BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. SYLVAN UNION SCHOOL DISTRICT.	OAH CASE NO. 2014010077 ORDER DENYING MOTION FOR STAY PUT

On January 6, 2014, Student filed a motion for stay put. On January 8, 2014, the Sylvan Union School District (District) filed an opposition. Student, a 7-year-old who suffers from seizures, seeks an order that the District administer liquid cannabidiol (CBD), "a chemical derived from marijuana," to Student during the school day, as called for in the Student's September 12, 2013, individualized education program (IEP) which incorporates his individualized health plan.

APPLICABLE LAW

Until due process hearing procedures are complete, a special education student is entitled to remain in his or her current educational placement, unless the parties agree otherwise. (20 U.S.C. § 1415(j); 34 C.F.R. § 300.518(a) (2006)[1]; Ed. Code, § 56505 subd. (d).) This is referred to as "stay put." For purposes of stay put, the current educational placement is typically the placement called for in the student's IEP, which has been implemented prior to the dispute arising. (*Thomas v. Cincinnati Bd. of Educ.* (6th Cir. 1990) 918 F.2d 618, 625.)

In California, "specific educational placement" is defined as "that unique combination of facilities, personnel, location or equipment necessary to provide instructional services to an individual with exceptional needs," as specified in the IEP. (Cal. Code Regs., tit. 5, § 3042.)

Marijuana, and any compound that contains any quantity of marijuana, is a controlled substance in California. (Health & Saf. Code, §§ 11053, 11054, subd. (d)(13).) Possession of more than 28.5 grams of marijuana is punishable by fine, imprisonment, or both. (Health & Saf. Code, § 11357.) Under the federal Controlled Substances Act (21 U.S.C., § 801, et seq.), marijuana, including substances extracted from marijuana, is classified as a Schedule 1 drug, meaning that it has no generally recognized medical use. (21 U.S.C., § 802(16); 21

[1] All references to the Code of Federal Regulations are to the 2006 edition, unless otherwise indicated.

U.S.C. § 812, Schedule I, (c)(10).) Federal law prohibits knowingly or intentionally dispensing marijuana. (21 U.S.C. § 841(a).) A person who aids and abets another in violating federal law can be punished to the same extent as the individual who actually commits the crime. (18 U.S.C. § 2(a).) The penalty for a first violation of federal marijuana laws is imprisonment for up to five years, a fine of up to $250,000, or both. (21 U.S.C. § 841(b)(1)(D).) Federal law prohibits doctors from prescribing Schedule 1 drugs. (*U.S. v. Harvey* (S.D. Cal 2011) 794 F. Supp.2d 1103, 1106, citing *Gonzales v. Oregon* (2006) 545 U.S. 1, 5 [125 S.Ct. 2195162 L.Ed.2d 1].)

In 1996, as a result of Proposition 215, the Compassionate Use Act of 1996 (Health & Saf. Code, § 11362.5 (CUA)) was enacted to "ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes *where* that medical use is deemed appropriate and has been *recommended* by a physician," and to "ensure that patients and their *primary caregivers* who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution." (Health & Saf. Code, § 11362.5, subds. (b)(A) and (B)(emphasis added).) The Medical Marijuana Program (Health & Saf. Code, § 11362.7-11362.83 (MMP)), which became law in 2004, sets reasonable limitations on who may possess medical marijuana, and where it may be used.

The MMP provides certain patients and their caregivers with defenses from prosecution in California for medical marijuana use. The MMP defines a "primary caregiver" as the individual designated by a qualified patient "who has consistently assumed responsibility for the housing, health, health or safety of that patient," which may include specified businesses such as licensed health care and residential care facilities, but does not include school districts or school nurses. (Health & Saf. Code, § 11362.7, subd. (d).)

The MMP limits where marijuana may be used for medical purposes. The MMP does not require accommodations for medical use of marijuana in the workplace, or the premises of jails, correctional facilities or where persons under arrest are detained. (Health & Saf. Code, § 11362.785, subd. (a).) The MMP also expressly states that it does not authorize the use of marijuana for medical purposes while operating a motor vehicle, while operating a boat, on a school bus, or within 1,000 feet of a school, recreation center or youth center.[2] (Health & Saf. Code, § 11362.79(b).)

The U.S. Department of Justice has historically focused its enforcement efforts away from seriously ill individuals and their individual caregivers.[3] However, state laws allowing

[2] The statute specifically states that "[n]othing in this article shall authorize the smoking of medical marijuana…" but would logically apply to any use or consumption of marijuana at these locations and during these activities, including, for example, vaporizing or consumption.

[3] Off. of the Deputy Atty. Gen., U.S. Dept. of Justice, Memorandum, Guidance Regarding Marijuana Enforcement (Aug. 29, 2013).

the medical use of marijuana do not immunize persons from prosecution under the federal Controlled Substances Act. (*Raich v. Gonzales* (9th Cir. 2007) 500 F.3d 850, 867 (*Raich*)).

Specifically regarding administration of drugs on a school campus, the California Education Code authorizes school nurses or designated school personnel to assist pupils only in taking prescribed medications. (Ed. Code, § 49423, subd. (a).)

DISCUSSION

The parties do not dispute that Student's September 12, 2013 IEP is the last agreed upon and implemented IEP, nor that the IEP provides for daily nursing services for Student to be administered CBD. There also appears to be no dispute that Student is a qualified patient under the MMP, is taking CBD for medical purposes without a prescription, and that Student's father (Parent) is Student's primary caregiver. However, at an IEP team meeting held November 1, 2013, and attended by Parent, the District notified Parent that it was not authorized to administer a non-prescription drug to Student and would stop doing so immediately. In response, Student filed with the Office of Administrative Hearings (OAH) a due process hearing request alleging that the District denied him a free appropriate public education under the Individuals with Disabilities Education Act (20 U.S.C. § 1400, et seq. (IDEA)), and this motion for stay put, in which only the administration of non-prescription CBD, a Schedule 1 controlled substance, is at issue.

Student argues that he is entitled under stay put to have a school nurse administer CBD to him because that service is provided for in the last agreed upon and implemented IEP. In support of his motion, Student submits his IEP's and the sworn declaration of Parent, who gives a chronology of the events described in the complaint, states that Student is taking CBD in liquid form under his tongue to control seizures, states that since November 4, 2013, he has been picking Student up at school to take him 1,000 feet away from school grounds to administer the CBD and then returning Student to school, and opines that this change in administration significantly disrupts Student's school program as Student resists returning to school after leaving.

The District opposes Student's motion the grounds that administration of CBD on a school campus: (1) violates the CUA, because school nurses are not primary caregivers and marijuana derivatives may not be used within 1,000 feet of a school, (2) violates the Education Code because a Student's possession of marijuana on campus permits suspension or expulsion, and school personnel may only administer drugs prescribed by a physician, and (3) violates the Controlled Substances Act and the District's participation in the Safe and Drug-Free Schools and Community Act (20 U.S.C. § 7101, et seq.), and jeopardizes the District's participation in federal funding for school programs. The District submits the sworn declaration of its director of special education, who confirms Parent's chronology of events, and explains that the Stanislaus County Office of Education (SCOE) brought it to the District's attention on October 23, 2013 that administration of CBD was unlawful and

jeopardized the District's federal funding, resulting in the November 1, 2013 IEP team meeting to notify Parent of the termination of those services.

Education Code, section 49423, specifically authorizes school districts to administer prescribed medications to pupils, but Student does not have a prescription for CBD. Student cites no authority for compelling school district personnel to administer a non-prescription drug, let alone a drug on Schedule I of the Controlled Substances Act. The federal government has determined that there is no medical reason for possessing or dispensing Schedule I drugs, and has imposed stiff criminal penalties for such actions. As the moving party, at the very least, Student should provide authority for an order that requires such a radical departure from State and federal law.

The MMP does not provide a defense to District personnel for violating California law prohibiting possession and distribution of CBD. District personnel are not primary caregivers who may raise the MMP as a defense to State prosecution, and the MMP does not permit use of marijuana or its chemical derivatives on a school campus, or within 1,000 feet of school grounds. Only Student and Parent are arguably immune from State prosecution, and Parent concedes that he has implemented his preferred CBD dosage schedule by complying with the MMP and removing Student from school premises for that purpose. Further, Student provides no evidence that the Parent's preferred dosage schedule is the only one that will meet Student's medical needs, even assuming that a showing of the need for a non-prescription drug would warrant an order that the District to violate State or federal law, which it does not.

The MMP does not provide a defense to District personnel for violation of federal law prohibiting possession and distribution of CBD. Per *Raich*, state laws such as the MMP do not immunize persons from prosecution under the federal Controlled Substances Act. The federal government's assurances that it does not currently plan to focus enforcement action on the caregivers of seriously ill patients does not offer comfort to school personnel, who are not encompassed in the definition of caregiver under the MMP. Even Student's treating physician has apparently declined to write a prescription for CBD and run the risk of federal criminal prosecution, and Student provides neither the authority nor a compelling argument for an order that school personnel be required to take such a risk.

Student's argument that District personnel must administer a Schedule I drug in violation of State and federal law because it is written into an IEP is unpersuasive and unsupported. Student cites no authority for condoning patently unlawful conduct because it is embodied in an IEP or health plan. OAH is called upon on a daily basis to find IEP's inappropriate and unenforceable where they are in violation of the procedural or substantive requirements of the IDEA and State special education law. OAH will not turn a blind eye, under the guise of stay put, to an IEP that calls for unlawful criminal activity under other State and federal statutes simply because the parties had previously agreed upon and implemented the unlawful provisions.

The District was on notice after it was contacted by the SCOE that administration of CBD was in violation of State and federal law, and correctly stopped dispensing CBD immediately. The District acted reasonably in promptly calling an IEP team meeting to inform Parent that the unlawful activity would cease, and to solicit Parent's participation in drafting a new health plan that would accommodate Student's educational needs within the boundaries of the law.

Accordingly, for the reasons stated above, Student's motion for stay put is denied.

IT IS SO ORDERED.

Dated: January 09, 2014

/s/

ALEXA J. HOHENSEE
Administrative Law Judge
Office of Administrative Hearings