(2016) (describing the Congressional intent has expanded beyond simply providing access and ensures students with disabilities are subject to demanding standards-based assessments).

Osborne & Russo, supra note 37, at 16.


Endrew, 137 S. Ct. 988, 991 (2017).

Id. at 1000.

Id. at 996.

Id. at 1001 (quoting Rowley, 458 U.S. at 179 (internal quotation marks omitted)).

Rowley, 458 U.S. at 200.

Id. at 192.

Endrew, 137 S. Ct. at 992.

Id.

Id. (quoting the Brief for Petitioner 40).


Endrew, 137 S. Ct. at 1001.


Endrew, 137 S. Ct. at 1002.

Id. at 1001.


34 C.F.R. § 300.39(b)(3)(i) (defining “specially designed instruction”).


Decker, supra note 10.


Rowley, 458 U.S. at 207.


Id. at 542 (explaining that it must determine whether “the content, methodology, or delivery of instruction” have been narrowly tailored to “address the unique needs of the child that result from the child's disability” 34 C.F.R. § 300.39(b)(3)(i)).


Id.

Id. (quoting the Brief for Petitioner 40).


See also Zirkel, supra note 64, at 552.


Id.


Id. at *4.

Id. at *13.

Id. at *7.

Id. at *9-10.


Id. at *4.

Id. at *8.

Id.

Id. at *9, n.11.

Id. at *9 (quoting Endrew, 137 S.Ct. 988, 999 (2017)).

Id. at *6.

Id. at *7.

Id. at *12.


Endrew, 137 S.Ct. 988, 1001 (2017).


Endrew, 137 S. Ct. 988, 992 (2017).
increased use along with that of other substances but is addictive and can result in the adoption of undesirable lifestyles.\textsuperscript{11}

Not surprisingly, teachers and other school employees in jurisdictions where it is illegal to do so may ask whether they can legally smoke or ingest (in foods and/or drinks) marijuana during their personal time, particularly if it is for medical purposes.\textsuperscript{12} Educators who think that insofar as they can legally consume alcohol when not at work, they should be able to smoke marijuana if doing so does not interfere with their professional duties, are likely to be mistaken.

In light of significant legal questions emerging for educational leaders, their boards, and their lawyers, not to mention school employees, over the legalization of marijuana, the remainder of this article is broken into three sections focusing on employees rather than students insofar as students are too young to smoke legally. The first part looks at federal statutes on marijuana usage before examining related litigation in the second section. The third part offers recommendations for educational leaders, their boards, and their lawyers to consider as they devise and implement policies about marijuana use by employees. The article rounds out with a conclusion.

**Federal Drug Statutes Involving Marijuana**

**Federal Statutes**

The fact that a growing number of jurisdictions have legalized marijuana for recreational and/or medical reasons notwithstanding, it is worth noting two federal statutes regulating its possession and/or use. The first, the Controlled Substances Act, initially enacted in 1970, makes it a federal crime for persons, thus including public school systems. In response to the DWFPA, school boards need to have policies in place designed to keep themselves and their employees from running afoul of federal law.

**Recreational Marijuana Use**

In jurisdictions where it is legalized for recreational use, litigation makes it clear that educators are unlikely to succeed in claiming they cannot be disciplined for smoking marijuana when not at work. Further, while most state laws do not explicitly discuss marijuana use and employment, others defer to the judgment of employers. Accordingly, because a “[a] teacher’s employment in the public schools is a privilege, not a right,”\textsuperscript{13} boards can hold teachers to higher standards of conduct because they serve as role models for students.

The first of two cases directly involving an educator, albeit a bit dated, was litigated in Illinois where a teacher was fired after being arrested and pleading guilty to marijuana possession. On further review of the trial court’s reversal of a hearing officer’s decision that the teacher’s dismissal was improper, an appellate court affirmed in the board’s because its officials demonstrated a clear relationship between the plaintiff’s possession of marijuana and his fitness to teach. The court reasoned: “[w]e do not doubt that knowledge of a teacher’s involvement in illegalities such as possession of marijuana would have a major deleterious effect upon the school system and would greatly impede that individual’s ability to adequately fulfill his role as perceived by the Board.”\textsuperscript{19}

In the second case, a teacher unsuccessfully challenged his dismissal after he was fired for growing, possessing, and smoking marijuana even though the criminal charges against him were dropped because the police obtained the evidence in an impermissible search in violation of the Fourth Amendment. The teacher claimed that because the criminal charge against him was dropped due to the illegal search there was a lack of substantial evidence in the record supporting his dismissal. Rejecting the teacher’s argument, an appellate court in North Carolina affirmed that insofar as police did discover marijuana plants, a pipe, and rolling paper in his home and he admitted to smoking marijuana, the board had the authority to dismiss him from his job.\textsuperscript{20}

**Medical Marijuana Use**

Just as with recreational use, even more litigation demonstrates that the judiciary defers to federal law or employer policies when, in non-school cases, individuals unsuccessfully claim to have been disciplined unfairly because they used marijuana for medical reasons. To this end, the Sixth Circuit emphasized that Michigan’s Medical Marihuana [sic] Act did not protect an employee in a branch of a national retail chain from dismissal even though he was a registered user under state law and declared that he never smoked it while on the job or came to work under the influence of the drug. The court affirmed that insofar as the employee tested positive in a standard drug test, in violation of the company’s policy, the Act did not protect him from dismissal as a result of his having ingested marijuana to treat the knee he injured himself when he twisted it the wrong way while pushing a cart.
The Supreme Court addressed the interplay between state and federal law, the Controlled Substances Act, which regulated the manufacture, distribution, or possession of marijuana to intrastate growers and users for medical purposes. *Gonzales v. Raich.*

In a dispute from California, then one of at least nine states that legalized the use of medical marijuana. Vacating an order of the Ninth Circuit to the contrary, the Court ruled that insofar as the Controlled Substances Act applied, two women who used doctor-recommended marijuana for serious medical reasons could face federal charges for doing so even though a California law authorized its limited use for medicinal purposes.

More recently, a telephone company customer service representative who worked from home because he is quadriplegic unsuccessfully challenged his dismissal for using prescribed marijuana for muscle spasms. The employee lost his job because he tested positive for a component of medical marijuana during a random drug test. The Supreme Court of Colorado affirmed that insofar as use of medical marijuana was illegal under federal law, the Medical Marijuana Amendment of the state constitution did not protect him from the loss of his job.

**Recommendations**

Due to the lack of clarity in the interplay between federal and state marijuana laws, with the latter typically inadequately addressing its use by employees, coupled with the litigation and growth of statutory developments, it is incumbent on boards to devise and implement legally sound policies regardless of why it is used. Yet, policies can only go so far because lingering questions are likely to remain. For example, what happens if employees ingest marijuana in jurisdictions where it is legal to do so but return home and test positive for THC? Should the employees be suspended? Dismissed? How much is the resolution of such disagreements likely to depend on language in board policies and/or collective bargaining agreements?

Educational leaders, their boards, and attorneys in jurisdictions where marijuana use is legal should be particularly mindful to devise policies informing employees about its permissible and impermissible uses. Also, regardless of whether they are in states where it is legal to do so, school administrators, their boards, and other educational leaders may wish to consider the following suggestions when devising and/or reviewing their policies about marijuana use by school employees.

1. School boards should be proactive by adopting clear, up-to-date policies about marijuana possession and use by employees. Suggested members of a policy team could include a school nurse, a building and district level school administrator, a teacher, a board member, the board attorney, representatives of medical facilities, a physician, a drug rehabilitation counselor, and a faculty member from a local college or university who specializes in issues associated with drug use.

2. Board policies on marijuana use should be closely aligned with their drug testing policies for employees because most courts have upheld drug testing for individuals in safety sensitive positions such as teachers, cafeteria workers, and bus drivers.

3. Policies should
   - Remind employees that although state law may allow the use of marijuana for medical or recreational purposes, they can still face legal consequences under federal law; thus, policies should advise employees to avoid using marijuana;
   - note that the possession, use, and/or cultivation of marijuana by employees either at work or during personal time can lead to prosecution under federal law;
   - address the circumstances under which employees can be tested for marijuana use along with the levels of suspicion required to do so and what amounts of elements such as THC must be present in their bodies before individuals can be sanctioned;
   - be primarily rehabilitative, meaning they are designed to help identify staff members who may be abusing marijuana and get them help, rather than punitive in nature;
   - include procedures allowing employees to seek help and/or referrals for assistance without having to face job sanctions;
   - include graduated forms of discipline ranging from verbal and written warnings to suspensions and dismissals for more serious violations of board policy.

4. Educational leaders should offer regular professional development sessions for all staff members on their marijuana use policies both to inform attendees and to obtain feedback on how well plans are working.

5. To the extent that laws regarding marijuana usage are changing, it is important for policies to be kept up to date at all times.

6. Policies should be reviewed, and if necessary, updated annually, preferably during summer retreats so team members do not act in the “heat of the moment;” reviews should be conducted to ensure that policies are consistent with current best practices for substance abuse prevention as well as with federal and state statutes and litigation on marijuana use.

**Conclusion**

The rapid growth of the legalization of marijuana in recent years seems unlikely to slow down despite the issues and concerns raised by Attorney General Sessions. Even so, educational administrators, their boards, and other educational leaders should be careful to ensure they do not risk the loss of federal funding by neglecting to have policies in place regulating its use by employees whether for medical or recreational purposes. As such, considering the speed at which legal developments are occurring, educational leaders, their boards, and attorneys should keep up-to-date on developments in federal and state law with regard to the legalization of marijuana.

**Endnotes**


17 Id. (Thomas, J., dissenting).


21 Gonzales v. Raich, 545 U.S. 1, 5 (2005).


23 In June [2015], Maine became the first state to require all school districts to create a policy on use of the substance. Colorado and New Jersey also passed laws in the last year permitting certain students to receive the treatment in K12 schools.” Alison DeNisco, Schools Wrestles with Medical Marijuana Policies: Colorado and New Jersey Permit Certain Students to Receive Treatment, District Administration, March 2016, available at https://www.districtadministration.com/article/schools-wrestles-medical-marijuana-policies.
