

# GENERAL COUNSEL'S CORNER

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## Cannabis-Related Issues for Higher Education and Nonprofit Institutions

As highlighted in our past articles, there is a conflict between many states' laws and federal law involving marijuana, which is a form of cannabis.<sup>1</sup> Even though lawful access to marijuana is increasing at the state level for recreational and medical use, it is still classified as a Schedule I Controlled Substance under the U.S. Code;<sup>2</sup> therefore, its possession, sale or use is prohibited by federal law, even in those states whose laws have decriminalized its use. What makes marijuana a controlled substance is the presence of tetrahydrocannabinol (THC) at a level of 0.3% or more. Hemp, which is also a form of cannabis, contains less than 0.3% THC, and has been removed from the federal schedule of controlled substance.

It is well-known to colleges and universities that they risk losing federal funds for failing to comply with marijuana restrictions under the Drug Free Schools and Communities Act.<sup>3</sup> What may not be as apparent is that nonprofit corporations could jeopardize their 501(c)(3) designated status when promoting marijuana. This means that private higher education institutions or entities affiliated with public institutions, such as campus foundations, which enjoy 501(c)(3) status, must be mindful of the Internal Revenue Service's (IRS) position on activities involving marijuana.

In a private letter ruling issued in 2020<sup>4</sup>, the IRS denied an organization's application for 501(c)(3) status on the grounds that its purposes contravened federal law. In doing so, the IRS was applying what is sometimes referred to as the "illegality doctrine," which provides that activities that are in violation of the law can never be charitable. The facts of the private letter ruling involved an organization intended to dispense cannabis medications to qualified patients; provide information about these types of medications to the patients and their caregivers; help patients understand the instructions their doctors or other health practitioners provide; and monitor patient's health and progress to make sure the cannabis medications were working effectively and safely. In addressing these purposes, the IRS stated that "[w]hile medical marijuana may currently be legal in the state you reside, it is currently not recognized as legal by federal law. Therefore, despite any educational or charitable purpose you may plan to achieve through your activities, you are promoting an illegal activity under federal law. Therefore, you are not

<sup>1</sup> Barbara A. Lee and Camisha Parkins, *General Counsel's Corner: Cannabis and Research on Campus*, July 11, 2022 See <https://www.bsk.com/news-events-videos/general-counsels-corner-cannabis-and-research-on-campus>; Barbara Lee and Catherine Grazioplene, *General Counsel's Corner: Cannabis on Campus*, June 23, 2022. <https://www.bsk.com/news-events-videos/cannabis-and-the-campus>; Gail M. Norris, *General Counsel's Corner: Cannabis Use in Hospitals*, August 2, 2022 <https://www.bsk.com/news-events-videos/cannabis-use-in-hospitals>.

<sup>2</sup> 21 U.S.C. §812.

<sup>3</sup> 20 U.S.C. § 1145g; 1011i

<sup>4</sup> <https://www.irs.gov/pub/irs-wd/202014019.pdf>

operating for an exclusive purpose within the meaning of Section 501(c)(3) of the Code.”<sup>5</sup> While private letter rulings are not precedential, the IRS in its only publicly available pronouncement to date has definitively taken the position that any type of activity undertaken by a 501(c)(3) organization that could be considered a promotion of marijuana could jeopardize the organization’s exempt status.

### Practical Considerations During the Academic Year

As more states are opening up access to cannabis production, possession and use, it seems natural for higher education institutions and their related entities to take a more relaxed approach toward cannabis in general. However, until the federal government adjusts its laws, rules, regulations and policies to be more consistent with those of a majority of the states, cannabis that is classified as a federal controlled substance cannot be allowed on campus, except in limited circumstances related to research.<sup>6</sup>

Universities in states where recreational marijuana has been legal for a few years still have very strict policies against marijuana possession or use on campus. For instance, the University of Colorado Boulder states in its literature that “it is illegal for anyone (regardless of age) to have or use marijuana on campus in any form, even with a prescription. Being under the influence of marijuana is a violation of the CU (University of Colorado) drug policy and may result in student conduct sanctions and processes.”<sup>7</sup> The University of Massachusetts Amherst also has strong warnings on its website regarding the prohibition of marijuana.<sup>8</sup>

All colleges and universities that receive federal assistance should have policies that prohibit marijuana possession and use on campus. Some institutions in states where recreational marijuana is legal prohibit the presence of cannabis in all of its forms,<sup>9</sup> while others restrict marijuana only.<sup>10</sup> Institutions in states where recreational marijuana is legal should carefully consider their drug policies to determine not only what form of cannabis should be allowed, but also how students will be disciplined for violations relating to possession and use. Clear notice to students of prohibited items and how violations will be addressed is most important. Any changes in drug policies will naturally depend on the campus culture and should be fully vetted with campus counsel, executive leadership, the campus community and even local community stakeholders.

Another area that causes concern to campus administrators is that of accommodating a student with a disability who has a license to use marijuana for medicinal purposes based upon a doctor’s recommendation. Section 504 of the Rehabilitation Act (Sec. 504) and the Americans with Disabilities Act (ADA) both require schools to consider reasonable accommodations of students with disabilities. Many state laws have similar requirements. Because marijuana is a controlled substance under federal law, campuses are prohibited from allowing it on campus and therefore cannot honor a

5 <https://www.irs.gov/pub/irs-wd/202014019.pdf>, page 5.

6 Supra note 1 (see <https://www.bsk.com/news-events-videos/general-counsels-corner-cannabis-and-research-on-campus.>)

7 <https://www.colorado.edu/orientation/2022/04/21/marijuana-things-know#:~:text=It%20is%20illegal%20for%20anyone,student%20conduct%20sanctions%20and%20processes.>

8 <https://www.umass.edu/marijuana/#:~:text=You%20are%20part%20of%20the,or%20guests%20of%20the%20university..>

9 [https://oregon.starrezhousing.com/StarRezPortalX/4D19793C/21/437/Resources-Residence\\_Hall\\_Stand](https://oregon.starrezhousing.com/StarRezPortalX/4D19793C/21/437/Resources-Residence_Hall_Stand); <https://source.colostate.edu/marijuana-guidelines/>; [https://policy.oregonstate.edu/UPSM/07-045\\_university\\_policy\\_marijuana](https://policy.oregonstate.edu/UPSM/07-045_university_policy_marijuana); <https://rrr.princeton.edu/2022/university-wide-regulations/16-health-and-safety-policies>; <https://www.purchase.edu/offices/community-standards/cannabis-marijuana-policy/>.

10 [https://www.umass.edu/dean\\_students/sites/default/files/documents/07.01.2019%20Code%20of%20Student%20Conduct.pdf](https://www.umass.edu/dean_students/sites/default/files/documents/07.01.2019%20Code%20of%20Student%20Conduct.pdf); <https://cpb-us-e1.wpmucdn.com/blogs.cornell.edu/dist/8/4200/files/2018/07/University-Policy-4.8-Alcohol-and-Other-Drugs-1u4c6cy.pdf>; <https://www.rochester.edu/reslife/assets/pdf/Policy%20and%20Campus%20Guide/Res%20Life%20Combined%20Policy%20List.pdf>; <https://www.bc.edu/content/dam/bc1/offices/StudentAffairs/main/StudentGuide/Section-4.0-Student-Code-of-Conduct2020.pdf>

student's request to use marijuana as an accommodation even with the requisite legal authorization under state law.

One federal appellate court found that the use of medical marijuana was not protected under the ADA, since the ADA does not protect individuals who engage in the illegal use of drugs and the covered entity acts on the basis of such use.<sup>11</sup> In this case, the plaintiffs challenged two California cities' attempt to close medical marijuana dispensaries as violative of their rights under Title II of the ADA, which prohibits disability discrimination in the provision of public services, since the cities' actions would effectively block their access to treatment. In ruling in favor of the cities, the 9th Circuit reasoned that Congress made clear that the ADA defined "illegal drug use" by reference to federal, rather than state law, and federal law did not authorize the plaintiffs' medical marijuana use." The Court therefore concluded that "the plaintiffs' medical marijuana use was not protected by the ADA."<sup>12</sup>

Although prohibited from allowing medical marijuana on campus, a college could assist the qualified disabled student with other forms of reasonable accommodation that do not involve the presence of the medical marijuana on campus, such as offering the student online courses or allowing the student to live off-campus if there is an on-campus housing mandate.

Also, it is important for the campus to understand whether the medical authorization is indeed for cannabis that is a controlled substance. As stated earlier, what makes cannabis a controlled substance is the level of THC of 0.3% or greater. Cannabis products with lesser levels of THC potentially could be permitted on some campuses under state and federal law, although there may be challenges in establishing how much THC is present in a product brought onto campus. The Food and Drug Administration has approved one cannabis-derived product—Epidiolex—which is used to treat seizures in people with certain conditions and contains no THC. Therefore, allowing a student to have this particular medication on campus would not run afoul of federal law.

With cannabis-related businesses and organizations growing in states where marijuana is legal, there may be more pressure on colleges and universities to host cannabis vendors on campus or otherwise allow their facilities to be used for cannabis-related activities. Requests to use campus facilities must be thoroughly analyzed under governing federal law, such as the Drug Free Schools and Communities Act and, if applicable, the IRS' private ruling, which puts at risk an institution's 501 (c)(3) status for cannabis-related activities that could be considered a promotion of illegal activity under federal law. At the very minimum, any outside party must be prohibited from bringing cannabis containing 0.3% or more of THC or marijuana onto campus.

Cannabis' popularity and increased use present unique challenges to colleges and universities given the tension between many states' laws and federal law involving marijuana. Compounding the complexities are the nuances surrounding cannabis, whether it is a controlled substance or not depending on the presence of THC, and whether the college is obligated to accommodate a request for cannabis use under governing disability laws. For these reasons, it is good practice to consult with counsel when tackling questions related to cannabis on campus in this new academic year.

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<sup>11</sup> James v. City of Costa Mesa, 700 F.3d 394 (9th Cir. 2012).

<sup>12</sup> See James at 397.



*General Counsel's Corner is a publication presented by one of Bond's former general counsels and academic administrators of higher education institutions: [Monica Barrett](#) (Rutgers); [Sandra Casey](#) (SUNY and Siena College); [Shelley Sanders Kehl](#) (Pratt Institute); [Barbara Lee](#) (SVP for Academic Affairs at Rutgers); [Gail Norris](#) (University of Rochester); and [Jane Sovern](#) (CUNY). In each issue, a different attorney from this team will share with you recent legal developments, tips, strategies and useful information to assist you with your daily work on campus.*

This post is brought to you by [Sandra M. Casey](#) and [Catherine A. Graziose](#) in our Albany office. Sandra served in senior leadership roles as Deputy and acting General Counsel for the State University of New York (SUNY) system and College Counsel to Siena College, bringing extensive and varied experience in higher education and compliance to her clients. Catherine is a higher education attorney in Bond's Albany office and assisted in co-authoring this article.

