

EMERGING LEGAL ISSUES IN URBAN EDUCATION



Lawful and Unlawful Student Drug Use

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Agenda

I. Background

- A. Section 504, IDEA, and ESSA
- B. Administration of Medications & School Protections

II. Cannabis

- A. What is it? Is it Legal?
- B. Administration in Schools
- C. Recent Developments

III. Tobacco & E-Cigarettes

IV. Student Privacy & Drug Use

V. Student Rights & School Authority to Discipline

VI. Trending Issues

- A. Youth Marijuana Use
- B. The Vaping Crisis
- C. The Opioid Epidemic



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Drugs in Public Schools: Background



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Medications at School – Section 504

- Section 504 of the Rehabilitation Act (“Section 504”) prohibits discrimination on the basis of disability in any program or activity receiving federal financial assistance
- Section 504 requires schools to provide aides and services to disabled students
 - Including: assisting students in the administration of medication when necessary for access to education



SECTION 504



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Medications at School - IDEA

- The Individuals with Disabilities Education Act (“IDEA”) ensures that children with disabilities are granted a free appropriate public education in the least restrictive environment



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Medications at School - ESSA

- The Every Student Succeeds Act – Title IV (“ESSA”) ensures that children with disabilities are provided a quality education
 - Including “drug-free environments”
- Schools are required to use a portion of funds on activities, such as “drug and violence prevention activities and programs”



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Medications at School

- IDEA
 - Chemical dependency in and of itself generally is not recognized as a “disability”
 - However, the underlying condition, rather than the drug use itself, may be considered the disability schools are required to accommodate
- Section 504
 - Generally, does not protect students engaged in the illegal use of drugs



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Administration - Nurses

- Ideally, registered professional nurses
- Should require a written statement from the parent and physician, including:
 - Name
 - Dosage
 - Administration time
 - Diagnosis/reason for medication



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Administration - Parents

- Schools may permit “volunteer” parents accustomed to providing the medication to administer it on field trips and/or at school events



- Caution: Parents with nursing qualifications who volunteer in their nursing capacity may be providing “professional” services



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Legal Protections

- State Law - *Tort Immunity for school officials, including school nurses
- Federal Law – *Qualified immunity when sued for damages in cases claiming violations of Federal law
 - Some federal courts have extended this immunity to school nurses in the 4th Amendment (search/seizure) context



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What is Cannabis?

Cannabis sativa L.

- Marijuana
- Industrial Hemp



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Cannabis - Legal Status

- Federally prohibited under the Controlled Substances Act (“CSA”)
 - Definition prohibits all forms of the cannabis plant, including both marijuana and industrial hemp

The term "marihuana" means **all parts of the plant Cannabis sativa L.**, whether growing or not; the seeds thereof . . . and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin...

- Regulated marijuana is legal under some state laws



Medical Marijuana

For example, below are the Colorado Approved Conditions

- Cancer
- Glaucoma
- HIV/AIDS **or** chronic or debilitating disease/condition with 1 or more of the following:
 - Cachexia
 - Persistent muscle spasms
 - Seizures
 - Severe nausea
 - Severe pain



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Adult-Use Marijuana

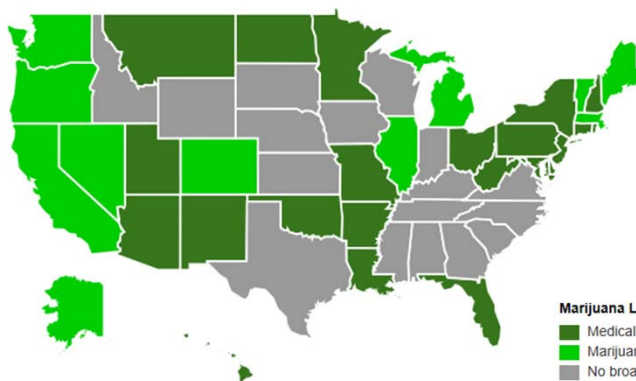
For example, below are the Colorado Adult-Use Provisions

- Must be 21-years old to purchase, possess, and use
 - Felony if sell/share with anyone under 21
- Cannot be used (smoked, eaten, or vaped) in public places
 - Must use on private property



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Marijuana Laws By State



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Industrial Hemp – What Is It?

- “**Industrial Hemp**” means a plant of the genus Cannabis and any part of the plant, whether growing or not, containing a delta-9 tetrahydrocannabinol (THC) concentration of no more than three-tenths of one percent (0.3%) on a dry weight basis.
- What it is
 - Commodity
 - Agriculture Product
- What it is not
 - Marijuana
 - Psychoactive

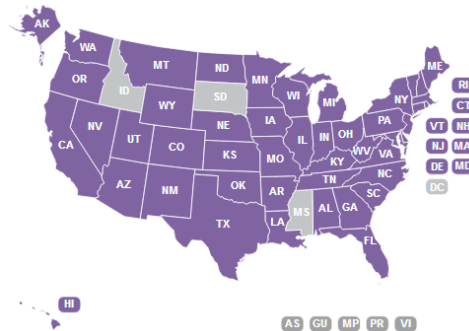


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47 States With Industrial Hemp Legislation

Allows cultivation of hemp for commercial, research or pilot programs

Does not allow cultivation of hemp.



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Industrial Hemp & CBD

- “The Hemp Farming Act of 2018” removed “Industrial Hemp” from the definition of “marijuana” under the CSA and treats it as an agricultural commodity
 - The Act also decriminalized the production and use of hemp and hemp derived products, such as CBD oil
- Cannabidiol (“CBD”) – cannabinoid which can be derived from Industrial Hemp



CBD Oil



- Can be derived from both marijuana (medical and adult-use) and Industrial Hemp
- Medicinal properties
- 47 States have enacted laws permitting some form of marijuana or marijuana-based products (generally CBD oil & low or no THC)



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Administration in Schools - Catch 22

- **Section 504 & IDEA v. Federal Law & ESSA**

- Federal law requires school districts to provide an educational environment **free from controlled substances** (such as marijuana) as a condition of receiving federal funds (Drug Free Workplace Act 41 U.S.C § 8)
- ESSA § 4108(2)
 - “[E]ach local educational agency . . . that receives an allocation under section 4105(a) shall use a portion of such funds to develop, implement, and evaluate comprehensive programs and activities that—
 - (2) foster safe, healthy, supportive, and **drug-free environments** that support student academic achievement”

**Generally, schools are not required to make accommodations for the use of medical marijuana*



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Administration in Schools - Medical Marijuana

- The majority of states that allow the use of medical marijuana bar its consumption in public places, including school property
 - **Some** states permit parents to give their child non-smokable medicinal marijuana-derived products at school



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Administration in Schools - CBD

- **MAY** be permissible
 - Depends on the circumstances
- **Medical Marijuana** derived CBD - likely is **NOT** permissible
- **Industrial Hemp** derived CBD - likely **IS** permissible



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Verifying Medical Marijuana Patients



- State law specifies who must register
- Policies should reflect statutory requirements
- No criminal liability for valid medical patients



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Administration in Schools – Who Should Administer?

- States that permit medical marijuana use in schools should regulate who administers it and how it is stored



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Administration in Schools – Who Should Administer?

Caution: Some states expressly prohibit nurses from administering medical marijuana



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Navigating the Administration of Medical Marijuana

- Requests to use are an “unreasonable accommodation” under Section 504
 - *Garcia v. Tractor Supply Co.*, 154 F.Supp. 3d 1225 (D.N.M. 2016)
- Use of “illegal drugs” is not a disability
 - *Forrest City Residential Management v. Beasley*, 71 F.Supp.3d 715 (E.D.Mich. 2014)



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Recent Developments

Albuquerque Pub. Schs. v. Sledge (D.N.M. Aug. 8, 2019)

- Section 504 and IDEA **do not** require schools to permit or accommodate the possession and use of marijuana on school grounds
- IDEA
 - Does not “require a state educational agency to pursue legislative amendments of any kind, much less a legislative amendment permitting school to commit a federal crime”
- Section 504
 - The actions of the school officials were not based on the student’s disabled status, but were rather a reflex to the substance of cannabis and the laws that prohibit its possession and use



Recent Developments

- *A.S. et. al v Board of Education for Schaumburg School District #54 and the State of Illinois* (N.D. Ill. 2018)
 - Ashley's Law – Amended School Code
 - Students are allowed to take medical marijuana at school, if they qualify under the state's medical marijuana program
 - Prescription/Certification
 - Non-smokable product
 - Consumption must not "disrupt the school educational environment"
 - School officials are not forced to administer
 - Senate Bill 455 – Expanded Ashley's Law
 - Requires schools allow administrators/nurses to administer medical marijuana



Looking Ahead



- Clear Conflicts
- State specific



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Tobacco

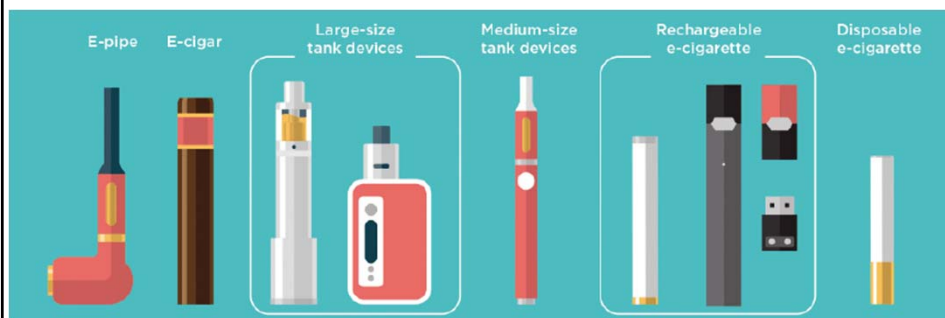


- Schools can prohibit the possession and use of tobacco products
- Federal law prohibits use of tobacco indoors
- States may restrict use to designated outdoor areas



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E-Cigarettes – What Are They?



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E-Cigarettes & “Vaping”



Electronic nicotine delivery systems (ENDS), or e-cigarettes, are the most commonly used tobacco product by young people

- Some states include e-cigarettes in the definition of “tobacco products”
- States have started to pass laws prohibiting the sale, use, and/or possession of ENDS by minors



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E-Cigarettes & “Vaping”



- FDA prohibits sale and distribution of tobacco products to minors
- Example: Juul Labs



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“Vaping” Medical Marijuana



- **May** be permissible
- The form of “medical marijuana” varies by state



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Student Privacy and Drug Use

- Student health records = education records
- Must maintain drug & alcohol treatment records in a locked and secure area
 - Keep separate from educational records
 - Includes information relating to identity, diagnosis, prognosis, or treatment



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Student Privacy and Drug Use

- Consent required
- Records must remain confidential after student returns from drug or alcohol use treatment
- Develop Records Policy

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Students' Rights

- 1st Amendment – Free Speech
- 4th Amendment – Unreasonable Search & Seizure
- 5th Amendment – Right Against Self-Incrimination
- 14th Amendment – Due Process



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Students' Rights – 1st Amendment

- 1st Amendment – Free Speech
 - Illegal drug-related speech can be regulated
 - *Morse v. Frederick*, 551 U.S. 393 (2007)



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Students' Rights – 4th Amendment

- 4th Amendment – Search & Seizure
 - Reasonable searches
 - “not excessively intrusive”
 - Public schools can conduct random drug testing on athletes
 - Expanded to include ALL participants in extracurricular activities
- Balance:
 - Privacy rights of students
 - Duty to maintain safe environment



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Students' Rights – 5th Amendment

- 5th Amendment – No Self-Incrimination
 - Interrogations may require “Miranda” warnings if:
 - School resource officers
 - Resulting in criminal charges
 - Consider Student’s Age:
 - *Yarborough v. Alvarado*, 541 U.S. 652 (2004)
 - *J.D.B. v. North Carolina*, 564 U.S. 261 (2011)



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Students' Rights – 14th Amendment

- 14th Amendment – Due Process
 - Property interest in education
- Requires
 - Opportunity to be Heard
- *Goss v. Lopez*, 419 US 565 (1975).



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School Authority to Discipline

- Code of Conduct
 - Prohibits students from being under the influence of drugs or alcohol while at school or sponsored activities
 - May require impairment testing if allowed by state



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School Authority to Discipline – Drug Testing



- Extracurricular Activities
 - Allowed
 - *Vernonia School Dist. 47J v. Acton*, 515 U. S. 646 (1995)



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School Authority to Discipline – Drug Testing



- Non-Extracurricular Activities
 - Need “*Reasonable Suspicion*”
 - Rumors = not enough



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School Authority to Discipline – Extracurricular Activities

- Schools CAN exclude a student from extracurricular activities if he/she has committed an alcohol or drug infraction.
- Including:
 - Off-campus conduct
 - Off-season conduct
- Right → Privilege



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Trending Issues

1. Marijuana Use
2. Vaping
3. Opioids



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Youth Marijuana Use



- A new study shows that cannabis use declined 8% in states that legalized recreational marijuana
- Previous studies have been mixed
 - some claim legalization has no impact on youth consumption
 - others show a decline in teen use



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Marijuana –Proactive Measures

For example, below are some of Colorado’s proactive measures

- All packages must feature a universal symbol
 - “Contains Marijuana. Keep out of the reach of children.”
- All packages must be child-resistant
- The words “candy” or “candies” cannot appear on marijuana or marijuana packaging
- Edibles in the shape of fruits, animals, or humans are prohibited



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The “Vaping” Crisis



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The “Vaping” Crisis

- Exploding E-Cigarettes
 - 2015-2017: ~ 2035 E-Cigarette explosion and burn injuries
- Seizures
 - Last decade: 127 reports of seizures or other neurological symptoms
- Lung Injuries/ Mysterious Pulmonary Illnesses
 - > 2,000 reported injuries
 - ~ 42 deaths
 - In 49 states, including D.C. and the US Virgin Islands
 - 79% of patients < 35 years old



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“Vaping” Bans



- Emergency Orders
 - Forbid the sale of all flavored vaping products
 - Require disclosure of all ingredients

MI, NY, MA, RI, MT, WA, OR, CA



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“Vaping” Bans



- Some states have banned the sale of all vaping products
- Colorado rules now prohibit the following additives:
 - Polyethylene glycol (PEG);
 - Vitamin E Acetate; and
 - Medium Chain Triglycerides (MCT Oil)

Most bans are in effect until 2020, **BUT** ... can be extended



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The Likely Culprit

- Vitamin E Acetate
 - Known additive used to dilute liquid in e-cigarettes
 - Generally safe to swallow, but may be dangerous when inhaled
 - Not yet conclusive



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Juul Labs Lawsuits

School Districts Sue Juul Over Marketing to Students

- *Francis Howell Sch. District v. Juul Labs Inc.* (E.D.Mo. Oct. 7, 2019)
 - Racketeer Influenced Corrupt Organizations (RICO) Act - 18 U.S.C. § 1962(a).
 - Claim Juul is liable for hooking a generation of young smokers with its sweet flavors, causing a drain on school resources
- *The People of the State of California v. Juul Labs Inc.* (Alameda County Super. Ct. Nov. 18, 2019)
 - Claims Juul is endangering children's lives & accuses the company of setting a „flawed“ age-verification process for online sales



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Juul Labs Lawsuits

Students Sue Juul Over Targeting Ads to Youth

- *Meija v. Juul Labs Inc. et. al.*, (D. Ariz. Nov. 25, 2019)
 - 19 year old student alleges that Juul used misleading ads that resulted in his nicotine addiction, health concerns, emotional distress, and a "diminished enjoyment of life"
 - Claiming that Juul's 2015 "Vaporized" advertising campaign focused on colorful devices and the range of flavors while misleading teens "about the product's purpose — to deliver nicotine to the blood stream at the same rate as combustible cigarettes."



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The Opioid Epidemic

- 75% of annual drug-related deaths are caused by opioids
- 30% increase in opioid overdoses nationwide between 2016-2017



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The Opioid Epidemic - AYAs

- 1/5 adolescents and young adults (AYAs) report misusing opioids



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Opioid Lawsuits

School Districts Sue Opioid Manufacturers & Distributors Over Costly Effect on Students

- *The Sch. Board of Miami-Dade County, FL v. Endo Health Solutions Inc., et.al.* (Sept. 30, 2019)
 - Racketeer Influenced Corrupt Organizations (RICO) Act - 18 U.S.C. § 1962(a).
 - Claims the district has had to spend money and divert law enforcement attention to mitigate the effects of the opioid crisis



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Combating The Opioid Epidemic

1. Set guidelines and permit the use of opioid antagonists (nurses trained to administer life-saving drugs) to combat overdose
2. Require the inclusion of opioid abuse instruction in health curricula



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Questions?



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 - Industry News
 - Agency Regulations
 - CBD
 - Industrial Hemp



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