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CBD on Campus: Many Questions, Few Answers

Although there is clarity under federal law that colleges and universities may not permit marijuana (also known as cannabis) to be used or possessed on campus by either students or employees,¹ there is less clarity about whether colleges and universities can, or should, permit another form of cannabis—cannabidiol (CBD)—to be used or possessed on campus. Although CBD is technically legal under federal law (and the law of many states), its legal status does not tell the whole story.

What is CBD?

CBD is a naturally occurring chemical derived directly from hemp that is found in cannabis plants.² CBD and tetrahydrocannabinol (THC) are the two main natural compounds found in cannabis and hemp plants;³ however, the differences between the two compounds make its regulation on campuses quite different. CBD, by definition, is supposed to contain less than 0.3% of THC, the substance in cannabis that produces the “high.” Although only 19 states and the District of Columbia permit both the medical and recreational use of cannabis,⁴ all 50 states have passed laws legalizing the use of CBD in some capacity.⁵ To make matters more complicated, cannabis is still listed as a Schedule I controlled substance under the Controlled Substances Act (the CSA), meaning its possession, sale and use is still illegal at the federal level.⁶ Furthermore, colleges and universities are subject to stricter federal restrictions than other organizations in that cannabis cannot be grown, possessed or used on campuses if the institution receives federal funds.⁷

CBD sales are projected to reach upwards of \$11 billion over the next five years.⁸ Many factors play into this projection and the rising popularity of CBD products. Since CBD is not a controlled substance, no prescription is needed to obtain it. Many storefronts and online sites across the U.S. sell CBD products, particularly in those states that have legalized marijuana. CBD was also one of the first easily obtainable, cannabis-related substances that provided positive benefits while being non-intoxicating.⁹ CBD also comes in many different product forms, such as tinctures, gummies, capsules and topical creams.¹⁰

1 See Barbara A. Lee and Catherine A. Graziose, “Cannabis and the Campus,” June 23, 2022, available at: <https://www.bsk.com/news-events-videos/cannabis-and-the-campus>. See also Sandra M. Casey and Catherine Graziose, *General Counsel’s Corner: Cannabis-Related Issues for Higher Education and Non-Profit Institutions*, Sept. 7, 2022, available at: <https://www.bsk.com/news-events-videos/cannabis-related-issues-for-higher-education-and-nonprofit-institutions>; Barbara A. Lee and Camisha Parkins, *General Counsel’s Corner: Cannabis and Research on Campus*, July 11, 2022, available at: <https://www.bsk.com/news-events-videos/general-counsels-corner-cannabis-and-research-on-campus>; and Gail Norris, *Cannabis Use in Hospitals*, August 11, 2022, available at: <https://www.bsk.com/news-events-videos/cannabis-use-in-hospitals-health-law-wire>.

2 <https://www.health.harvard.edu/blog/cannabidiol-cbd-what-we-know-and-what-we-dont-2018082414476>

3 <https://www.healthline.com/health/cbd-vs-thc>

4 <https://mjbizdaily.com/map-of-us-marijuana-legalization-by-state/>

5 <https://www.health.harvard.edu/blog/cannabidiol-cbd-what-we-know-and-what-we-dont-2018082414476>

6 21 U.S.C. § 812.

7 48 CFR § 52.223-6; 34 CFR § 86.2.

8 <https://www.healthline.com/health-news/cbd-sales-projected-to-hit-11-billion-by-2027-is-it-safe-effective>

9 <https://www.healthline.com/health-news/cbd-sales-projected-to-hit-11-billion-by-2027-is-it-safe-effective>

10 <https://www.cbdmd.com/blog/post/understanding-different-types-of-cbd-products>

Why is CBD an issue for colleges and universities?

As noted above, the Drug-Free Schools and Communities Act Amendments of 1989 (the Act)¹¹ require colleges and universities that receive federal funds to prohibit the presence of controlled substances on campus, at the risk of losing the college's federal funding. Marijuana is on the list of controlled substances; CBD is not.¹²

If all CBD were certain to contain less than 0.3% of THC, the issue would be far less complicated. However, the Food and Drug Administration (FDA) has not approved either marijuana or CBD for medical use or for food additives. Therefore, CBD production is not regulated by the FDA or any other federal government agency for purity and/or potency.¹³ Chemical analyses of samples of CBD have found widely divergent amounts of CBD and, in some cases, THC above the level of 0.3% has been found in samples, rendering that sample illegal under federal law.

Here's what the scientists say:¹⁴

In 2020, the FDA did a study on products that claimed to have a specific amount of CBD and those claimed amounts were compared to the FDA testing results. Of the 102 products that indicated a specific amount of CBD, 18 products (18%) contained less than 80% of the amount of CBD indicated, 46 products (45%) contained CBD within 20 percent of the amount indicated, and 38 products (37%) contained more than 120 percent of the amount of CBD indicated. Of great concern is that 49% of the products tested contained THC.¹⁵

The *Journal of the American Medical Association* published a letter demonstrating the results of "undercover" purchases of CBD. Of 84 samples tested, THC was detected in 21%. There were other defects in the mislabeled products. Only 30.95% were accurately labeled. Accuracy of labeling depended on product type, with vaporization liquid most frequently mislabeled (87.50%) and oil most frequently labeled accurately (45.0%). THC was detected (up to 6.43 mg/mL) in 18 of the 84 samples tested (21.43%).¹⁶

These government studies demonstrate that the purchaser cannot be certain that the product contains the stated amount of CBD, nor that it does not contain excessive amounts of THC. Furthermore, CBD can have side effects, such as dry mouth, diarrhea, reduced appetite, drowsiness and fatigue, and may interact with other drugs.¹⁷

CBD is not approved by the FDA for medical treatments, so doctors cannot prescribe CBD.¹⁸ At the

11 Public Law 101-226.

12 Hemp, from which CBD is derived, was removed from the controlled substances list in 2018 by the Agriculture Improvement Act of 2018, also known as the "Farm Bill." Public Law 115-334 §§ 10113, 12619.

13 Several states, however, do regulate the production of CBD. For example, both New York and Colorado regulate the cultivation and manufacture of CBD. See <https://cannabis.ny.gov/cannabinoid-hemp> and <https://cdphe.colorado.gov/hemp-food>.

14 The following research results are discussed in David G. Evans, "Medical Fraud, Mislabeled, Contamination: All Common in CBD Products." 117 *Missouri Medicine* 5 (2020).

15 Report to the U.S. House "Sampling Study of the Current Cannabidiol Marketplace to Determine the Extent That Products are Mislabeled or Adulterated Report in Response to Further Consolidated Appropriations Act, 2020," FDA July, 2020, https://hempindustrydaily.com/wp-content/uploads/2020/07/CBD-Marketplace-Sampling_RTC_FY20_Final.pdf; See also: See the 2016 warning letter section at: <https://www.fda.gov/NewsEvents/PublicHealthFocus/ucm484109.htm>

16 <https://jamanetwork.com/journals/jama/article-abstract/2661569?redirect=true>

17 <https://www.mayoclinic.org/healthy-lifestyle/consumer-health/expert-answers/is-cbd-safe-and-effective/faq-20446700#:~:text=Though%20it's%20often%20well%20tolerated,dosage%20of%20CBD%20in%20products.>

18 Jay Ripton, "CBD Oil and Physician Liability," *Physicians Practice*, August 4, 2020, available at <https://www.physicianspractice.com/view/cbd-oil-and-physician-liability> (last visited September 2, 2022).

moment, the only approved CBD drug is Epidiolex, which treats a rare form of children's epilepsy. Therefore, the uncertainty about whether CBD is "actually" CBD would make it difficult for college staff, including law enforcement, to ascertain whether a particular use of CBD is legal under federal law, even if it is legal under state law.

Issues for University Counsel

Given the uncertainty of the purity of any particular CBD product that may be possessed by a student or employee, university counsel need to confer with their clients about how the institution will go about dealing with CBD. It is very likely that students or staff currently possess and use CBD products on campus, and since properly constituted CBD is not illegal, actions to restrict its use will be unpopular. However, counsel need to address the following issues, at a minimum.

Banning CBD on Campus: Drug-Free Policies

Given marijuana's status as a prohibited drug under the Act, colleges and universities that receive federal funds are required to adopt a policy that prohibits the use, possession and sale of marijuana on their campuses. Most colleges and universities have such policies in place, even in California where marijuana has been legal since 1996.¹⁹ However, since there are differences between cannabis and CBD products (including their THC content), colleges with policies that prohibit marijuana and do not also specifically prohibit CBD products expose themselves to legal disputes.²⁰ Policies that do not mention low-level hemp, CBD and other hemp or cannabis-derived products with 0.3% or less THC content seemingly provide students and staff a "green light" to use CBD products on campus.

This is an issue for many institutions. Not only does a policy that only mentions cannabis imply that CBD use is permitted, it is also confusing to staff who are in charge of implementing and enforcing the policy. Since some CBD products contain varying quantities of THC, both students and staff will be left wondering whether such products comply with an institution's drug-free policy. Further, it may be impossible to know whether a product contains more than 0.3% THC, and even the product's label (if available) may not be accurate, given the research findings cited above. Therefore, it is almost impossible to regulate CBD products under a policy that just mentions cannabis. Having drug-free policies that specifically prohibit not only cannabis, but also CBD and low-level hemp products (akin to banning alcohol or smoking on campus irrespective of a student's age), may be the only surefire way to ensure that all staff and students are clear on what substances are prohibited on campus—and, of course, that will be an unpopular decision.

Are Institutions Required to Make a "Reasonable Accommodation" Under the ADA for CBD?

The Americans with Disabilities Act (the ADA) prohibits discrimination on the basis of disability and applies to all colleges and universities, whether privately or publicly funded.²¹ Institutions are required to make reasonable accommodations for individuals with disabilities where the institution is made aware of the student's disability and the accommodation would not pose an undue hardship for the institution.²²

19 <https://www.forbes.com/sites/richardjchang/2021/06/23/colleges-ban-medical-marijuana-use-even-in-states-where-it-is-legal/?sh=4494926f59ae>

20 Several colleges and universities have been sued by students who claim that they are entitled to consume medical marijuana for certain disorders. This situation is especially problematic for students in health care programs who must be tested regularly for controlled substances. See, for example, [Medical marijuana on campus: Colleges say no and face lawsuits - Washington Times](#) (last visited 9/6/22). Some institutions choose to permit CBD use under certain circumstances. For example, Colorado State University has taken the position that "products derived from legally grown hemp—required to be grown by a licensed vendor in Colorado—can be legally possessed." <https://www.leafreport.com/education/the-confusion-over-cbd-on-college-campuses-outdated-policies-and-the-need-for-education-7770>

21 <https://adata.org/faq/what-are-public-or-private-college-universitys-responsibilities-students-disabilities>

22 <https://www.disabilityrightssc.org/the-rights-of-college-students-with-disabilities-2/>; <https://educationattorney.com/what-are-reasonable-accommodations-for-students-with-disabilities/>

The ADA also provides that an “individual with a disability” does not include a person using illegal drugs, which are defined in the ADA to include those drugs that are “unlawful under the [CSA].”²³ However, this does not include substances: (1) authorized by the CSA or other federal law; or (2) taken under the supervision of a licensed medical professional.²⁴ Federal courts have found that the ADA’s reasonable accommodation requirement does not apply to any substance that federal law classifies as a Schedule I drug, even if state law has decriminalized its use.²⁵

Clearly, institutions do not need to make a reasonable accommodation for a student’s marijuana use. With respect to CBD, since it is not regulated by the FDA, it is not a drug and a physician may not prescribe it for medical use. Therefore, it would appear that the ADA would not require a college to allow a student to use CBD as a reasonable accommodation, even if it is legal under state and federal law, because this should foreclose the possibility that CBD could fit within the “taken under the supervision of a licensed medical professional” exception.

CBD Use by Student-Athletes

The NCAA has banned all use of cannabinoids, including CBD, by college athletes,²⁶ even though its policies permit medical exceptions for other banned substances.²⁷ Because of the potential for impermissible levels of THC in CBD, athletes who undergo drug testing may test positive for marijuana even if they have only used CBD. Because of the scope of risks involved for student-athletes who use any form of CBD, general counsel should discuss this matter with athletics department staff, including trainers who may work closely with student-athletes and may be giving them advice on pain management that could pose problems if that advice includes the use of a CBD product. College counsel may wish to review performance requirements and policies for trainers and other athletics staff to ensure it is clear that there may be consequences for advising student-athletes to use a CBD product.

CBD Use Off Campus

If a college or university’s student conduct policy includes off-campus misconduct, general counsel may wish to discuss with institutional leaders whether that policy should apply to off-campus use or possession of CBD if the same has been prohibited on campus. Should such a decision be made, it is likely to be controversial because, as noted above, CBD is not illegal under federal law and the laws of many states. Even so, campus boundaries are porous and it may be difficult, if not impossible, to keep CBD off campus whether or not the institution’s policy prohibits it both on and off campus.

Conclusion

As our title suggests, CBD poses more questions for general counsel than answers. Although the presence of CBD on campuses poses fewer regulatory risks for institutions than its sister substance, marijuana, perplexing legal issues exist. Practical issues exist as well—for example, should the biennial report required by the Drug Free Schools and Communities Act include information on the institution’s training of students on safety concerns about CBD? Should an institution appear to attempt to limit CBD

²³ 42 U.S.C. §§ 12210(a), 12210(d)(1).

²⁴ 42 U.S.C. § 12210(d)(1).

²⁵ *James v. City of Costa Mesa*, 700 F.3d 394 (9th Cir. 2012), cert. denied, 569 U.S. 994 (2013).

²⁶ https://ncaaorg.s3.amazonaws.com/ssi/substance/SSI_DrugPoliciesBrochure.pdf. The NCAA policy is specifically applicable to the 2022-23 academic year. Even athletes who use CBD to control diseases such as epilepsy have been denied exceptions by the NCAA. See, for example, <https://reason.com/2018/05/29/ncaa-bans-football-player-because-he-use/>.

²⁷ According to NCAA policy, “[m]edical exceptions may be granted for substances in the following banned drug classes: anabolic agents, stimulants, beta blockers, diuretics and masking agents, hormone and metabolic modulators, beta-2 agonists, peptide hormones, growth factors or related substances and mimetics and narcotics. Id.

on campus? For example, should requests by student health centers or student or external groups who wish to offer “samples” of CBD products to students be denied? These are difficult questions, and more certainty about the content of any CBD product would make the decisions somewhat easier. Should the FDA decide to regulate the production and quality of CBD, institutions and their counsel could be more certain about how—and even whether—to address the question of CBD on campus.

If you have any questions, please consult [Barbara A. Lee](#), [Dustin M. Dorsino](#) or any attorney in Bond’s [higher education practice](#).

