oil in any form intended to be used through an e-cigarette is a punishable violation on its own—in addition to possibly being punishable as use or possession of an illegal drug.

If the substance in question appears to be marijuana, but the student claims that it is legal hemp, consider the circumstances. State law does not authorize the manufacture of a product containing hemp for smoking. If, for example, a campus administrator can document that the substance is in a smokable form or smoke is obvious in the student’s vicinity; the student has made statements indicating possession or intent to sell marijuana; or the student appears to be “high,” the district has a strong legal basis for disciplinary action, including DAEP or expulsion for possession or use of a controlled substance at school.

Use, possession, sale, or delivery of oils, edibles, and other products may be punishable under a school district’s student code of conduct as misconduct related to an illegal drug or a controlled substance if the product has THC in excess of the legal limit of 0.3 percent. As mentioned above, this determination requires chemical testing. District leaders should consult with local law enforcement authorities to determine how a student might be charged for using or possessing marijuana in their jurisdiction. Though school disciplinary decisions are not always reliant on criminal charges, parents and others may be confused if the school interprets conduct as criminal when law enforcement does not.

Before deciding on any disciplinary measure involving suspension, removal to a DAEP, expulsion, or placement in a JJAEP, the campus behavior coordinator must take into account the legally required mitigating factors: self-defense; intent or lack of intent; a student’s disciplinary history; a disability that substantially impairs the student’s capacity to appreciate the wrongfulness of the misconduct; and whether the student is homeless or in foster care. Consideration of the mitigating factors is required even if the decision concerns a disciplinary measure described as “mandatory” in the Texas Education Code.\textsuperscript{22}

For example, while possession of marijuana could lead to mandatory placement in DAEP, a campus administrator could reasonably conclude that a student with a small amount of CBD oil that a parent provided for anxiety did not intend to commit the crime of possessing marijuana. Therefore, after considering the mitigating factor of the student’s intent, the administrator

\textsuperscript{19} Tex. Health & Safety Code § 161.252.
\textsuperscript{22} Tex. Educ. Code § 37.001(a)(4).
could decide not to place the student in DAEP, even if it turns out that what the student believed to be CBD oil exceeded the legal limit for THC concentration of 0.3 percent. Just like with any other disciplinary decision, campus officials should treat all students consistently and document the basis for the outcome.

Finally, if a student claims that they need to use CBD to treat a medical or mental health condition, take the student’s motivations seriously. There may be an underlying issue that the district can, or even must, accommodate under federal law.

**Can a student use CBD or medical marijuana pursuant to a Section 504 plan or IEP?**

Public schools across the country have received requests from parents who wish to use CBD for their children’s physical and mental health needs, including autism. Districts may find themselves caught between compliance with state and federal drug laws and their obligation to provide a free appropriate public education under the Individuals with Disabilities Education Act (IDEA) and Section 504 of the Rehabilitation Act of 1973.

As discussed above, students with a condition such as autism, multiple sclerosis, or a seizure disorder are entitled to legally use CBD products under the Texas Compassionate Use Act. When this is the case, districts should come to an arrangement with the parents and the family’s authorized medical provider that is memorialized in a Section 504 plan or individualized education program (IEP). Note that the FDA-approved drug Epidiolex is intended as a preventative medication, but an authorized doctor may prescribe additional uses, including use of CBD substances during school hours. If this is the case, the student’s IEP or Section 504 plan should address when the CBD is needed and who will administer it to the student.

The school nurse may object to administering CBD to a student. Under the Texas Compassionate Use Act, however, an authorized physician may prescribe CBD products other than the FDA-approved Epidiolex. In these rare circumstances, districts should follow their FFAC(LOCAL) policies for administering prescription medication and come to an agreement that meets the student’s needs.

If a parent requests that a student be allowed to use CBD at school for an issue that could rise to the level of a disability, district officials should consult Policy FFAC(LOCAL) and work closely with legal counsel. It may be wise to offer alternative accommodations. For instance, in the hypothetical situation of a student taking CBD to treat anxiety, the district could offer to provide preferential seating, testing accommodations, or opportunities to check in with a counselor or mentor.
Conclusion

In the rapidly changing field of cannabis law, even experts have a hard time explaining what is and is not legal. School officials are understandably confused. Paradoxically, when the law is changing quickly, the best advice may be to slow down. Don’t rush to adopt a policy that may be impacted or even negated by pending issues on the state or federal levels. Don’t rush to discipline; remember your policies and the legally required mitigating factors. Finally, don’t rush to judgment. Approach employees, students, and parents without bias as to their choice of treatment.\(^\text{23}\) TASB Legal Services will continue to keep districts informed as the law evolves.

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\(^{23}\) See, e.g., Position Brief – Cannabis/Marijuana, Nat’l Assoc. of Sch. Nurses (Jan. 2019) (requiring the school nurse to “approach the student and family without judgment regarding their choice of treatment or preferences”).