

ABCs and CBD: Why Children with Treatment-Resistant Conditions Should Be Able to Take Physician-Recommended Medical Marijuana at School

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At the end of 2018, thirty-three states and the District of Columbia, Puerto Rico, and Guam had implemented comprehensive public medical marijuana programs. Along with adults, these programs provide access to children with qualifying illnesses to certain forms of the drug. But, due in part to fear of prosecution by the federal government, which still considers marijuana to be an illegal substance, most school districts do not allow the drug on school property. This forces some students to choose between missing school to take a medication they are legally allowed to take at home—jeopardizing their education—or forgoing a dose until the eight-hour school day is over—jeopardizing their health.

Many have written about children and medical marijuana, but most have focused on child custody issues when a parent uses the drug. Few have explored the hardships faced by children who rely on daily doses of physician-recommended medical marijuana. This Note identifies these problems and argues that lawmakers should close this regulatory gap by developing laws or guidance to insulate schools from harsh consequences and ensure students are not prevented from receiving the valuable education to which they are entitled. Anecdotal and empirical evidence is increasingly supportive of the benefits of medical marijuana use by some children. This Note contends that a coordinated effort by many actors, including all branches of federal, state, and local governments as well as school districts, is necessary to ensure that these benefits are truly attained.

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I. INTRODUCTION

For much of her life, Genny Barbour missed two and a half hours of school each day.¹ The New Jersey teenager suffers from severe epilepsy and autism, conditions that together cause frequent, debilitating seizures that leave her with the “mentality of a 2-year-old.”² After trying routine methods to help their daughter, like prescription medications and even brain surgery, Roger and Lora Barbour discovered medical marijuana.³ Now, by taking three or four doses of

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¹ Susan K. Livio, *N.J. Judge: Mother Can’t Bring Medical Marijuana to Her Child at School*, NJ.COM (Sept. 15, 2015), http://www.nj.com/politics/index.ssf/2015/09/nj_judge_rules_mom_may_not_deliver_marijuana_oil_t.html [https://perma.cc/KU63-US3L] [hereinafter Livio, *Mother Can’t Bring Medical Marijuana*]; see also Asher Fogle, *Medical Marijuana Saved Our Daughter’s Life*, GOODHOUSEKEEPING (June 24, 2015), <https://www.goodhousekeeping.com/health/a33066/genny-barbour-medical-marijuana/> [https://perma.cc/87FU-KCGC].

² Celeste E. Whittaker, *Maple Shade Family Continues Medical Marijuana Fight*, COURIER POST (Jan. 26, 2016), <http://www.courierpostonline.com/story/news/local/south-jersey/2016/01/26/maple-shade-family-continues-medical-marijuana-fight/79351602/> [https://perma.cc/2N2C-H7PE].

³ Final Decision Granting Respondent’s Motion for Summary Decision and Denying Petitioner’s Motion for Summary Decision, OAL DKT. No. EDS 00879-15, at *1 (2015), 2015 WL 9254137 (N.J. Admin.) [hereinafter Final Decision, *G.B. v. Maple Shade*]; see also Livio, *Mother Can’t Bring Medical Marijuana*, *supra* note 1.

physician-recommended marijuana oil a day, Genny has a seizure only once every few days, if that.⁴

However, because federal law considered marijuana a Schedule I controlled substance, criminalizing possession and use,⁵ Genny's special education school, the LARC School within the Maple Shade School District, would not allow her to take her doses on school property.⁶ Instead, they proposed that Genny's parents pick her up each day at lunchtime, take her at least 1,000 feet off campus, administer her dose, and return her to school.⁷ As this would disrupt Genny's routine⁸ and create safety issues,⁹ her parents refused, and Genny could only attend school for half a day.¹⁰ Unlike her peers, who could go to the nurse for daily amounts of powerful medicines like Ritalin,¹¹ Genny was forced to go home. Because of federal and state drug laws, she was being deprived of valuable learning time and convenience.¹²

Genny's parents took their struggles to court.¹³ In December 2014, they sued Maple Shade School District and LARC School for refusing to administer the oil to Genny at lunchtime on campus.¹⁴ New Jersey had enacted a medical marijuana program in 2010 under the Compassionate Use Medical Marijuana

⁴ Susan K. Livio, *Fight Isn't Over for N.J. Teen Who Won Right to Consume Medical Marijuana at School*, NJ.COM (June 27, 2016), http://www.nj.com/politics/index.ssf/2016/06/7_months_ago_this_teen_won_the_right_to_use_edible.html [<https://perma.cc/DQT9-VX3V>] [hereinafter Livio, *Fight Isn't Over*].

⁵ Controlled Substances Act, 21 U.S.C. §§ 801–971 (2012).

⁶ Decision Denying Emergent Relief, OAL DKT. No. EDS 16939-14, at *2 (2015), 2015 WL 303174 (N.J. Admin.) [hereinafter First Denial, *G.B. v. Maple Shade*].

⁷ *Id.* This accommodation would satisfy the state-mandated Drug-Free School Zone law that prohibits distribution, dispensing, and possession of controlled substances on or within 1,000 feet of school property or buses. Drug-Free School Zones, N.J. STAT. ANN. § 2C:35–7(a) (West 2010).

⁸ Routines can be a source of enjoyment and a coping mechanism for autistic individuals. See *Obsessions, Repetitive Behaviour and Routines*, NAT'L AUTISTIC SOC'Y, <http://www.autism.org.uk/about/behaviour/obsessions-repetitive-routines.aspx> [<https://perma.cc/Q5K7-D5WA>].

⁹ First Denial, *G.B. v. Maple Shade*, *supra* note 6, at *2 (“[The accommodation] also creates a safety issue because G.B. would be required to walk off campus and at least 1,000 feet away from school on a busy roadway on a daily basis.”).

¹⁰ Final Decision, *G.B. v. Maple Shade*, *supra* note 3, at *2–3.

¹¹ See Livio, *Fight Isn't Over*, *supra* note 4. Ritalin is a central nervous system stimulant that is used for the treatment of Attention-Deficit/Hyperactivity Disorder (ADHD) in children and adults. *Medication Guide: Ritalin*, FDA, <https://www.fda.gov/downloads/Drugs/DrugSafety/ucm089090.pdf>. [<https://perma.cc/WD7F-A6V6>]. Because Ritalin can be abused or lead to dependence, it is a Schedule III controlled substance under federal law. *Id.*; Controlled Substances Act, 21 U.S.C. § 812(b)(2) (2012).

¹² First Denial, *G.B. v. Maple Shade*, *supra* note 6, at *2.

¹³ See Livio, *Fight Isn't Over*, *supra* note 4.

¹⁴ First Denial, *G.B. v. Maple Shade*, *supra* note 6, at *1. Before filing this first request for emergency relief, the Barbours filed a request for a due process hearing with the New Jersey Department of Education, who ruled against them, seeking continued implementation of Genny's Individualized Education Plan (IEP) without marijuana administration. *Id.*

Act (CUMMA).¹⁵ The court, after considering the conflict between CUMMA, the Controlled Substances Act, and the drug-free school zone acts, ruled in favor of the school district.¹⁶ The court recognized the harm that could befall the school district for allowing “the administration of a controlled dangerous substance on school grounds”¹⁷ After an unsuccessful appeal of this holding,¹⁸ the Barbours filed another emergency relief petition in September 2015, this time requesting the school district to allow Lora, rather than the school nurse, to administer the drug; the court again denied their petition.¹⁹

Prompted in part by the Barbours’ fight,²⁰ New Jersey amended its medical marijuana program in November 2015 to require public and nonpublic schools to develop and adopt policies permitting administration of medical marijuana to qualifying patients.²¹ The law enables designated caregivers to administer physician-recommended medical marijuana to children on school grounds.²² Shortly after the passage of the law, LARC became the first school in the nation to permit legally-recommended medical marijuana on campus.²³

Genny is only one of thousands of students suffering from severe conditions who find relief with forms of medical marijuana.²⁴ As of November 2018, thirty-three states and the District of Columbia, Puerto Rico, and Guam allowed for comprehensive public medical marijuana and cannabis programs.²⁵

¹⁵ New Jersey Compassionate Use Medical Marijuana Act, N.J. STAT. ANN. § 24:6I-1 (West 2010).

¹⁶ First Denial, *G.B. v. Maple Shade*, *supra* note 6, at *4-5.

¹⁷ *Id.* at *4. The court also held that, federal law aside, school administrators did not qualify as caregivers authorized to administer marijuana under CUMMA. *Id.*

¹⁸ Final Decision, *G.B. v. Maple Shade*, *supra* note 3, at *6.

¹⁹ Denying Emergent Relief, OAL DKT No. EDS 13087-15, at *1, *4 (2015), 2015 WL 9254133 (N.J. Admin.) [hereinafter Second Denial, *G.B. v. Maple Shade*]. In so holding, the court dispelled the implication from January that a registered caregiver could administer the drug, instead focusing on the conflicts between CUMMA and state and federal drug laws. *See generally id.*

²⁰ Susan K. Livio, *N.J. School 1st in Nation to Allow Medical Marijuana for Students*, NJ.COM (Nov. 12, 2015), http://www.nj.com/politics/index.ssf/2015/11/nj_teens_school_adopts_medical_marijuana_policy_to.html [<https://perma.cc/CW5Q-P2B7>] [hereinafter Livio, *1st in Nation*].

²¹ Pub. L. 2015, § 158 (*amending* N.J. STAT. ANN. § 24:6I-1). The amendment also applies to facilities providing services to persons with developmental disabilities. *Id.*

²² *Id.*; *see also Administering Medical Marijuana to Authorized Students in DCF Regional Schools*, N.J. DEP’T OF CHILDREN & FAMILIES POLICY MANUAL OFFICE OF EDUC. (June 20, 2017), https://www.state.nj.us/DCF/policy_manuals/OOE-I-A-1-57.pdf [<https://perma.cc/7QG3-AEQM>].

²³ Livio, *1st in Nation*, *supra* note 20.

²⁴ *See infra* Part II.B.2.

²⁵ *State Medical Marijuana Laws*, NAT’L CONFERENCE OF STATE LEGISLATURES (Nov. 8, 2018), <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx#1> [<https://perma.cc/3NSE-RC78>] [hereinafter *State Medical Marijuana Laws*]; *see also* Lindsay Schnell, *Weed Wins the Midterms: Michigan, Missouri, Utah Legalize Marijuana*, ABC10 (Nov. 7, 2018), <https://www.abc10.com/article/news/nation-world/weed-wins-the->

Additionally, thirteen states allowed use of “low THC, high cannabidiol (CBD)” products for medical reasons in limited situations, and all allowed such use by minors.²⁶ Many of these schemes were passed with the purpose of ensuring access for children suffering from severe conditions such as cancer or epilepsy.²⁷ Despite this, as of November 2018, New Jersey is one of only seven states, along with Maine, Florida, Colorado, Illinois, Washington, and Delaware, that allow students to use medicinal marijuana in school, the place at which they spend on average forty hours a week.²⁸ This is mainly because of a fear of noncompliance with federal law, as marijuana is still considered an illegal controlled substance.²⁹ As a result, most of these children are forced to take other measures to receive treatment, including leaving school property, sometimes by as much as a mile, in inclement weather, to take medication that they are legally allowed to take at home.³⁰ Others, like Genny, would be negatively impacted by the interruption of the school day created by having a caregiver give them their dose.³¹ So, despite LARC’s progressive adoption of a medical marijuana policy, Genny often continued to attend half-days, missing educational opportunities because of her condition.³²

midterms-michigan-missouri-utah-legalize-marijuana/103-612135200
[<https://perma.cc/GX2R-XK5Q>].

²⁶ *State Medical Marijuana Laws*, *supra* note 25; *see also 17 States with Laws Specifically About Legal Cannabidiol (CBD)*, PROCON.ORG (May 8, 2018), <https://medicalmarijuana.procon.org/view.resource.php?resourceID=006473> [https://perma.cc/LJ4D-QE5W] [hereinafter *CBD Laws*].

²⁷ *See Dateline: Growing Hope*, (NBC television broadcast June 7, 2017), <https://www.nbcnews.com/dateline/video/full-episode-dateline-growing-hope-464847427875> [https://perma.cc/2FGM-K2YH]. Some legislators considered medical marijuana bills more urgent after seeing and hearing from children with conditions and their families. *See id.*

²⁸ Samantha Young, *The Pluses and Minuses of Allowing Medical Marijuana at School*, KAISER HEALTH NEWS (Aug. 30, 2018), <https://khn.org/news/the-pluses-and-minuses-of-allowing-medical-marijuana-at-school/> [https://perma.cc/N2SC-HT6F]. “New Jersey, Illinois, Delaware and Colorado permit parents to give their child non-smokable medicinal pot products at school. [In 2018], Colorado expanded its law to allow school staff to administer the medication. Washington and Florida allow school districts to decide for themselves whether to allow the drug on campuses. And Maine expanded state regulations to permit [any] medical marijuana use at school . . .” *Id.* Additionally, California is poised to enact a similar law as Washington and Florida if the Governor signs the bill. *See* Kathleen Ronayne, *California Bill Would Allow Medical Pot on School Campuses*, AP NEWS (Aug. 27, 2018), <https://www.usnews.com/news/best-states/california/articles/2018-08-27/california-bill-would-allow-medical-pot-on-school-campuses> [https://perma.cc/C355-VPHK]. For the specific laws in each state, see *infra* note 180.

²⁹ Livio, *Mother Can’t Bring Medical Marijuana*, *supra* note 1.

³⁰ *See infra* notes and text in Part IV.A.

³¹ Whittaker, *supra* note 2. According to Roger Barbour, “Lora is still bringing Genny home at noon, because the school has no plan for us to give Genny the medicine . . .” *Id.*

³² *Id.*

It is important to emphasize at the outset that this Note is not arguing for the legalization or decriminalization of all forms of marijuana.³³ Additionally, this Note is not encouraging the distribution to or use by minors of marijuana for recreational purposes.³⁴ Rather, this Note adamantly insists that the only appropriate use of medical marijuana by minors is in the narrow context of a recommendation and supervision by a certified physician. With these assumptions in mind, the goal of this Note is to advocate for the recognition by schools and governments of some minor students with certain severe conditions who have been legally prescribed medical marijuana. These students should be able to take their doses at school so they are not prevented from receiving an adequate, constitutionally protected education.

Overall, despite the stated aim to make medical marijuana safe and accessible for those in need, state efforts have fallen short for certain children, turning a drug policy issue into a medical and educational rights issue.³⁵ To both shed light on and attempt to solve these problems, Part II of this Note will provide important background on the use and effectiveness of marijuana as a medicinal substance. Evidence demonstrates the potential benefits of low THC, high CBD forms of cannabis oil on conditions such as epilepsy, autism, and cancer in children.³⁶ Next, Part III will discuss the federal prohibition on marijuana, state legislation efforts despite this prohibition, and the federal response to this state activity. Importantly, sick children drive much of the state-level legislation.³⁷ Part IV will discuss how there is a distinct gap in many state statutes relating to marijuana administration in school, despite such laws being enacted with these children in mind.³⁸ It will describe the hardships parents and children face in trying to access the medication they desperately need. These problems are in turn implicating broader statutory and constitutional principles, including a child's right to an education. Medical marijuana is an abstract and quickly developing area of law, and Part V of this Note will propose steps that federal and state actors should pursue while they are waiting for the law to settle, including amending their laws to provide exceptions for students with certain conditions. If society is genuinely committed to giving children the medicine they need, federal and state officials should act to make schools feel insulated

³³ Legalization means that if law enforcement catches an individual in possession or use of marijuana, he or she cannot be prosecuted under state law. MEDICOLEGAL ASPECTS OF MARIJUANA: WASHINGTON EDITION 7 (Linda M. Callahan & Jay M. Tiftickjian eds., 2016). Decriminalization means that people who use marijuana can be punished under state law, but only by some means other than prison time. *Id.* at 8.

³⁴ Recreational marijuana use is beyond the scope of this Note. Further, unlike medical marijuana, which minors may legally use under most state programs, recreational marijuana remains illegal for minors under twenty-one years of age. *Recreational Marijuana Laws, POLICY SURVEILLANCE PROGRAM*, <http://lawatlas.org/datasets/recreational-marijuana-laws> [<https://perma.cc/DGU6-BEFD>].

³⁵ See *infra* Parts III, IV.

³⁶ See *infra* Part II.

³⁷ See *infra* Part III.

³⁸ See *infra* Part IV.

from prosecution so they may implement policies to ensure students can exercise their valuable rights to learn and grow.

II. MARIJUANA AS MEDICINE

Marijuana, a drug made from the crushed leaves and flower buds of the *Cannabis sativa* plant, has been utilized medicinally by the human population for thousands of years.³⁹ First cultivated in China,⁴⁰ marijuana spread as trade flourished, eventually reaching the new world, where physicians utilized it as a cure for migraines, insomnia, and other conditions.⁴¹ Today, much empirical and anecdotal evidence demonstrates the continued medical viability of certain strains of marijuana.⁴²

A. Marijuana's Chemical Makeup

The active ingredients within the cannabis plant are hundreds of compounds called cannabinoids.⁴³ Different cannabinoids can affect the body in different ways.⁴⁴ For lawmakers and physicians alike, the conversation about the effects of medical marijuana revolves around two main cannabinoids: tetrahydrocannabinol (THC) and cannabidiol (CBD).⁴⁵ While THC is primarily responsible for marijuana's well-known psychoactive effects,⁴⁶ CBD does not

³⁹NANCY E. MARION, *THE MEDICAL MARIJUANA MAZE: POLICY AND POLITICS* 4 (2014). The term marijuana is occasionally broadened to include hemp, which encompasses the fibers from the plant stalks used to make ropes, canvas, and paper. See RUDOLPH J. GERBER, *LEGALIZING MARIJUANA: DRUG POLICY REFORM AND PROHIBITION POLITICS* 2 (2004). Hemp is not the subject of this Note.

⁴⁰MARK K. OSBECK & HOWARD BROMBERG, *MARIJUANA LAW IN A NUTSHELL* 19 (2017); MARION, *supra* note 39, at 4.

⁴¹GERBER, *supra* note 39, at 2.

⁴²See, e.g., Kerstin Iffland & Franjo Grotenhermen, *An Update on Safety and Side Effects of Cannabidiol: A Review of Clinical Data and Relevant Animal Studies*, NCBI (June 1, 2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5569602/> [<https://perma.cc/A5BA-GSCS>] (“In general, the often described favorable safety profile of CBD in humans was confirmed and extended by the reviewed research.”).

⁴³Amy E. Thompson, *Medical Marijuana*, *JAMA* (June 23, 2015), <https://jamanetwork.com/journals/jama/fullarticle/2338256> [<https://perma.cc/L3ZK-RFFH>]; see also JONATHAN P. CAULKINS ET AL., *MARIJUANA LEGALIZATION: WHAT EVERYONE NEEDS TO KNOW* 5 (2d ed. 2016). These substances can be isolated, extracted from the plant, synthesized in a lab, or produced artificially. See INST. OF MED., DIV. OF NEUROSCIENCE & BEHAVIORAL HEALTH, *MARIJUANA AND MEDICINE: ASSESSING THE SCIENCE BASE* ii (Janet E. Joy et al. eds., 1999), <https://www.nap.edu/read/6376/chapter/1> [<https://perma.cc/47JP-BBCD>] [hereinafter IOM Report].

⁴⁴Thompson, *supra* note 43.

⁴⁵*Id.*

⁴⁶OSBECK & BROMBERG, *supra* note 40, at 18. These effects can include impacts on memory, concentration, and coordination; dry mouth; increased or decreased appetite, and

cause the same “high.”⁴⁷ Instead, CBD binds to receptors in the brain and throughout the body, interacting with the body’s immune and anti-inflammatory functions.⁴⁸

Based on this, advocates argue that high-CBD, low-THC strains of marijuana can have positive therapeutic results in a variety of illnesses and conditions without giving the patient an undesired mental effect.⁴⁹ Among other things, such strains have been used for pain relief, antiemesis, and appetite stimulation in AIDS and cancer patients.⁵⁰ In children, high-CBD low-THC marijuana products are especially used to combat severe forms of epilepsy, cancer, and autism.⁵¹ Medical marijuana can be administered by smoking, vaporizing, incorporation into foods or liquids, or extraction into solvents and taken through tinctures.⁵²

other conditions. Laura Cox, *Marijuana: Effects of Weed on Brain and Body*, LIVE SCI. (June 6, 2017), <https://www.livescience.com/24558-marijuana-effects.html> [<https://perma.cc/RH54-AC6R>]; *Medical Marijuana Side Effects*, SW. MED. MARIJUANA CTR., http://www.evaluationtoday.com/Medical_Marijuana_Side_Effects.html [<https://perma.cc/KKF2-K2ZZ>].

⁴⁷ See OSBECK & BROMBERG, *supra* note 40, at 17–18; Janet Wells, *Dazed and Confused: Marijuana Legalization Raises the Need for More Research*, U. CAL. S.F. (June 20, 2017), <https://www.ucsf.edu/news/2017/06/407351/dazed-and-confused-marijuana-legalization-raises-need-more-research> [<https://perma.cc/TU3L-JVDQ>].

⁴⁸ See *Do Cannabinoids Have Anti-Inflammatory Effects?*, ECHO CONNECTION (Apr. 12, 2017), <https://echoconnection.org/cannabinoids-anti-inflammatory-effects/> [<https://perma.cc/59K3-J6VM>]; *When Weed Is the Cure: A Doctor’s Case for Medical Marijuana*, NPR (July 14, 2015), <https://www.npr.org/sections/health-shots/2015/07/14/422876973/when-weed-is-the-cure-a-doctors-case-for-medical-marijuana> [<https://perma.cc/L3ZK-RFFH>].

⁴⁹ *When Weed Is the Cure: A Doctor’s Case for Medical Marijuana*, *supra* note 48. Since it is almost impossible to isolate CBD, high-CBD, low-THC strains of marijuana have been developed to reduce unwanted mental results while still achieving maximum medicinal value. *Id.*

⁵⁰ IOM Report, *supra* note 43, at ix.

⁵¹ Morgan Smith, *Why Marijuana Is Helping Kids with Epilepsy, Autism & Cancer*, POTGUIDE.COM (June 16, 2017), <https://potguide.com/pot-guide-marijuana-news/article/why-marijuana-is-helping-kids-with-epilepsy-autism-cancer/> [<https://perma.cc/97NM-2PPK>]. Most children who rely on this form of medical marijuana have conditions so severe that other typical treatments, including prescription medications and surgeries, are ineffective. See, e.g., Kate Pickert, *Pot Kids: Inside the Quasi-Legal, Science-Free World of Medical Marijuana for Children*, TIME (2019), <http://time.com/pot-kids/> [<https://perma.cc/KQ2V-7SNL>] (describing medical marijuana usage by children with intractable epilepsy); Yardena Schwartz, *Marijuana May Be a Miracle Treatment for Children with Autism*, USA TODAY (Apr. 25, 2017), <https://www.usatoday.com/story/news/world/2017/04/25/marijuana-pot-treatment-children-autism-cannabis-oil/100381156/> [<https://perma.cc/QU5F-NGSG>].

⁵² MEDICOLEGAL ASPECTS OF MARIJUANA: WASHINGTON EDITION, *supra* note 33, at 10–11. Medical marijuana is most often officially recommended in edible or oil form. See IOM Report, *supra* note 43, at ix–x.

B. Evidentiary Support of Marijuana's Positive Medicinal Properties

Because marijuana in most forms is federally illegal,⁵³ little accountable, large-scale research exists documenting medical marijuana's possible uses and effects.⁵⁴ However, the studies that do exist show a nuanced picture. Additionally, the momentum of the marijuana movement in the past decade has contributed to an increase in empirical studies on the drug's effectiveness,⁵⁵ and it is expected that more work will continue to be done.⁵⁶ Finally, and perhaps most persuasively, anecdotal evidence from parents and children with severe disorders who have found relief with CBD and low-THC marijuana products is plentiful and powerful.⁵⁷

1. Empirical Studies

Several comprehensive studies have been conducted relating to the potential benefits of medical marijuana. One of the first was released in 1999 by the Institute of Medicine (IOM).⁵⁸ Among other things, the IOM concluded that “[t]he accumulated data indicate a potential therapeutic value for cannabinoid drugs, particularly for symptoms such as pain relief, control of nausea and vomiting, and appetite stimulation.”⁵⁹ Thus, the report validated the idea that marijuana could be a successful therapy for certain conditions. The report also recommended further research to determine the possible health benefits and risks of cannabinoids.⁶⁰

More reports and studies have been conducted as the marijuana movement has gained traction. Among the most recent reports is one issued by the National Academies of Sciences, Engineering, and Medicine (NASEM), which constituted a comprehensive review of “existing evidence regarding the health effects . . . of cannabis and cannabinoids use.”⁶¹ The NASEM Report, like the IOM Report before it, found that cannabinoids represented an effective therapeutic treatment method for adults with specific symptoms suffering from

⁵³ See *infra* Part III.

⁵⁴ See Wells, *supra* note 47.

⁵⁵ See *id.*

⁵⁶ *NIDA's Role in Providing Marijuana for Research*, NAT'L INST. DRUG ABUSE, <https://www.drugabuse.gov/drugs-abuse/marijuana/nidas-role-in-providing-marijuana-research> [<https://perma.cc/5JZV-R6CJ>].

⁵⁷ See, e.g., *infra* Part II.B.2.

⁵⁸ IOM Report, *supra* note 43, at i. Notably, the marijuana plant contains THC, which is “the primary psychoactive ingredient in marijuana,” whereas cannabinoids generally are the “group of compounds related to THC,” which can be isolated and synthesized. *Id.* at 2.

⁵⁹ See *id.* at 3.

⁶⁰ *Id.* at 3–8.

⁶¹ *Health Effects of Cannabis and Cannabinoids: Public Release Slides*, NAT'L ACADS. OF SCIS., ENG'G, & MED. (Jan. 2017), <http://nationalacademies.org/hmd/~media/Files/Report%20Files/2017/Cannabis-Health-Effects/Cannabis-public-release-slides.pdf> [<https://perma.cc/KTZ9-L88L>] [hereinafter NASEM Report].

a narrow range of diseases, but also that more research was needed to definitively validate the findings.⁶²

These reports were directed toward adults, but studies with children in mind have also been conducted.⁶³ For example, a 2015 study by leading physicians including Orrin Devinsky, M.D., director of the NYU Comprehensive Epilepsy Center, aimed to “establish whether addition of cannabidiol to existing anti-epileptic regimens would be safe, tolerated, and efficacious in children and young adults with treatment-resistant epilepsy.”⁶⁴ The results of the study indicated that there was an average reduction in monthly motor seizures of 36.5%.⁶⁵ Based on these findings, Devinsky and colleagues concluded “that cannabidiol might reduce seizure frequency and might have an adequate safety profile in children and young adults with highly treatment-resistant epilepsy.”⁶⁶ Observational reports at hospitals and other healthcare facilities also support the anti-seizure effect of CBD in teenagers.⁶⁷ For instance, a retrospective chart review of children receiving oral cannabis extract at a Colorado epilepsy center found reduced seizure frequency in up to 57% of patients as well as improved behavior/alertness (33%), language (11%), and motor skills (11%).⁶⁸

Along with this completed research, there are currently several studies in progress.⁶⁹ Although there is no indication that these studies will stop any time soon, several factors are not helping the quest to pin down the potential for medical marijuana, the most significant of which is federal agencies. Along with the restrictions created by the illegal status of the drug,⁷⁰ the DEA’s tight control

⁶² *Id.*

⁶³ See, e.g., Orrin Devinsky et al., *Cannabidiol in Patients with Treatment-Resistant Epilepsy: An Open-Label Interventional Trial*, 15 LANCET NEUROLOGY 270, 270–78 (2015); Barbara S. Koppel et al., *Systematic Review: Efficacy and Safety of Medical Marijuana in Selected Neurologic Disorders*, 82 NEUROLOGY 1556, 1556–63 (2014); B.E. Porter & C. Jacobson, *Report of a Parent Survey of Cannabidiol-Enriched Cannabis Use in Pediatric Treatment-Resistant Epilepsy*, 29 EPILEPSY BEHAV. 574, 574 (2013).

⁶⁴ Devinsky, *supra* note 63, at 270. Approximately 214 individuals aged 1–30 with severe, intractable, childhood-onset, treatment-resistant epilepsy were enrolled in the study and given daily doses of oral cannabidiol over twelve-week periods. *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* This study was published in Lancet Neurology in 2015. *Id.*

⁶⁷ See, e.g., Craig A. Press et al., *Parental Reporting of Response to Oral Cannabis Extracts for Treatment of Refractory Epilepsy*, 45 EPILEPSY BEHAV. 49, 49–52 (2015).

⁶⁸ *Id.* at 49–50.

⁶⁹ See, e.g., Doris Newmeyer & Simona Meier, *Cannabidiol in Children with Refractory Epileptic Encephalopathy (CARE-E)*, CLINICALTRIALS.GOV <https://clinicaltrials.gov/ct2/show/NCT03024827> [<https://perma.cc/AW4H-RLF9>] (studying the effects of cannabis oil on children with epilepsy and listing an estimated completion date of December 2019); Schwartz, *supra* note 51. Many researchers are having to leave the United States to conduct studies because of the strict stance taken by the federal government. See also Anna Capasso, *Do Cannabinoids Confer Neuroprotection Against Epilepsy?: An Overview*, 11 OPEN NEUROLOGY J. 61, 61 (2017).

⁷⁰ The CSA and its regulations establish a framework through which the federal government regulates the use of controlled substances for legitimate medical, scientific,

of the cultivation of marijuana for research purposes⁷¹ has left many aspects of the substance untestable.⁷² Obtaining agency approval for marijuana-related studies is a necessary and complex process.⁷³ Furthermore, these agencies are often more willing to support studies focusing on drug abuse rather than benefits.⁷⁴ But, on a positive note, in 2017, the National Institutes of Health (NIH) gave \$140 million for cannabinoid research, including \$15 million on CBD.⁷⁵ The FDA also loosened restrictions on CBD research in 2015.⁷⁶ Overall, although more research certainly needs to be conducted as to the specific effects of marijuana on children, there are increasing amounts of empirical data that demonstrate the bright potential for medical marijuana and CBD in the treatment of serious childhood conditions.

2. Anecdotal Evidence

Along with empirical evidence, anecdotal evidence provides strong support for the use of medical marijuana in certain children. “About 100,000 U.S. children have intractable epilepsy—a treatment-resistant category of the disease characterized by uncontrolled seizures . . .”⁷⁷ Several hundred others with conditions such as autism and cancer are also on state medical marijuana lists.⁷⁸

research, and industrial purposes, and prevents these substances from being diverted for illegal purposes. *See infra* III.A.

⁷¹ *NIDA’s Role in Providing Marijuana for Research*, *supra* note 54; *see also* Controlled Substances Act, 21 U.S.C. § 823(a)-(b) (2012).

⁷² Because of this, the DEA has only issued one license for research-marijuana cultivation since the CSA was enacted, held by The University of Mississippi since 2016. *NIDA’s Role in Providing Marijuana for Research*, *supra* note 56; *see also Frequently Asked Questions*, U. MISS. SCH. PHARMACY, <https://pharmacy.olemiss.edu/marijuana/> [<https://perma.cc/V72E-K89Q>].

⁷³ Depending on the source of funding, researchers are required to obtain approval from as many as four separate agency bodies: DEA, FDA, NIH, and NIDA (a subdivision of the NIH). *NIDA’s Role in Providing Marijuana for Research*, *supra* note 56. *See generally* BRIAN T. YEH, THE CONTROLLED SUBSTANCES ACT: REGULATORY REQUIREMENTS (2012), <https://fas.org/sgp/crs/misc/RL34635.pdf> [<https://perma.cc/RAP7-A2BL>] (elaborating on the CSA and its regulations that establish a framework through which those who wish to handle controlled substances, including doctors, hospitals, pharmacies, and scientific researchers, must register).

⁷⁴ Wells, *supra* note 47 (“A lot of the studies that NIDA has supported look at the downsides. Studies about the benefits are rarer . . .”).

⁷⁵ Richard A. Friedman, *Is CBD Helpful, or Just Hype?*, N.Y. TIMES (Dec. 26, 2018), <https://www.nytimes.com/2018/12/26/opinion/cbd-cannabis-health-anxiety.html> [<https://perma.cc/5FZK-95AZ>].

⁷⁶ *Id.*

⁷⁷ *See* Pickert, *supra* note 51.

⁷⁸ *Qualifying Conditions for a Medical Marijuana Card by State*, LEAFLY, <https://www.leafly.com/news/health/qualifying-conditions-for-medical-marijuana-by-state> [<https://perma.cc/CME9-BSVU>]. According to the Colorado Department of Public Health and Environment, at the end of 2012, there were only thirty-seven children under the age of eighteen on the state’s medical marijuana registry. *See* COLO. DEP’T OF PUB. HEALTH &

A company that sells a popular CBD oil has a waiting list of more than 12,000 families.⁷⁹ These children and their families have seen encouraging results from medical marijuana, and their stories have impacted legislators and courts to push for the lifting of barriers in their way.⁸⁰

One of the first publicized experiences was that of Colorado toddler Charlotte Figi.⁸¹ Charlotte was diagnosed with Dravet syndrome, a form of intractable epilepsy characterized by clusters of severe seizures, at two years old.⁸² Despite being on seven drugs, including heavy-duty, addictive substances like barbiturates, Charlotte continued to have seizures and began to decline quickly.⁸³ At one point, the hospital told her parents that there was nothing they could do.⁸⁴ Around that time, Charlotte's parents discovered online reports of the positive effects of medical marijuana and, with no other option, tried it.⁸⁵ After her mother put a dose of CBD oil in her feeding tube, Charlotte did not have a seizure for seven days.⁸⁶ Now a grade-schooler, Charlotte is largely seizure-free and is a "fashionista" in the making.⁸⁷

ENV'T, MEDICAL MARIJUANA REGISTRY PROGRAM UPDATE (2012). However, that number quickly jumped, reaching as high as 471 in February 2015. *See* COLO. DEP'T OF PUB. HEALTH & ENV'T, MEDICAL MARIJUANA REGISTRY PROGRAM UPDATE (2015). At the end of 2017, there were 304 children, still a massive increase from five years earlier. *See* COLO. DEP'T OF PUB. HEALTH & ENV'T, MEDICAL MARIJUANA REGISTRY PROGRAM UPDATE (2017).

⁷⁹ Pickert, *supra* note 51.

⁸⁰ *See, e.g.*, Travis Fain, *Va. Senate Passes Medical Marijuana Bill*, DAILY PRESS (Feb. 5, 2015), <https://www.dailypress.com/news/politics/dp-nws-ga-epilepsy-marijuana-20150205-story.html> [<https://perma.cc/3BDX-RSJC>].

⁸¹ Young, *supra* note 28.

⁸² Saundra Young, *Marijuana Stops Child's Severe Seizures*, CNN (Aug. 7, 2013), <https://www.cnn.com/2013/08/07/health/charlotte-child-medical-marijuana/index.html> [<https://perma.cc/L2PM-NFLX>].

⁸³ *Id.* Eventually, Charlotte lost the ability to walk, talk, and eat and was having an average of 300 grand mal seizures a week; her heart stopped several times. *Id.*

⁸⁴ *Id.* As a result, Charlotte was placed into hospice at the age of five. Sarah Cody, *Parents Continue Fight to Legalize Marijuana Oil in CT to Treat Seizures*, HARTFORD COURANT (Jan. 18, 2016), <https://www.courant.com/ctnow/hc-mommy-minute-0118-20160114-story.html> [<https://perma.cc/HA35-5JWS>].

⁸⁵ Young, *supra* note 82. Prior to the discovery of medical marijuana, Charlotte had been placed on several medications and a special diet. *Id.* The family had even seriously considered an experimental anti-seizure drug being used on dogs. *Id.* According to a doctor who worked with the family, "[Charlotte's] been close to death so many times...[w]hen you put the potential risks of the cannabis in context like that, it's a very easy decision." *Id.* Another doctor said, "[T]hey had exhausted all of her treatment options . . . [e]verything had been tried—except cannabis." *Id.*

⁸⁶ *Id.* When Charlotte's parents ran out of oil, they turned to a Colorado company that had just manufactured a new high-CBD, low THC strain of cannabis oil. *Id.* The "miracle" oil is now called Charlotte's Web, in honor of Charlotte's recovery. *See* Josh Stanley, *The Surprising Story of Medical Marijuana and Pediatric Epilepsy*, SINGJU POST (Sept. 12, 2014), <https://singjupost.com/josh-stanley-the-surprising-story-of-medical-marijuana-and-pediatric-epilepsy-transcript/?singlepage=1> [<https://perma.cc/5KXL-MNJZ>].

⁸⁷ *Raise the Realm Day 5: Charlotte-Epilepsy*, REALM CARING, <https://www.theroc.us/>

Charlotte's story inspired families across the country.⁸⁸ In Virginia, fourteen-year-old Haley Smith was having around 1,000 seizures a year, and her epilepsy drugs were doing more harm than good.⁸⁹ Haley's parents, desperate for a remedy that worked without harsh side effects, started her on a CBD oil like Charlotte's Web.⁹⁰ After eighteen months on the oil, Haley was experiencing a 45% reduction in seizures and was making "tremendous" cognitive gains.⁹¹

In Illinois, eleven-year-old Ashley Surin was diagnosed as a toddler with acute lymphoblastic leukemia; treatment sent her cancer into remission but also triggered debilitating seizures.⁹² Although prescription medications helped, they left her with memory loss and mood swings while still not stopping the seizures.⁹³ Ashley's parents were open to anything and were optimistic when their doctor recommended medical marijuana.⁹⁴ She used a medical marijuana patch as well as CBD oil, and her seizures all but stopped.⁹⁵

These experiences are some of many, and collectively this empirical and anecdotal evidence demonstrates that an increasing number of children have found relief with medical marijuana.⁹⁶ Their families see CBD and medical

blog/1896-raise-the-realm-day-5-charlotte [https://perma.cc/3WUC-P4WZ].

⁸⁸ "Charlotte's Web" Marijuana Supposed Cure for Kids' Seizures but Doctors Skeptical, CBS (Feb. 18, 2014), <https://www.cbsnews.com/news/charlottes-web-marijuana-a-hope-for-kids-with-seizures-despite-unproven-medical-benefits/> [https://perma.cc/RUL9-FXTH].

⁸⁹ Mario J. Garcia, *Growing Hope: The Fight for Medical Marijuana for Epileptic Kids*, NBCNEWS.COM (June 8, 2015), <https://www.nbcnews.com/health/health-news/growing-hope-fight-medical-marijuana-epileptic-kids-n369796> [https://perma.cc/S8VA-JFU3]. Haley was also diagnosed with Dravet syndrome and first started having violent seizures at five months old. *Id.*

⁹⁰ *Id.* For more information about Haley and her progress through the utilization of medical marijuana, see *Haley Is My Hero*, <http://www.haleymyhero.com/> [https://perma.cc/3L3Q-SHZH].

⁹¹ *Haley Is My Hero*, *supra* note 90.

⁹² Jen Christensen, *Groundbreaking Medical Marijuana Case Lets Little Girl Go Back to School*, CNN (Apr. 12, 2018), <https://www.cnn.com/2018/01/22/health/medical-marijuana-school-illinois/index.html> [https://perma.cc/2N2H-JD2J]. Ashley and her parents sued in federal court in Illinois to gain the right to use her medication at school—according to the district attorney, the medical marijuana "changed Ashley's life today and [it] may've also changed the lives for other children for the better." *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Treatment-resistant epilepsy is not the only debilitating condition that has anecdotal support of the benefits of medical marijuana. For example, Mark and Christy Zartler administered medical marijuana to their daughter with severe autism. See Naomi Martin, *Texas Judge Weighs Whether Father Who Treated Autistic Daughter with Marijuana Is Fit to Be Her Guardian*, DALL. NEWS (Mar. 4, 2018), <https://www.dallasnews.com/news/news/2018/03/04/texas-judge-weighs-whether-father-treated-autistic-daughter-marijuana-fit-guardian> [https://perma.cc/V93L-TLRB]. According to the family's nurse practitioner, teenager Kara's autism causes her to engage in self-injurious behavior—"[s]he punches her

marijuana as their last resort; they have become “medical refugees – leaving their homes to chase the uncertain prospect that medical cannabis may save their children’s lives.”⁹⁷ Although it is true that more scientific studies are needed, it cannot be denied that medical marijuana has proven an effective choice for some children with severe, treatment-resistant conditions.

III. FEDERAL AND STATE MEDICAL MARIJUANA ACTIVITY

The possession and use of medical marijuana remains a complicated phenomenon in the legal context because a clear conflict exists between state and federal law. With the advent of state medical marijuana programs that are actively inconsistent with federal controlled substances law,⁹⁸ the impetus has been placed on the federal government to respond. Currently, federal officials have taken a hands-off approach, and this further supports the proposition that the creation of a safe zone from federal prosecution for schools allowing medical marijuana on campus is a workable course of action.⁹⁹

A. Federal Prohibition

Marijuana production, distribution, possession, and use was confirmed illegal under federal law in 1970 when Congress passed the Controlled Substances Act (CSA).¹⁰⁰ Through the CSA, Congress created a system of five drug classifications called “schedules” establishing varying degrees of control over different substances.¹⁰¹ Marijuana has always been located under Schedule I.¹⁰² Drugs placed under this schedule level are those that have been deemed by

head pretty significantly and she has caused brain damage.” *Id.* But, moments after receiving her dose of vaporized medical marijuana, Kara calms down; in Kara’s case, medical marijuana “paradoxically...prevents abuse.” *Id.*

⁹⁷Lex Talamo et al., *Parents Demand Medical Marijuana for Epileptic Kids*, NBCNEWS.COM (Aug. 18, 2015), <https://www.nbcnews.com/health/health-news/parents-demand-medical-marijuana-epileptic-kids-n411186> [<https://perma.cc/DJ4F-XERC>].

⁹⁸MEDICOLEGAL ASPECTS OF MARIJUANA: WASHINGTON EDITION, *supra* note 33, at 6–7.

⁹⁹*See e.g.*, Memorandum from Dep’y Attorney General David W. Ogden to Selected U.S. Attorneys (Oct. 19, 2009), <https://www.justice.gov/sites/default/files/opa/legacy/2009/10/19/medical-marijuana.pdf> [<https://perma.cc/62NW-H9SN>] [hereinafter Ogden Memo].

¹⁰⁰Controlled Substances Act, 21 U.S.C. §§ 801–812 (2012). Marijuana is the most commonly used illegal drug in the world. CAULKINS ET AL., *supra* note 42, at 5.

¹⁰¹21 U.S.C. §§ 811–812. For the purposes of the CSA, “the term control means to add a drug or other substance, or immediate precursor, to a schedule under part B of this subchapter, whether by transfer from another schedule or otherwise.” 21 U.S.C. § 802(5); *see also* YEH, *supra* note 73, at 1 (“The placement of drugs or other substances into schedules under the CSA is based upon the substance’s medical use, potential for abuse, and safety or dependence liability.”).

¹⁰²*See* 21 U.S.C. § 812(b)(1). Notably, in recognition of the development of high CBD, low THC products, the Drug Enforcement Administration (DEA) in 2016 specifically added “marihuana extracts” to the list of Schedule I drugs. *See* Establishment of a New Drug Code

Congress as (1) having “a high potential for abuse”; (2) having “no currently accepted medical use in treatment in the United States”; and (3) lacking “accepted safety for use . . . under medical supervision.”¹⁰³

The DEA has continuously upheld this strict scheduling of marijuana, despite several petitions by federal and state government officials.¹⁰⁴ In 2016, in response to such petitions and after consideration of an FDA recommendation that marijuana “be maintained in Schedule I of the CSA,”¹⁰⁵ the DEA announced that it would not be rescheduling marijuana any time soon.¹⁰⁶ The only exception to this stance occurred in September 2018, when the DEA moved to reschedule a specific, FDA-approved form of CBD called Epidiolex.¹⁰⁷ “As of right now, any other CBD product other than Epidiolex remains a Schedule I controlled substance,” DEA spokesperson Rusty Payne said at the time. “So it’s still illegal under federal law.”¹⁰⁸

for Marihuana Extract, 81 Fed. Reg. 90194–90196 (Dec. 14, 2016) (to be codified at 21 C.F.R. pt. 1308). Rather than including CBD with marijuana generally, this move making CBD its own category demonstrates the strict DEA position. *See id.* It is consistent with marijuana’s broad judicial interpretation. *See, e.g.,* United States v. Gagnon, 635 F. 2d 766, 770 (10th Cir. 1980); United States v. Walton, 514 F. 2d 201, 203 (D.C. Cir. 1975).

¹⁰³ 21 U.S.C. § 812(b)(1). Also included in Schedule I are most opiates, including heroin, and most hallucinogens, including LSD and peyote. *Id.* § 812(c)(10). For a complete listing of Schedule I substances, see 21 C.F.R. § 1308.11(d)(31) (2018).

¹⁰⁴ For instance, in 2011, Governors Lincoln Chafee (Rhode Island) and Christine Gregoire (Washington) petitioned the federal government to reschedule marijuana. *See* Michael Cooper, *2 Governors Asking U.S. to Ease Rules on Marijuana to Allow for Its Medical Use*, N.Y. TIMES (Nov. 30, 2011), <http://www.nytimes.com/2011/12/01/us/federal-marijuana-classification-should-change-gregoire-and-chafee-say.html> [on file with *Ohio State Law Journal*]. In 2016, several federal lawmakers, including Sen. Elizabeth Warren of Massachusetts and Sen. Barbara Boxer of California, encouraged the DEA to reschedule marijuana and ease the barriers on marijuana research. *See Senators Seek Further Information About Federal Efforts to Facilitate Medical Marijuana Research*, OFFICE OF SENATOR ELIZABETH WARREN (Dec. 21, 2015), https://www.warren.senate.gov/?p=press_release&id=1039 [<https://perma.cc/E4Q5-PA4E>].

¹⁰⁵ Karen B. DeSalvo, Acting Assistant Sec’y for Health, *Recommendation to Maintain Marijuana in Schedule I of the Controlled Substances Act*, U.S. FOOD & DRUG ADMIN. (May 20, 2015), https://www.scribd.com/document/325957054/FDA-Acting-Commission-On-Marijuana-Rescheduling#from_embed [<https://perma.cc/CEZ8-4WZQ>].

¹⁰⁶ Letter from Chuck Rosenberg, Acting Adm’r, U.S. Dep’t of Justice, Drug Enf’t Admin., to the Honorable Gina M. Raimondo, Governor of Rhode Island, the Honorable Jay R. Inslee, Governor of Washington, and Bryan A. Krumm (Aug. 11, 2016), <https://www.dea.gov/sites/default/files/divisions/hq/2016/Letter081116.pdf> [<https://perma.cc/G6AV-6RDX>]. The DEA’s decision was based mainly on the lack of medical marijuana research. *Id.*

¹⁰⁷ *See* David Hodes, *Does the Farm Bill Legalize CBD, Too? Not Exactly*, LEAFLY (Dec. 13, 2018), <https://www.leafly.com/news/politics/does-the-farm-bill-legalize-cbd-too-not-exactly> [<https://perma.cc/5B8B-FBK6>]; U.S. DEPT. OF JUSTICE, LISTS OF: SCHEDULING ACTIONS, CONTROLLED SUBSTANCES, REGULATED CHEMICALS 3 (2018), <https://www.deadiversion.usdoj.gov/schedules/orangebook/orangebook.pdf> [<https://perma.cc/RV2J-XMQ8>].

¹⁰⁸ *See* Hodes, *supra* note 107.

Additionally, in December 2018, President Trump signed into law the Agricultural Improvement Act of 2018 (otherwise known as the 2018 Farm Bill) containing a provision that amends the CSA to exclude hemp, a species of cannabis from which CBD can be extracted.¹⁰⁹ Historically, hemp has not been used as a drug—the legalized form has less than 0.3% of THC¹¹⁰ and instead is used for industrial products like paper, cardboard, carpets, clothes, and rope.¹¹¹ Importantly, the Farm Bill does not legalize marijuana for recreational or medical uses; rather, it only allows for the sale of hemp-derived products, including some CBD products, that comply with state and federal regulatory programs.¹¹² The law also does not alter the FDA’s authority over hemp products or the DEA’s stance on CBD.¹¹³ It is true that the Farm Bill removes hemp-derived products from Schedule I status under the CSA, but the law does not legalize CBD generally,¹¹⁴ and its overall effects on the medical marijuana market are still unclear.

B. *State Medical Marijuana Programs and the Children Behind Them*

Even though medical marijuana remains federally illegal, some states have passed laws permitting citizens to use, possess, or grow marijuana for medicinal purposes, including CBD, without fear of punishment.¹¹⁵ As of November 2018, thirty-three states, along with the District of Columbia, Puerto Rico, and Guam, have general medicinal marijuana programs, and thirteen states have specific

¹⁰⁹ See Agricultural Improvement Act of 2018 § 7129, 7 U.S.C. § 3319(d) (2018).

¹¹⁰ See *President Signs 2018 Farm Bill with Hemp Reforms – Implications for Regulatory Oversight of Hemp-Derived Products Including Cannabidiol (CBD)*, HOGAN LOVELLS (Dec. 21, 2018), https://www.hoganlovells.com/~/_media/hogan-lovells/pdf/2018/2018_12_21_pharma_alert_president_signs_2018_farm_bill_with_hemp_reforms.pdf?la=en [<https://perma.cc/4YUR-NGXH>] [hereinafter *CBD Regulatory Implications*].

¹¹¹ German Lopez, *Trump and Congress Just Legalized Hemp*, VOX (Dec. 20, 2018), <https://www.vox.com/policy-and-politics/2018/12/12/18136408/hemp-marijuana-legalization-trump-congress-farm-bill> [<https://perma.cc/6QFR-S3X8>].

¹¹² See *CBD Regulatory Implications*, *supra* note 110.

¹¹³ The Farm Bill shifts the regulatory and enforcement burden for FDA-regulated hemp products from the DEA to the FDA. *Id.* The FDA “has consistently taken the position that CBD, whether derived from hemp or marijuana, is prohibited from use as an ingredient in food and dietary supplements.” *Id.*; see also *supra* note 108 and accompanying text.

¹¹⁴ See John Hudak, *The Farm Bill, Hemp Legalization and the Status of CBD: An Explainer*, BROOKINGS (Dec. 14, 2018), <https://www.brookings.edu/blog/fixgov/2018/12/14/the-farm-bill-hemp-and-cbd-explainer/> [<https://perma.cc/XRJ2-QR57>]. Rather, CBD generally remains a Schedule I substance under federal law. *Id.*

¹¹⁵ See MARION, *supra* note 39, at 41. A few states have also legalized marijuana for recreational purposes. See *State Medical Marijuana Laws*, *supra* note 25. This is not the subject of this Note.

laws relating to CBD.¹¹⁶ Notably, and especially in the case of CBD legislation and regulations, the driving forces behind the passage and implementation of state medical marijuana programs seems to be the drug's beneficial health effects, including those for children with serious medical conditions like epilepsy and cancer.¹¹⁷ With these children in mind, many legislators actively supported such state programs against the federal government and the CSA.¹¹⁸

Regarding general forms of medical marijuana, California became the first state to legalize medical cannabis in 1996.¹¹⁹ The program had three purposes: (1) “[t]o ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes”; (2) to ensure patients, physicians, and caregivers are not subject to criminal penalties; and (3) to encourage the federal government and other states to “implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need.”¹²⁰ In other words, patient benefit was the primacy goal of this legislation.¹²¹ California's actions sparked a trend; just in the past three years, ten states, along with Guam and Puerto Rico, have passed medical marijuana legislation.¹²² Important aspects of these programs include the amount of marijuana a patient may possess, the physician recommendation system,¹²³ the specific conditions that marijuana can be used to treat,¹²⁴ and rules for cultivators, processors, and distributors.¹²⁵

¹¹⁶ See *State Medical Marijuana Laws*, *supra* note 25. In general, these statutes remove criminal penalties from patients for use medical cannabis in accordance with the program rules. See MARION, *supra* note 39, at 41.

¹¹⁷ See *CBD Laws*, *supra* note 26.

¹¹⁸ See *id.*

¹¹⁹ The Compassionate Use Act, Cal. Health & Safety Code § 11362.5 (West 2007). The main context behind California's legalization was the AIDS/HIV epidemic of the late 1980s and early 1990s. See CAULKINS ET AL., *supra* note 43, at 201.

¹²⁰ The Compassionate Use Act, Cal. Health & Safety Code § 11362.5(A)–(C).

¹²¹ See CAULKINS ET AL., *supra* note 43, at 200–01.

¹²² See sources cited *supra* note 25. On an international level, the United States can also take note from other countries embracing cannabis research to combat medical conditions. See, e.g., BUREAU VOOR MEDICINALE CANNABIS, <https://www.cannabisbureau.nl/> [<https://perma.cc/J8UM-96FN>] (Office for Medicinal Cannabis, the Netherlands); MEDICAL CANNABIS UNIT, <https://www.health.gov.il/English/MinistryUnits/Pages/UnitsList.aspx> [<https://perma.cc/5FD8-6QDC>] (Israeli division for regulation of medical marijuana).

¹²³ Because of conflict with federal law, physicians are prohibited from prescribing medical marijuana. See CAULKINS ET AL., *supra* note 43, at 209 (explaining that doctors cannot write prescriptions for medical marijuana because “prescriptions apply only to FDA-approved medications”). To circumvent this, states allow physicians to “recommend” medical marijuana to patients or to parents of minors, which constitutes a certification that a patient has a qualifying condition and could benefit from medical cannabis. See *Conant v. Walters*, 309 F.3d 629, 630 (9th Cir. 2002).

¹²⁴ In most states, these include cancer, Crohn's disease, epilepsy, chronic pain, PTSD, multiple sclerosis, inflammatory diseases, and AIDS/HIV, among others. See MARION, *supra* note 39, at 9–14.

¹²⁵ See *id.* at 41–42; see, e.g., OHIO REV. CODE ANN. § 3796 (West Supp. 2018).

This momentum is not showing any signs of slowing down,¹²⁶ and the main goal of these programs is to provide access to seriously ill individuals to medical marijuana. Although most legislators are concerned with adults, the raised awareness of children with severe conditions has led lawmakers to take them into account in supporting general medical marijuana programs.¹²⁷ For example, in urging his fellow lawmakers to support Ohio's Medical Marijuana Program, H.B. 523, Representative Dan Ramos referenced the impact of hearing the stories of "little children, some which have seizure disorders" and how the medical marijuana program could help them.¹²⁸ Other legislators in Virginia expressed similar sentiments.¹²⁹ Perhaps most persuasive is Connecticut's recent expansion of its medical marijuana program.¹³⁰ In May 2016, Governor Dannel Malloy signed into law additions to the state's legislation that would extend the program to minors with certain medical conditions to use marijuana for palliative purposes.¹³¹

Along with general medical marijuana programs, CBD-specific regulations demonstrate how the focus of such laws is to provide access to severely ill patients, specifically children.¹³² Many of the laws are named after children and explicitly reference debilitating epilepsy conditions or cancer.¹³³ Most convincing are the statements made by officials who were part of the enactment of these laws.¹³⁴ After signing SB 1030, which allows the use of non-smoked CBD by certain patients with cancer, chronic seizures, or muscle spasms, into

¹²⁶ On November 6, 2018, voters in two more states—Missouri and Utah—approved the creation and implementation of comprehensive medical marijuana programs. Schnell, *supra* note 25.

¹²⁷ See *CBD Laws*, *supra* note 26.

¹²⁸ Jim Siegel, *Legislation Legalizing Medical Marijuana Clears Ohio House*, COLUMBUS DISPATCH (May 11, 2016), <https://www.dispatch.com/content/stories/local/2016/05/10/medical-marijuana-vote.html> [<https://perma.cc/L7FH-ESDG>].

¹²⁹ See *Dateline: Growing Hope* (NBC television broadcast June 7, 2015), <https://www.nbcnews.com/datetime/video/growing-hope--part-3-464847939629> [<https://perma.cc/2FGM-K2YH>].

¹³⁰ Arielle Levin Becker, *The Basics: Medical Marijuana for Minors Wins Final Passage*, CT MIRROR (Apr. 30, 2016), <https://ctmirror.org/2016/04/30/the-basics-medical-marijuana-for-minors-wins-final-passage/> [<https://perma.cc/4Y63-B4C2>] [hereinafter Becker, *The Basics*].

¹³¹ Arielle Levin Becker, *Malloy Signs Medical Marijuana for Minors Bill*, CT MIRROR (May 17, 2016), <https://ctmirror.org/2016/05/17/malloy-signs-medical-marijuana-for-minors-bill/> [<https://perma.cc/27B5-7W96>].

¹³² These laws explicitly allow for the use of low THC/high CBD forms of marijuana, usually in oil form, by qualifying children and adults. See *CBD Laws*, *supra* note 26.

¹³³ Examples include Carly's Law (Alabama); Haleigh's Hope Act (Georgia); Harper Grace's Law (Mississippi); Julian's Law (South Carolina); and Charlee's Law (Utah). *Id.*; see also SB 181, 148th Gen. Assemb. (Del. 2015-2016), Vol. 80 Del. Laws Ch. 422 (2015-2016) (Rylie's Law).

¹³⁴ See, e.g., Press Release, Rick Scott, Governor Rick Scott Signs Charlotte's Web Legislation (June 23, 2017), <https://www.flgov.com/governor-rick-scott-signs-charlottes-web-legislation-2/> [<https://perma.cc/Q9AL-SH2C>].

law, Florida Governor Rick Scott stated, “As a father and grandfather, you never want to see kids suffer. The approval of [CBD oil] will ensure that children in Florida who suffer from seizures and other debilitating illnesses will have the medication needed to improve their quality of life.”¹³⁵ Similarly, Mississippi Governor Phil Bryant released a statement shortly after signing Harper Grace’s Law in which he said, “The bill I signed into law today will help children who suffer from severe seizure disorders.”¹³⁶ Finally, Oklahoma Governor Mary Fallin stated after signing the state’s CBD bill into law that “[t]his bill will help get sick children potentially life-changing medicine.”¹³⁷ Thus, state actors have recognized that marijuana is an effective form of medicine and that medical marijuana programs were intended to benefit such children.¹³⁸

C. *The Federal Response—Administration and Policies*

As more states begin to implement both recreational and medicinal marijuana statutory schemes, attention has shifted to the federal government and how it will handle such disregard of federal law. During the Obama Administration, sources of guidance¹³⁹ along with a Congressional spending rider¹⁴⁰ led to the implication that the federal government would not intervene in the states so long as federal enforcement priorities are maintained.¹⁴¹ However, this leniency has come into question under the Trump Administration.¹⁴² Despite this uncertainty, marijuana reform has become a matter of when, not if, and it is unlikely that the momentum will be halted.¹⁴³ This only strengthens the argument for children to benefit from the system at school.

1. *Legislative Branch Actions*

Congress has expressed its intent to take a hands-off approach regarding state medical marijuana programs.¹⁴⁴ Along with consistent bills by lawmakers

¹³⁵ *Id.*

¹³⁶ *CBD Laws, supra* note 26.

¹³⁷ *Id.* Leaders from Georgia, Iowa, Texas, Virginia, and Wisconsin also made similar statements when enacting their CBD laws. *Id.*

¹³⁸ See Ogden Memo, *supra* note 99.

¹³⁹ See *infra* Part III.C.2.

¹⁴⁰ See *infra* Part III.C.1.

¹⁴¹ In March 2017, then-White House spokesman Sean Spicer confirmed that the DOJ would not prosecute medical marijuana users “in part because Congress has already banned it from doing so.” See Trevor Hughes, *Trump Sends Mixed Message on Marijuana, but Pot Industry Pushes Ahead*, USA TODAY (Mar. 9, 2017), <https://www.usatoday.com/story/news/2017/03/09/marijuana-industry-uncertain-about-trump/98948484/> [<https://perma.cc/T2XS-LRD4>].

¹⁴² See *id.*

¹⁴³ See *id.*

¹⁴⁴ See, e.g., REFER ACT of 2018, H.R. 4779, 115th Cong. (2018).

to reschedule marijuana¹⁴⁵ and the removal from Schedule I of the CSA of hemp-derived products in 2018,¹⁴⁶ Congress has reduced the DEA's budget in relation to marijuana enforcement with respect to funding for the DEA's cannabis eradication program.¹⁴⁷ The Rohrabacher-Blumenauer (formerly Rohrabacher-Farr) Budget Amendment effectively defunds the DOJ from acting against marijuana activity that otherwise complies with state medical legalization.¹⁴⁸

Although this amendment does not change the legal status of cannabis and must be renewed each fiscal year to remain in effect,¹⁴⁹ it represents the first time there has been any "softening" on the part of the federal government toward medical marijuana policy.¹⁵⁰ Congress continues to renew the rider, most recently on March 23, 2018 as part of a \$1.3 trillion federal spending bill.¹⁵¹ The Ninth Circuit has confirmed that this rider prohibits federal prosecution of individuals acting in compliance of state laws.¹⁵²

2. Executive Branch Actions

Following state implementation of medical cannabis programs, the DOJ¹⁵³ has issued memos and other sources of guidance that instruct federal prosecutors

¹⁴⁵ *Id.* (proposing an amendment to the CSA that bans federal prosecution of individuals and entities that are compliant with state laws).

¹⁴⁶ *See supra* notes 104–114 and accompanying text.

¹⁴⁷ *See* Kimberly A. Houser, *What Inconsistent Federal Policy Means for Marijuana Business Owners: Washington's I-502 and the Federal Controlled Substances Act*, 50 GONZ. L. REV. 305, 306 (2014/2015).

¹⁴⁸ *See id.* First introduced in 2004 with the goal of preventing the DEA from interfering with state medical marijuana laws, the spending rider passed the House in May 2014, passed the Senate in December 2014, and was almost immediately signed into law by President Obama. *See id.*; Kris Hermes, *Feds Back Off Medical Marijuana Enforcement in 32 States and DC*, AMS. FOR SAFE ACCESS (Dec. 29, 2014), http://www.safeaccessnow.org/feds_back_off_medical_marijuana_enforcement_in_32_states_and_dc [<https://perma.cc/S9EY-4892>].

¹⁴⁹ *See* Jacob Sullum, *The Federal Ban on Medical Marijuana Was Not Lifted*, REASON (Jan. 4, 2016), <http://reason.com/archives/2016/01/04/the-federal-ban-on-medical-marijuana-was> [<https://perma.cc/4FQ8-BNWJ>].

¹⁵⁰ Houser, *supra* note 147, at 307–08.

¹⁵¹ Jason D. Navarino et al, *Rohrabacher-Blumenauer Amendment Is Renewed Through September 2018*, LEXOLOGY (Apr. 3, 2018), <https://www.lexology.com/library/detail.aspx?g=49575d57-77b9-4e1d-9e2e-15b9c9925878> [<https://perma.cc/M3E2-2QSM>]. The status of the September 2018 renewal is unclear; *see* Alexander Lekhtman, *Will a New Democratic Congress Help Make Marijuana Dreams a Reality?*, CIVILIZED. (Jan. 2, 2019), <https://www.civilized.life/articles/will-a-new-democratic-congress-help-make-marijuana-dreams-a-reality/> [<https://perma.cc/UR4Z-3SKL>].

¹⁵² *United States v. McIntosh*, 833 F.3d 1163, 1178 (9th Cir. 2016). This unanimous ruling is binding on the nine western states of the Ninth Circuit and will most likely influence other circuit courts in the future.

¹⁵³ Headed by the United States Attorney General, the DOJ has final supervisory authority over the actions of the DEA, meaning they control prosecution efforts by U.S. Attorneys against individuals and commercial marijuana participants. *See Diversion Control*,

on how to proceed.¹⁵⁴ While these memoranda serve as guidance and cannot provide binding assurance of federal non-action, they speak to a strategy of nonintervention.¹⁵⁵ The first of these was a memo issued by Deputy Attorney General David Ogden in 2009 under the Obama Administration.¹⁵⁶ The Ogden Memo, while emphasizing a continued commitment to enforcement of the CSA throughout the country, recognized the simultaneous commitment to the preservation of prosecutorial resources.¹⁵⁷

Perhaps most importantly, the Ogden Memo confirmed that the DOJ did not view prosecution of legally compliant medical marijuana patients as an effective use of resources:

For example, prosecution of individuals with cancer or other serious illnesses who use marijuana as part of a recommended treatment regimen consistent with applicable state law, or those caregivers in clear and unambiguous compliance with existing state law who provide such individuals with marijuana, is unlikely to be an efficient use of limited federal resources.¹⁵⁸

In its entirety, the Ogden Memo encouraged focus on certain enforcement priorities while leaving local enforcement matters to the states.¹⁵⁹ Although the Ogden Memo in no way altered the DOJ's ability to enforce federal law through prosecution and in no way legalized marijuana,¹⁶⁰ it provided a powerful source of guidance that in turn disincentivized federal prosecutors from disrupting legal state cannabis activity.¹⁶¹ Further, in 2013, Deputy Attorney General James M. Cole issued a memo like the Ogden Memo but with necessary updates.¹⁶²

However, with the change in presidential administrations in 2016, this federal hands-off approach was called into question.¹⁶³ President Trump has

DEA, U.S. DEP'T OF JUSTICE, <https://www.deadiversion.usdoj.gov/Inside.html> [<https://perma.cc/2GQ6-R47V>] (explaining role of the Diversion Control Unit).

¹⁵⁴ See e.g., Ogden Memo, *supra* note 99.

¹⁵⁵ MEDICOLEGAL ASPECTS OF MARIJUANA: WASHINGTON EDITION, *supra* note 33, at 30–31.

¹⁵⁶ See Ogden Memo, *supra* note 99.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ Much in the same vein as the Ogden Memo, the DOJ continued to issue periodical memos that emphasized state independence. See, e.g., Memorandum from Dep'y Attorney General James M. Cole to U.S. Attorneys (June 29, 2011) (on file with U.S. Dept. of Justice).

¹⁶² Memorandum from Dep'y Attorney General James M. Cole to All U.S. Attorneys (Aug. 29, 2013) (on file with U.S. Dept. of Justice) [hereinafter Cole Memo].

¹⁶³ See Ethan Nadelmann, *As Trump Said in the Campaign, Leave Pot to the States*, N.Y. TIMES (Feb. 27, 2017), <https://www.nytimes.com/2017/02/27/opinion/as-trump-said-in-the-campaign-leave-pot-to-the-states.html> [on file with *Ohio State Law Journal*]; Interview with *The O'Reilly Factor* with Donald Trump (Feb. 10, 2016), <http://www.foxnews.com/transcript/2016/02/11/donald-trump-on-trade-deficit-with-china.html> [<https://perma.cc/23CK-KRW6>].

recognized the potential positive health effects of medical marijuana and repeatedly stated during his campaign that he would respect state activity relating to marijuana under a states' rights approach.¹⁶⁴ He also signaled his tepid support of medical marijuana by signing the 2018 Farm Bill.¹⁶⁵ But former Attorney General Jeff Sessions did not create any confusion as to his viewpoint of marijuana, actively criticizing its use and disapproving of state legalization efforts.¹⁶⁶

Thus, it is fitting that, in January 2018, former AG Sessions issued a memo rescinding the previous guidance in the Ogden and Cole Memos.¹⁶⁷ Citing the CSA, AG Sessions emphasized that “marijuana is a dangerous drug and...marijuana activity is a serious crime.”¹⁶⁸ In effect, AG Sessions' Memo is a reminder of federal supremacy and the ability of prosecutors to prosecute.¹⁶⁹ However, according to President Trump's press secretary, the DOJ move “simply gives prosecutors the tools to take on large-scale distributors and enforce federal law. The president's position hasn't changed”¹⁷⁰ This statement is in line with the hands-off approach advocated within the Cole and Ogden Memos, and overall the federal government has generally not intervened in state medical marijuana programs.

¹⁶⁴ See Interview on *The O'Reilly Factor*, *supra* note 163. (“[B]y the way—medical marijuana, medical? I'm in favor of it a hundred percent . . . I know people that have serious problems and they did that they really [sic]—it really does help them.”).

¹⁶⁵ See *supra* notes 109–114 and accompanying text.

¹⁶⁶ In the past, Attorney General Sessions has said that “[g]ood people don't smoke marijuana” and that “[w]e need grown-ups in charge in Washington to say marijuana is not the kind of thing that ought to be legalized . . . that it is, in fact, a very real danger.” See Tom Huddleston, Jr., *What Jeff Sessions Said About Marijuana in His Attorney General Hearing*, FORTUNE (Jan. 10, 2017), <http://fortune.com/2017/01/10/jeff-sessions-marijuana-confirmation-hearing/> [<https://perma.cc/Y53E-SRAS>]. Sessions has gone as far as to create a task force to investigate the growing marijuana presence with the goal of cracking down on such use. See Julia Manchester, *Federal Task Force Reportedly Recommends More Marijuana Study, No Crackdown*, THE HILL (Aug. 4, 2017), <http://thehill.com/homenews/administration/345413-justice-dept-task-force-on-marijuana-recommends-more-study-no> [<https://perma.cc/7BQ3-K9E8>]. However, the task force recommended more study of marijuana rather than a crackdown. See *id.* Further, AG Sessions was removed from office on November 7, 2018. See Peter Baker et al., *Jeff Sessions Is Forced Out as Attorney General as Trump Installs Loyalist*, N.Y. TIMES (Nov. 7, 2018), <https://www.nytimes.com/2018/11/07/us/politics/sessions-resigns.html> [on file with *Ohio State Law Journal*]. It is unclear how the new Attorney General will treat medical marijuana.

¹⁶⁷ See Memorandum from Attorney General Jefferson B. Sessions, III to All U.S. Attorneys (Jan. 4, 2018) (on file with U.S. Dept. of Justice). AG Sessions called the previous guidance “unnecessary” considering the DOJ's “well-established general principles” of prosecutorial discretion. *Id.*

¹⁶⁸ See *id.*

¹⁶⁹ See *id.*

¹⁷⁰ See Charlie Savage & Jack Healy, *Trump Administration Takes Step That Could Threaten Marijuana Legalization Movement*, N.Y. TIMES (Jan 4., 2018), <https://www.nytimes.com/2018/01/04/us/politics/marijuana-legalization-justice-department-prosecutions.html> [on file with *Ohio State Law Journal*].

3. Judicial Branch Actions

In the context of medical marijuana, the Supreme Court and lower federal courts have helped to define the laws regarding the drug and patient rights.¹⁷¹ Although the Supreme Court has continued to recognize the illegality of marijuana and its cultivation, even for medicinal purposes within legal state programs, the ruling of lower federal courts imply that the drug is becoming more accepted throughout the country as time passes.¹⁷²

The Supreme Court has consistently held that the medical necessity defense could not be allowed in federal courts to create an exception to the illegality of medical marijuana distribution.¹⁷³ In other words, the Court upheld the supremacy of federal law in the face of state activity. However, some lower federal and state courts have taken somewhat different directions in this area than the Supreme Court. For example, in *Conant v. Walters*, a physician who treated patients with AIDS and HIV, argued that the First Amendment protected him from federal attempts to prevent him from discussing or recommending medical marijuana.¹⁷⁴ The Ninth Circuit ultimately held in 2002 that the federal government could not revoke the licenses of physicians who recommended medical marijuana to patients, with one concurring judge emphasizing the burgeoning potential for medical marijuana as a form of treatment for certain conditions.¹⁷⁵ As can be seen from these and other cases, though the federal judicial branch has mostly confirmed the power of the CSA, the recognition by lower courts that physicians can recommend medical marijuana to patients indicates the momentum that the medical marijuana movement has made.

Overall, despite the federal prohibition on use and/or possession of marijuana in any form, several states have nevertheless crafted and implemented medical marijuana programs in recognition of its medical benefits for hundreds of citizens, including certain children.¹⁷⁶ In response, much of the federal government has taken a hands-off approach, focusing instead on larger priorities rather than committing resources to such individuals who are following their

¹⁷¹ See, e.g., *United States v. Oakland Cannabis Buyer's Coop.*, 532 U.S. 483 (2001).

¹⁷² See, e.g., *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002).

¹⁷³ See, e.g., *Gonzales v. Raich*, 545 U.S. 1, 2 (2005) (in which the Court relied on the CSA to strike a state law exempting patients and caregivers who possessed or grew medical marijuana from criminal prosecution); *Oakland Cannabis Buyer's Coop.*, 532 U.S. at 490 (in which federal officials in California sought to close the Oakland Cannabis Buyer's Cooperative and other medical marijuana distributors who were openly operating after the state implemented a medical marijuana program).

¹⁷⁴ *Conant*, 309 F.3d at 630.

¹⁷⁵ See *id.* at 643 (Kozinski, J., concurring). State courts have also been unwilling to accept the federal-state conflict as an excuse for restrictive actions relating to marijuana. See MARION, *supra* note 39, at 147 (describing a case from San Diego County in which the state court of appeals rejected the argument that the county was not required to provide medical marijuana identification cards to patients "since the federal ban on marijuana trumps state law").

¹⁷⁶ See, e.g., *Conant*, 309 F.3d at 629.

state's rules and regulations.¹⁷⁷ With this context in mind, school districts should begin to address the needs of students who benefit from medical marijuana.

IV. PROBLEMS AND IMPLICATIONS

It has been established through empirical and anecdotal evidence that CBD oil and other low THC/high CBD forms of marijuana can have positive and, in some cases, life-changing effects for children and young adults with debilitating conditions like aggressive cancer and treatment-resistant epilepsy.¹⁷⁸ It has also been established that the federal government has taken actions to show its intention to take a hands-off approach in terms of those legally complying with their state's medical marijuana program.¹⁷⁹ Despite these things, only seven states—New Jersey, Maine, Delaware, Illinois, Florida, Washington, and Colorado—allow students to use medicinal marijuana in school,¹⁸⁰ the place at which they spend on average forty hours a week. As a result, children and families who rely on medical marijuana are forced to take other measures to receive treatment.¹⁸¹ In many cases, the fact that these children are unable to receive the education to which they are entitled could be a constitutional and statutory violation.

A. *Hardships Faced by Child Medical Marijuana Patients*

Students who are unable to take their doses of medical marijuana on school property face adversity solely because of their uncontrollable medical condition.¹⁸² Unlike their peers, who are often allowed to take powerful medications like Ritalin at school, administered by a school nurse,¹⁸³ students who rely on medical marijuana are deprived of their doses on campus in most

¹⁷⁷ See, e.g., Ogden Memo, *supra* note 99.

¹⁷⁸ See *supra* Part II.B.1, II.B.2.

¹⁷⁹ See *supra* Part III.

¹⁸⁰ See Young, *supra* note 28. These laws allow the administration of non-smokable medical marijuana on school grounds, on a school bus, and/or at school-sponsored events. See, e.g., COLO. REV. STAT. 22-1-119.3 (2018) (Colorado statute also referred to as Jack's Law); SB 181, 148th Gen. Assemb. (Del. 2015-2016), Vol. 80 Del. Laws Ch. 422 (2015-2016) (*amending* 16 DEL. STAT. ANN. § 4904A to permit a qualified caregiver or parent to administer medical marijuana on school grounds); FLA. STAT. ANN. 1006.062 (West 2019 Supp.) (Florida statute); HB 4870, 100th Gen. Assemb. (Ill. 2018) (Illinois, Ashley's Law); ME. REV. STAT. ANN. 20-A §6306 (2017 Supp.) (Maine statute amended on June 30, 2015); 2015 N.J. Laws 1173 (Pub. L. 2015, §158 *amending* N.J. STAT. ANN. § 24:61-1); SB 5052 § 31(4), 64th Leg. (Wash. 2015), 2015 Wash. Sess. Laws. 321 (Washington law).

¹⁸¹ See Livio, *Fight Isn't Over*, *supra* note 4.

¹⁸² See *id.*

¹⁸³ See, e.g., Carey Goldberg, *For School Nurses, More Than Tending the Sick*, N.Y. TIMES (Jan. 28, 1999), <http://www.nytimes.com/1999/01/28/us/for-school-nurses-more-than-tending-the-sick.html> [on file with *Ohio State Law Journal*] (listing different medications given to students by school nurses and describing the "ever-more-pharmacologized society").

states.¹⁸⁴ For students like Genny Barbour who require multiple doses of medical marijuana oil or patches each day, staying at school for eight straight hours without taking their medicine is not an option.¹⁸⁵ Despite the beneficial results that medical marijuana has produced in children with treatment-resistant conditions, they cannot bring onto school property the medication that they can legally take at home.¹⁸⁶

In coping with this problem, some parents have chosen to time the marijuana doses so that they do not interfere with school.¹⁸⁷ However, staggering and consistently changing doses can have potentially dangerous side effects.¹⁸⁸ Furthermore, especially in children with autism, changes in routines can lead to dramatic negative behaviors.¹⁸⁹

To avoid this situation, some parents have been forced to go to their child's school and give them their dose.¹⁹⁰ However, federal and state safe and drug-free schools acts (as well as state marijuana programs that do not make an exception for students) do not allow controlled substances within a certain distance of schools (usually 1,000 feet).¹⁹¹ Therefore, parents and their children are forced to leave school property, sometimes by as much as a mile,¹⁹² in

¹⁸⁴ See Livio, *Fight Isn't Over*, *supra* note 4.

¹⁸⁵ See *id.*

¹⁸⁶ See *State Medical Marijuana Laws*, *supra* note 25.

¹⁸⁷ This was the approach taken by Genny's parents. See Livio, *Fight Isn't Over*, *supra* note 4. In Genny's case, to ensure she gets at least half a day of school, her parents began giving her three larger doses a day rather than four small ones—however, this is only a “temporary” fix, and it negatively impacts Genny's sleep patterns. *Id.*

¹⁸⁸ See *Guide to Using Medical Cannabis*, AMERICANS FOR SAFE ACCESS, http://www.safeaccessnow.org/using_medical_cannabis [https://perma.cc/7MUK-483P] (describing how differing and/or excessive dosages can be uncomfortable and can produce different subjective effects).

¹⁸⁹ See *Obsessions, Repetitive Behavior and Routines*, *supra* note 8.

¹⁹⁰ This was the accommodation proposed in Genny's case. First Denial, *G.B. v. Maple Shade*, *supra* note 6, at 3.

¹⁹¹ For a comprehensive guide of all state-level drug-free school zone laws, see Nicole D. Porter, *Drug-Free Zone Laws: An Overview of State Policies*, SENTENCING PROJECT (Dec. 2013), <http://sentencingproject.org/wp-content/uploads/2015/12/Drug-Free-Zone-Laws.pdf> [https://perma.cc/HG3P-7XKW]; see also Safe and Drug-Free Schools and Communities Act, 20 U.S.C. §7101-7102 (2012) (outlining the provisions from which school districts created their drug-free school zone laws).

¹⁹² See Porter, *supra* note 191 (outlining state drug-free school zone acts and the distance from schools parents would need to be to administer medical marijuana).

inclement weather.¹⁹³ Besides being hugely disruptive for students¹⁹⁴ and inconvenient for parents who have to leave work in the middle of the day, it is an impossible route for certain children who cannot handle the transition from home to school.¹⁹⁵ Thus, for these children, the only option is to attend school part time, if at all.¹⁹⁶ This results in the missing of valuable educational time and opportunities. Even in Washington, New Jersey, Illinois, Maine, and Delaware, some students still face challenges in receiving their medical marijuana dose. Because under these laws school nurses are not allowed to administer the drug,¹⁹⁷ students for whom a parent or caregiver's administration of the dose would be too disruptive are forced to take alternative, burdensome measures.¹⁹⁸ As can be seen from these experiences, students who benefit from medical marijuana face unduly burdensome challenges in receiving their doses at school.

B. *Constitutional and Statutory Implications*

These extraordinary measures that parents and students must take to ensure receipt of their legally recommended medicine have constitutional and statutory implications on the right to education and on disability discrimination. In this context, because many students are being forced to miss school because their school districts, understandably fearful of federal prosecution, do not permit them to take their necessary medicine on campus, the right to medication is in direct conflict with the right to an education.

A child's right to and receipt of an education is vital to a free society. The Supreme Court has emphasized this principle in cases such as *Plyler v. Doe*, in which it struck down a state statute and a municipal attempt that denied funding

¹⁹³ Seven-year-old River Barclay from Washington and her father John go through this struggle every school day. See Matt Markovich, *Father's Push to Give Daughter Medical Marijuana at School May Prompt Change in State Law*, KOMO NEWS (Jan. 12, 2017), <http://komonews.com/news/local/fathers-push-to-give-daughter-medical-marijuana-at-school-may-prompt-change-in-state-law> [<https://perma.cc/YU9Z-3P57>]. CBD has greatly improved River's seizure condition, but she must have a dose at noon every day to stay seizure free. *Id.* Thus, "at lunch break, John picks up his daughter when it's cold, takes her home for lunch, and gives her dosage." *Id.*

¹⁹⁴ In Genny's case, she continued to attend school only part-time because "[t]he school has no plan . . . to control her behavior when Lora then has to leave her there." Whittaker, *supra* note 2.

¹⁹⁵ *Id.*

¹⁹⁶ See, e.g., Livio, *Mother Can't Bring Medical Marijuana*, *supra* note 1; Markovich, *supra* note 192.

¹⁹⁷ See, e.g., ME. REV. STAT. ANN. 22 § 2426 (creating an exception to administering medical marijuana on campuses in Maine, but only extending the exception to parents and caregivers); 2015 N.J. Law 1173 (*amending* § 24:6I-1) (requiring parents, guardians, or primary caregivers, not school nurses, to be authorized to assist the student with the medical use of medical marijuana); First Denial, G.B. v. Maple Shade, *supra* note 6, at 6 (holding that school officials are not considered caregivers under CUMMA).

¹⁹⁸ See, e.g., Livio, *Mother Can't Bring Medical Marijuana*, *supra* note 1.

for education to illegal alien children.¹⁹⁹ Within its decision, the Court discussed the value of education, observing that the deprivation of education would likely contribute to illiteracy, unemployment, and crime.²⁰⁰ According to the Court, “[p]ublic education has a pivotal role in maintaining the fabric of our society and in sustaining our political and cultural heritage; the deprivation of education takes an inestimable toll on the social, economic, intellectual, and psychological wellbeing of the individual, and poses an obstacle to individual achievement.”²⁰¹ Therefore, it could be argued that keeping children from school because of their medicinal needs goes against established precedent on the value of education.²⁰²

The results of a ban on medical marijuana on school campuses also impact non-discrimination statutes like the Individuals with Disabilities Education Act (IDEA). Under the IDEA, a spending statute passed by Congress in 1999, every child is entitled to a Free Appropriate Public Education (FAPE).²⁰³ The IDEA requires that states, in exchange for funding to do so, ensure that there is an appropriate level of medical support to allow students with disabilities to attend school.²⁰⁴ If an education alternative is necessary, it must be the least restrictive option (i.e., schools cannot force children to be homeschooled to avoid providing an education).²⁰⁵ There are two important aspects to emphasize: First, the IDEA applies to *every* child, no matter the severity of disability.²⁰⁶ Second, if a child is considered disabled under the IDEA, the question is not if they are entitled to medical support but what type.²⁰⁷ In accordance with the IDEA, school districts must do whatever is necessary to ensure that a disabled child can attend school each day.²⁰⁸

¹⁹⁹ See *Plyler v. Doe*, 457 U.S. 202, 202 (1982).

²⁰⁰ See *id.* at 230.

²⁰¹ *Id.* at 203.

²⁰² The Supreme Court has consistently recognized the value of education. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972) (“[E]ducation prepares individuals to be self-reliant and self-sufficient participants in society.”); *Abbington Sch. Dist. v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring) (describing public school as “a most vital civic institution for the preservation of a democratic system of government”); *Brown v. Bd. of Ed.*, 347 U.S. 483, 493 (1954) (“[Education] is the very foundation of good citizenship. Today it is a principle instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.”); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (“American people have always regarded education and [the] acquisition of knowledge as matters of supreme importance.”).

²⁰³ Individuals with Disabilities Education Act, 20 U.S.C. § 1400(d) (2012).

²⁰⁴ *Id.* § 1401(26)(A).

²⁰⁵ *Id.* § 1411(F).

²⁰⁶ *Id.* § 1400(a).

²⁰⁷ *Id.*

²⁰⁸ *Id.* § 1401(26)(A). While school districts do not have to provide the type of service that the parents choose or the type that is most effective, simply allowing children to miss valid educational time should not be considered a reasonable accommodation.

In this instance, children who have conditions so severe and so treatment-resistant that they can find relief only with medical marijuana may be deprived of a fair and appropriate public education. Some children cannot be in school safely for the required number of hours without receiving a dosage of their marijuana oil.²⁰⁹ Although the IDEA enables children with disorders such as ADHD to create Individualized Education Plans (IEPs) that specifically allow for them to go to the nurse for doses of powerful medications such as Ritalin, there is no such accommodation for medical marijuana as of yet because of its status under the CSA. Yet these two statutes, IDEA and CSA, conflict with each other. In this situation, the application of the CSA has resulted in children like Genny not being able to attend school to which they are entitled under the IDEA. Congress was entitled to pass both pieces of legislation, but the passage of the IDEA did not consider the implications of the CSA.²¹⁰ But, in determining which statute prevails, it is important to note the constitutional nature of the right to attend school—as education has clear constitutional overtones, Congress cannot take steps to thwart that right.²¹¹ In this case, this provides support for the limited exception to the CSA to allow medical marijuana on school property for certain children under certain conditions.

Children with intractable conditions who find relief with medical marijuana face extreme hardships when they attempt to obtain the education that they are legally required and constitutionally entitled to receive. Because of federal and state laws that create understandable hesitation in school districts to allow marijuana on school property, many children have been partially or completely unable to receive educational accommodations. This virtually unrecognized gap in the law has in turn wrongfully implicated the statutory and constitutional rights of children with these illnesses. On a basic level, these students simply want to take their medication, and the law is keeping them from doing so at school.

V. THE NECESSARY CREATION OF A SAFE SPACE FOR SCHOOLS

The key to solving these problems lies in the encouragement of action by all levels of government that results in the creation of a safe space for school districts under certain terms. But because marijuana in all forms remains federally prohibited under the CSA, many state and school actors continue to be understandably hesitant to facilitate its medicinal use by children on school

²⁰⁹ See *supra* Part IV.A.

²¹⁰ Under IDEA, if a student “knowingly possesses, uses, or sells illegal drugs, or sells a controlled substance at school . . . or at a school function,” he or she may be placed in an interim alternate educational setting for up to 45 school days. See MITCHELL L. YELL, *THE LAW AND SPECIAL EDUCATION* 346 (3d ed., 2006). Accordingly, IDEA does not contemplate the use of medical marijuana, a controlled substance, in the school environment.

²¹¹ As per judicial review, if Congress passes unconstitutional laws, they must be struck. *Marbury v. Madison*, 5 U.S. 137, 138 (1803). In this narrow instance, the CSA could be seen as unconstitutional.

property. Since Congress is as of now disinclined to move from prohibition by rescheduling marijuana or removing it from the CSA's purview all together, it would be disingenuous to say achieving access for these children is anything other than an uphill battle.²¹² However, this battle has already begun; actions have already been taken to enable access to certain medical marijuana products by certain individuals.²¹³ Physicians and lawmakers alike recognize that children with treatment-resistant conditions can benefit from high CBD, low THC medical marijuana.²¹⁴ These children are sympathetic marijuana users, and they should not be forced to choose between their right to an education and their health (and, in some instances, their lives). Broadening the scope of these measures already in place at the federal, state, and local levels and implementing new policies would show school districts that, although the current political climate makes decriminalization of marijuana at the federal level implausible, they remain free to ensure that certain children in their jurisdictions receive the life-changing treatments they need without fear of prosecution or rescission of funds. It is a large move to reschedule marijuana,²¹⁵ but, because of the increasing amount and functionality of state medical marijuana programs, it would not be a seismic change to allow children to receive at school the medicine that they are already legally able to receive at home.

A. Federal Government

Even in the shadow of federal prohibition, the momentum of marijuana reform and the medical marijuana industry in the past decade has been incredible.²¹⁶ In other words, federal prohibition has clearly not stopped states

²¹² Although federal drug policy is only a small focus of this Note, the Author emphasizes that rescheduling marijuana and removing it from the Schedule I designation would be a step in the right direction.

²¹³ Action has already occurred in the form of congressional spending limits, memos from executive agencies, CBD-specific bills, and statewide medical marijuana programs, some of which include laws explicitly allowing use of medical marijuana at schools. See *supra* Part III.

²¹⁴ See *supra* Part II.

²¹⁵ Despite recognition by lawmakers and physicians, including former U.S. Surgeon General Vivek Murthy, that marijuana can be helpful for some medical conditions, congressional action or administrative action are the only ways by which rescheduling can occur. See John Hudak & Grace Wallack, *How to Reschedule Marijuana, and Why It's Unlikely Anytime Soon*, BROOKINGS (Feb. 13, 2015), <https://www.brookings.edu/blog/fixgov/2015/02/13/how-to-reschedule-marijuana-and-why-its-unlikely-anytime-soon/> [<https://perma.cc/SHZ8-U895>]. The exact process for rescheduling marijuana is beyond the scope of this Note.

²¹⁶ Twenty-three of the thirty-three states that have implemented medical marijuana programs, as well as Guam, Puerto Rico, and the District of Columbia, have done so in the past ten years. See *State Medical Marijuana Laws*, *supra* note 25. Marijuana (both recreational and medicinal) is also one of the fastest growing industries in the world. See Debra Borchart, *Marijuana Sales Totaled \$6.7 Billion in 2016*, FORBES (Jan 3., 2017), <https://www.forbes.com/sites/debraborchart/2017/01/03/marijuana-sales-totaled-6-7->

nor certain federal actors from striving toward their goal of making medical marijuana more accessible to those who could benefit from it,²¹⁷ including children. To ensure that such children truly benefit from medical marijuana, the federal government should take action that assures school districts that they will be safe from prosecution or other criminal intervention if they allow medical marijuana on school grounds. Although there seems to be no sign of marijuana rescheduling soon,²¹⁸ there are several steps that each branch of the federal government can take to demonstrate their commitment to the educational and medical rights of certain children.

1. Legislative Branch Actions

Congress is often deemed the first branch or the people's branch of government,²¹⁹ and, especially considering that fact that popular opinion is embracing medical marijuana more as time goes on,²²⁰ any solution should begin (but certainly not end) there. First, members of Congress have already acted to decriminalize or reschedule medical marijuana.²²¹ This practice should continue, and other members should provide their support for such legislation.²²² Members could also introduce specific legislation that exempts

billion-in-2016/#3ef86c2375e3 [https://perma.cc/PEF2-MDNU]. At the end of 2016, 21% of the total U.S. population lived in legal adult use markets, and Colorado, Washington, and Oregon saw their sales increase 62% through September of 2016 over 2015. *Id.* According to an analyst at ArkView Market Research, a prominent market research group focused on cannabis, “[t]he only consumer industry categories I’ve seen reach \$5 billion in annual spending and then post anything like 25% compound annual growth in the next five years are cable television (19%) in the 1990’s and the broadband internet (29%) in the 2000’s.” *Id.*

²¹⁷ See Hughes, *supra* note 141.

²¹⁸ See *supra* text and accompanying notes, Part III.A.

²¹⁹ See generally LOUIS FISHER, ON APPRECIATING CONGRESS: THE PEOPLE’S BRANCH (2010) (describing the Framers’ intentions for Congress and the value of popular consent).

²²⁰ As of October 2018, approximately 62% of Americans support marijuana legalization in some form. See Hannah Hartig & Abigail Geiger, *About Six-in-Ten Americans Support Marijuana Legalization*, PEW RES. CTR. (Oct. 8, 2018), <http://www.pewresearch.org/fact-tank/2018/10/08/americans-support-marijuana-legalization/> [https://perma.cc/Q6HQ-Z6JG].

²²¹ One of the first bills proposed to move cannabis from Schedule I to Schedule II was introduced in 1981; legislation attempts to change marijuana’s status occur perennially. See Hudak & Wallack, *supra* note 215. In 2011, a bill was introduced to remove marijuana from the schedules entirely but died in committee. *Id.* One of the more recent attempts was the Regulate Marijuana Like Alcohol Act, which states “[T]he Attorney General shall . . . issue a final order that removes marijuana in any form from all schedules under [the CSA].” H.R. 1841, 115th Cong. (as introduced, Mar. 30, 2017).

²²² As a side note, marijuana’s status as a Schedule I controlled substance under the CSA represents not only a failure to take seriously its valid medical uses but also an unnecessarily strict response in including it with powerful hallucinogens and opioids. See *Overdose Death Rates*, NAT. INST. ON DRUG ABUSE (Aug. 2018), <https://www.drugabuse.gov/related-topics/trends-statistics/overdose-death-rates> [https://perma.cc/NVC2-6YLT] (documenting heroin overdose rates and showing that “[f]rom 2002 to 2017 there was a 7.6-fold increase

such children from the regulatory scheme or, more generally, continue to push the legalization of CBD sparked by the 2018 Farm Bill's acceptance of hemp. Congressional amendments to the Safe and Drug-Free School provisions effectively placing marijuana in the same category as aspirin or Ritalin for school purposes would essentially get rid of a major source of conflict from the schools' perspectives.²²³ Enactment of such amendments would constitute a powerful signal to school districts that they will not be penalized for allowing their students to take their medication.

In this same vein, the second path Congress could take to aid in the creation of a safe space for schools would be the passage of a resolution. A joint resolution with the effect of a real bill or, more realistically, a simple resolution needing only approval from one house²²⁴ would allow legislators the chance to clearly articulate that the goal of medical marijuana and CBD programs is to facilitate the drug's use by seriously ill children. Through a resolution, members of Congress could provide official recognition that one of the problems with federal prohibition is that it prevents children in states where medical marijuana is legal from having access to it at school because school districts are understandably worried. Congress utilizes resolutions frequently²²⁵—a resolution such as this would make children, parents, and school districts feel more at ease.

Finally, spending riders like the Rohrabacher-Blumenauer Amendment have proven powerful tools to partially insulate from prosecution state and school officials who are concerned about federal funding and acts like the Safe and Drug-Free Schools Act.²²⁶ Such spending riders should be made more

in the total number of deaths"); *cf.* DRUG ENF'T ADMIN., DRUGS OF ABUSE 75 (2017), *available at* https://www.dea.gov/sites/default/files/sites/getsmartaboutdrugs.com/files/publications/DoA_2017Ed_Updated_6.16.17.pdf#page=76 [<https://perma.cc/L97K-F4T4>] (“No death from overdose of marijuana has been reported.”).

²²³ *See, e.g.*, G.B. v. Maple Shade Twp. Bd. of Educ. & LARC Sch., OAL DKT. No. EDS 16939-14, at *3–4 (2015), 2015 WL 303174 (N.J. Admin.) (referencing the harm that could befall Maple Shade and LARC from allowing a controlled substance on school property in violation of New Jersey's drug-free school zone laws).

²²⁴ *See* Andrea Ford, *A Brief History of Congressional Resolutions*, TIME (Jan. 6, 2009), <http://content.time.com/time/politics/article/0,8599,1869854,00.html> [<https://perma.cc/65UX-33BJ>]. A joint resolution (except that proposing a constitutional amendment) requires approval of both chambers and is submitted to the President for signature into law. *Bills and Resolutions*, U.S. SENATE, <https://www.senate.gov/legislative/bills.htm> [<https://perma.cc/FK5X-U94U>]. A simple resolution is used to express nonbinding positions of a single chamber. *Id.*

²²⁵ For example, the 110th Congress introduced 3,000 resolutions and passed 1,000. Ford, *supra* note 224.

²²⁶ *See* Jacob Sullum, *Even Without the Rider That Protects Medical Marijuana, a Pot Crackdown Is Unlikely*, REASON (Dec. 18, 2017), <http://reason.com/blog/2017/12/18/even-without-the-rider-that-protects-med> [<https://perma.cc/9H84-Q5YQ>] (“The medical marijuana amendment, which was first enacted in December 2014 and has been renewed each year since then, has proven a significant barrier to DOJ harassment of patients and

robust in general but could also include explicit language about children with treatment-resistant conditions—knowing that the DOJ does not have funding to prosecute would certainly provide some sense of security for many school districts. Collectively, there are many actions that Congress could and should take to protect the medical and educational rights of certain children.

2. Executive Branch Actions

Within the Executive Branch, the most important actors who could affect the most nationwide change regarding this issue are the president, the Department of Education (DOE), and the DOJ. Although President Trump is unlikely to make any statements concerning medical marijuana beyond the states' rights approach taken during his campaign,²²⁷ Betsy DeVos, DOE Secretary under the Trump Administration, is in the best position to ensure that schools in particular feel safe about letting their students take medical marijuana on campus.²²⁸ Recently, Secretary DeVos began an effort to reform how the federal government advises college and universities about handling sexual misconduct.²²⁹ The stated goal of her efforts is to guarantee that institutions receiving federal funding “must ensure that no student suffers a deprivation of her or his access to educational opportunities on the basis of sex.”²³⁰ Regardless of the public debate surrounding Secretary DeVos's efforts, the purpose behind them—confirmation of a right to education for all—seems to directly apply to children's use of medical marijuana at school.

There is much that Secretary DeVos and the DOE could do to ensure that no student suffers a deprivation of his or her access to educational opportunities based on health. The issuance of a formal policy or statement directed at school districts that assured that the DOE would not impose consequences on a school district for looking out for its students, especially its sick children, would give such districts a powerful ally. Since many school districts already engage in the administration of medication to students, including intense drugs such as Ritalin, addressing CBD oil would not require a reinvention of the wheel.

providers . . . Sessions himself concedes that the rider ties his hands.”). Since it is unlikely that medical marijuana for children at schools would pass as its own bill at this point, a spending rider included in a larger bill would have a similar effect without the inherent, though understandable, controversy.

²²⁷ See Savage & Healy, *supra* note 170.

²²⁸ The Secretary of Education “is responsible for the overall direction, supervision, and coordination of all activities of the Department” and advises the president on policies, activities, and programs related to education. Principal Office Functional Statements, U.S. DEP'T OF EDUC., https://www2.ed.gov/about/offices/list/om/fs_po/osods/intro.html [<https://perma.cc/3R6D-Q5UL>]. Betsy DeVos has not made public her opinion on medical marijuana.

²²⁹ See generally *Q&A on Campus Sexual Misconduct*, U.S. DEP'T OF JUST. (Sept. 2017), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf> [<https://perma.cc/KZ2L-8JMA>].

²³⁰ *Id.*

Another approach that these federal actors, especially the DOJ, could take to ensure that schools feel safe from prosecution while they allow their students to take their legally recommended medical marijuana doses on school property is to explicitly designate schools as a medical marijuana “safe zone.” A similar model has already been utilized in the immigration context.²³¹ The US Immigration and Customs Enforcement (ICE) has officially designated “Sensitive Locations,” which are places where enforcement actions such as arrests are not to occur at or be focused on.²³² Places designated as sensitive locations under the ICE program include places of public demonstration (such as rallies or parades), religious or civil ceremonies or observances, medical treatment and healthcare facilities, and, most important to this analogy, schools, including daycares, pre-schools, and secondary and post-secondary schools, as well as places of education-related activities and the bus stop.²³³ ICE is not supposed to enforce unless (1) exigent circumstances exist; (2) other law enforcement actions have led officers to a sensitive location; or (3) prior approval is obtained.²³⁴ The main goal of the policy is to ensure that people seeking to participate in activities or utilize vitally important services are free to do so, without fear or hesitation.²³⁵ Although enforcement actions may occur at sensitive locations in limited circumstances, ICE emphasizes that such actions will be “generally avoided.”²³⁶ The U.S. Customs and Border Protection (CBP) has also issued similar guidelines.²³⁷

²³¹ The prosecutorial discretion inherent in the immigration context makes it a helpful point of comparison for medical marijuana enforcement policies. The sheer number of individuals seeking entry and facing deportation means that ICE must prioritize. See generally U.S. DEP’T OF JUSTICE, OFFICE OF PLANNING, ANALYSIS, & TECH., FY 2012 STATISTICAL YEARBOOK B2 (2013), available at https://cis.org/sites/default/files/2018-03/EOIR_2012.pdf [<https://perma.cc/KZ2L-8JMA>] (indicating that in 2012 Immigration Courts received 410,753 cases and processed 382,675). Just as the DOJ advocated for discretion in the Ogden and Cole Memos, ICE Director John Morton published a memo acknowledging ICE’s “limited resources to remove those illegally in the United States” and thus prioritizing enforcement based on important public policies such as national security. Memorandum from ICE Dir. John Morton (June 17, 2011), <https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf> [<https://perma.cc/DPN5-9ANE>].

²³² *FAQ on Sensitive Locations and Courthouse Arrests*, U.S. DEP’T OF HOMELAND SEC., IMMIGRATION & CUSTOMS ENF’T, <https://www.ice.gov/ero/enforcement/sensitive-loc> [<https://perma.cc/4VFU-UCQE>] [hereinafter ICE FAQ]; see also Memorandum from Dir. John Morton to Field Office Dirs, Special Agents in Charge, & Chief Counsel (Oct. 24, 2011), <https://www.ice.gov/doclib/ero-outreach/pdf/10029.2-policy.pdf> [<https://perma.cc/U2SY-3QGN>].

²³³ ICE FAQ, *supra* note 232.

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Sensitive Locations FAQs*, DEP’T OF HOMELAND SECURITY, U.S. CUSTOMS & BORDER PROTECTION, <https://www.cbp.gov/border-security/sensitive-locations-faqs> (on file with *Ohio State Law Journal*).

This model can be directly applied to this medical marijuana issue. Schools (including school buses and school-sponsored events) could be expressly designated sensitive locations at which prosecution for medical marijuana usage should not occur unless exigent circumstances exist. In other words, the guidance from the Ogden and Cole Memos should be codified in the form of a formal policy instructing agents to engage only in urgent circumstances.²³⁸ In so doing, the Executive Branch would be recognizing that prosecution of these individuals for the use of state legal, physician recommended medical marijuana is not an effective use of resources. This, along with other actions, would help states and schools feel more comfortable in the implementation of policies allowing for medical marijuana on campus.

3. *Judicial Branch Actions*

Although the Tenth Amendment relegates education as a state power with limited federal intervention,²³⁹ the federal courts have recently been the sites of lawsuits regarding use of medical marijuana by children with treatment-resistant conditions. Because federal courts can make individual rulings for individual children and create valuable precedent in this area, their future holdings could insulate school districts and further send the message of safety.

There have been two recent suits in federal courts across the country. First was that of twelve-year-old Alexis Bortell, who, along with her father and other plaintiffs including former NFL player Marvin Washington, filed suit in the Southern District of New York against AG Jeff Sessions, the DOJ, and the DEA, arguing that the CSA is unconstitutional as it relates to marijuana.²⁴⁰ Alexis, suffering from extreme seizures due to epilepsy, was facing brain surgery when she found that medical marijuana oil brought relief.²⁴¹ She moved from Texas to Colorado to have access to the oil but is now unable to leave the state because Texas does not recognize the legality of medical marijuana.²⁴² According to the

²³⁸ For example, if students were distributing their CBD oil to other students, prosecution may be appropriate. See Cole Memo, *supra* note 162; Ogden Memo, *supra* note 99.

²³⁹ The absence of any specific enumeration of federal power over education, coupled with the Constitution's Tenth Amendment, generally renders education a state function. See U.S. CONST. amend. X; Regina R. Umpstead, *The No Child Left Behind Act: Is It an Unfunded Mandate or a Promotion of Federal Educational Ideals?*, 37 J.L. & EDUC. 193, 196 (2008).

²⁴⁰ M.L. Nestel, *Jeff Sessions Sued by 12-Year-Old Girl with Epilepsy Who Wants to Legalize Medical Marijuana*, ABC NEWS (Nov. 12, 2017), <http://abcnews.go.com/US/jeff-sessions-sued-12-year-girl-epilepsy-legalize/story?id=51098947> [<https://perma.cc/EJ4E-K5Y5>].

²⁴¹ Kalhan Rosenblatt, *12-Year-Old Sues Attorney General Jeff Sessions to Legalize Medical Marijuana*, NBC NEWS (Nov. 13, 2017), <https://www.nbcnews.com/news/us-news/12-year-old-sues-u-s-attorney-general-jeff-sessions-n820466> [<https://perma.cc/A3DG-9WWS>].

²⁴² *Id.*

suit, “[t]his lawsuit stands to benefit tens of millions of Americans who require, but are unable to safely obtain, Cannabis for the treatment of their illnesses, diseases and medical conditions.”²⁴³ Although the district court dismissed the case in February 2018,²⁴⁴ the court expressed sympathy to plaintiffs’ assertions that marijuana has medical uses.²⁴⁵ Alexis and the other plaintiffs have since filed an appeal.²⁴⁶

Some states away in Illinois, eleven-year-old Ashley Surin and her parents successfully sued their Chicago school district and the state of Illinois in the District Court for the Northern District of Illinois for the right to use medical marijuana at school.²⁴⁷ Ashley argued that the school’s ban on the drug is unconstitutional because it denies the right to due process and violates the Individuals with Disabilities Education Act (IDEA) and the Americans with Disabilities Act (ADA).²⁴⁸ The federal judge allowed the school district to administer the medical marijuana,²⁴⁹ and the suit led to the passage of Ashley’s Law that allows Illinois children to take medical marijuana at school.²⁵⁰

These children, along with others, took their medical marijuana battles to federal court, and while in some cases the courts did not hold for them, the

²⁴³ See Nestel, *supra* note 240.

²⁴⁴ *Washington v. Sessions*, No. 17 CIV. 5625 (AKH), 2018 WL 1114758, at *1–10 (S.D.N.Y. Feb. 26, 2018). According to the opinion, “[t]he Second Circuit has already determined that Congress had a rational basis to classify marijuana as a Schedule I drug, and any constitutional rigidity is overcome by granting the Attorney General, through a designated agent, the authority to reclassify a drug according to the evidence before it . . . There can be no complaint of constitutional error when such a process is designed to provide a safety valve of this kind.” *Id.* at *6 (citations omitted).

²⁴⁵ *Id.* At one point, Judge Hellerstein said to the five plaintiffs’ lawyer, “[y]our clients are living proof of the medical effectiveness of marijuana.” Molly Crane-Newman and Victoria Bekiempis, *Judge Declares Marijuana Saves Lives After Hearing from Users Who Want Its Schedule I Status Tossed*, DAILY NEWS (Feb. 14, 2018), <http://www.nydailynews.com/new-york/manhattan-federal-judge-declares-marijuana-saves-lives-article-1.3821123> [<https://perma.cc/3DB4-342K>]. The judge also remarked, “How could anyone say your clients’ lives have not been saved by marijuana. . . . You can’t.” *Id.* at *6.

²⁴⁶ Mona Zhang, *Federal Judge Dismisses Marijuana Legalization Case, Plaintiffs Vow to Appeal*, FORBES (Feb. 26, 2018), <https://www.forbes.com/sites/monazhang/2018/02/26/federal-judge-dismisses-marijuana-legalization-case-plaintiffs-vow-to-appeal/#42c2071d6b65FN211> [<https://perma.cc/4L4B-YYT5>].

²⁴⁷ *Thanks to ‘Ashley’s Law,’ Sick Illinois Students Now Can Take Medical Marijuana at School*, CBS CHI. (Aug. 29, 2018), <https://chicago.cbslocal.com/2018/08/29/ashleys-law-ashley-surin-medical-marijuana-at-school-illinois-law/> [<https://perma.cc/BNC2-JNKY>] [hereinafter *Thanks to Ashley’s Law*].

²⁴⁸ Francesca Friday, *Illinois Judge Allows Epileptic Student to Use Medical Marijuana at School*, OBSERVER (Jan. 23, 2018), <https://observer.com/2018/01/illinois-judge-allows-epileptic-student-to-use-medical-marijuana-at-school/> [<https://perma.cc/87PA-AGL9>].

²⁴⁹ See Jen Christensen, *Groundbreaking Medical Marijuana Case Lets Little Girl Go Back to School*, CNN (Apr. 27, 2018), <https://www.cnn.com/2018/01/22/health/medical-marijuana-school-illinois/index.html> [<https://perma.cc/2N2H-JD2J>].

²⁵⁰ See *Thanks to Ashley’s Law*, *supra* note 247.

simple process of bringing the suit produced compromises from other entities, including the passage of laws in their favor. There will almost surely be more cases like those of Alexis and Ashley filed in federal court over time. These cases represent the chance for federal district and circuit courts to emphasize that children should not be denied their rights to education and healthcare because they rely on legally recommended medical marijuana in accordance with their state's program.

Overall, the federal government has many options they can take to create a haven for school districts with respect to medical marijuana usage in states that already allow legal recommendations of the drug. Rather than hiding behind the CSA and its treatment of marijuana as a Schedule I substance, the federal government should be working to break down barriers that stand in the way of these children.

B. State Governments

States that have established or are in the process of establishing medical marijuana programs have already taken important steps in facilitating access by certain children to certain forms of medical marijuana.²⁵¹ However, because most of these states do not have laws on the books that provide school districts with legal support to allow these children to take their medication on school property,²⁵² a gap has formed between the programs and the children for which they were created. These states thus have a responsibility to ensure their programs are accomplishing their purposes.²⁵³ Several solutions at the state level exist, including the passing of laws allowing such conduct as well as the creation by state courts of influential precedents.

First, laws and policies that would solve this problem would enable students to take their legal, physician recommended medical marijuana doses during the school day on school grounds, and if possible without requiring their parent or caregiver to administer them. Importantly, the foundation for these policies is that taking CBD in a controlled medical setting is vastly different from simply experimenting with dosing and CBD strains.²⁵⁴ Nothing in this Part suggests

²⁵¹ All currently implemented state medical marijuana programs allow for the use of the drug by minors through a registered adult parent or caregiver. *See supra* Part III.B.

²⁵² *See supra* note 180 and accompanying text.

²⁵³ Moreover, under Section 1412 of IDEA, state departments of education are responsible for ensuring that all children with disabilities receive a FAPE through school district supervision. Individuals with Disabilities Education Act, 20 U.S.C. § 1412 (2012).

²⁵⁴ This is the important foundation of the argument that marijuana should be considered a valid form of medication. One of the touchstones of modern medicine is that it can be “administered in controlled doses” with a “delivery system [that] provides predictable dose over defined period of time.” AM. SOC’Y OF ADDICTION MED., THE ROLE OF THE PHYSICIAN IN “MEDICAL” MARIJUANA (2010), *available at* https://www.asam.org/docs/public-policy-statements/1role_of_phys_in_med_mj_9-10.pdf?sfvrsn=0 [<https://perma.cc/DU7S-ES95>]. The American Society of Addiction Medicine has argued that “the therapeutic potentials of

that children should have unfettered access to any form of marijuana at any time. As discussed above, children and families to whom these laws and policies would apply possess legal recommendations by a certified physician. Furthermore, these recommendations would be in accordance with state law and address conditions provided for in the legislative materials.

State laws like those in Maine²⁵⁵ come close to achieving the principle that children should have a right to take medication they are legally recommended or can legally obtain without having to disrupt their school day or not attend school at all. In 2015, Maine lawmakers enacted provisions that effectively closed the gap in its medical marijuana program that excluded marijuana administration at school. First, under Maine law, a child who holds a written certification for the medical use of Maine’s medical marijuana program²⁵⁶ “may not be denied eligibility to attend school solely because the child requires medical marijuana in a nonsmokeable form as a reasonable accommodation necessary for the child to attend school.”²⁵⁷ Second, lawmakers created an exception to the requirement under the medical marijuana program that marijuana not be possessed or used in a school bus or on school grounds.²⁵⁸ The exception reads:

1-A. School exceptions. Notwithstanding subsection 1, paragraph B, a primary caregiver designated pursuant to section 2423-A, subsection 1, paragraph E may possess and administer marijuana in a nonsmokeable form in a school bus and on the grounds of the preschool or primary or secondary school in which a minor qualifying patient is enrolled only if:

A. A medical provider has provided the minor qualifying patient with a current written certification for the medical use of marijuana under this chapter; and

B. Possession of marijuana in a nonsmokeable form is for the purpose of administering marijuana in a nonsmokeable form to the minor qualifying patient.²⁵⁹

specific chemicals found in marijuana” should be prescribed “by nontoxic routs of administration in controlled doses just all [sic] other medicines are in the U.S.” *Id.*

²⁵⁵ ME. STAT. tit. 20-A, § 6306 (Supp. 2017); ME. STAT. tit. 22, § 2426, sub-§1 ¶ B (Supp. 2017) (amended in 2015). For the bill (entitled An Act to Provide Reasonable Accommodations for School Attendance for Children Certified for the Medical Use of Marijuana), see H.P. 381—L.D. 557 (June 30, 2015), <https://legislature.maine.gov/legis/bills/getPDF.asp?paper=HP0381&item=5&snum=127> [<https://perma.cc/PMH3-SRD4>].

²⁵⁶ Maine Medical Use of Marijuana, ME. STAT. tit. 22, § 2423-B (Supp. 2017).

²⁵⁷ ME. STAT. tit. 20-A, § 6306 (Supp. 2017).

²⁵⁸ ME. STAT. tit. 22, § 2426, sub-§1 ¶ B (Supp. 2017) (amended in 2015).

²⁵⁹ *Id.* at sub-§1-A. Importantly, a student with a severe, treatment-resistant condition inspired Maine lawmakers to enact this provision. Cyndimae Meehan had Dravet syndrome, and she and her mother became strong advocates for consistent legal access to medical cannabis in both Maine and Connecticut. See Gillian Graham, *Young Fighter for Sick Children’s Access to Medical Marijuana Dies*, PRESS HERALD (Mar. 15, 2016),

Laws such as these should be used as a model that all states with established or upcoming medical marijuana programs should pass.²⁶⁰ There are several successful parts of these provisions that other states should utilize as a guide for ensuring their medical marijuana programs achieve their stated ends. First, they allow for the administration of marijuana on the grounds of schools and on the school bus.²⁶¹ Second, the provisions maintain the requirement of a legal physician recommendation.²⁶² Third, they limit the administration to nonsmokeable forms of marijuana, which is in line with most medical research that notes the consequences of smoking.²⁶³ Finally, they include different levels of schooling, ensuring access for students regardless of age.²⁶⁴ Utilizing Maine's law as a model, as well as those of New Jersey, Illinois, Colorado, and others, states with medical marijuana programs should amend their schemes to fill this obvious gap.

However, while every state with a medical marijuana program should include provisions such as Maine's, there is still room to improve such laws. The main problem is that under most laws, only registered caregivers, such as parents or guardians, can administer the recommended marijuana dose.²⁶⁵ This means school nurses cannot give students their medication,²⁶⁶ placing the burden on parents and creating insurmountable disruptions for students. Besides changing the laws,²⁶⁷ there are a few potential solutions, the simplest of which could be providing parents or caregivers with a liability waiver to protect nurses from liability. Another option would be to require the registration of nurses at schools with children recommended marijuana in accordance with the state

<https://www.pressherald.com/2016/03/14/girl-who-inspired-medical-marijuana-law-dies-at-13-in-maine/> [<https://perma.cc/Q5JA-WU9U>].

²⁶⁰ States that do not have medical marijuana programs are beyond the scope of this note, though the author would encourage such states to take all measures necessary to ensure that children with treatment-resistant conditions have access to medical marijuana if needed, whether that means implementing a medical marijuana program or taking more limited steps with these children in mind.

²⁶¹ See ME. STAT. tit. 20-A, § 6306 (Supp. 2017).

²⁶² See *id.*

²⁶³ See IOM Report, *supra* note 43, at ix–x. According to the report, “the future of cannabinoid drugs lies not in smoked marijuana but in chemically defined drugs that act on the cannabinoid systems that are a natural component of human physiology.” *Id.* at ix.

²⁶⁴ See ME. STAT. tit. 20-A, § 6306 (Supp. 2017).

²⁶⁵ See, e.g., ME. STAT. tit. 22, § 2426, sub-§1-A (Supp. 2017) (amended in 2015).

²⁶⁶ *G.B. v. Maple Shade Twp. Bd. of Educ. & LARC Sch.*, OAL DKT. No. EDS 16939-14, at *5 (2015), 2015 WL 303174 (N.J. Admin.) (ruling that school administrators did not qualify as caregivers authorized to administer marijuana under CUMMA).

²⁶⁷ Colorado has already taken this approach. In June 2018, a bill was signed that allows school nurses to give medical marijuana to a student with a medical marijuana registry card at school. Colorado HB18-1286 (2018), School Nurse Give Medical Marijuana at School, <http://leg.colorado.gov/bills/hb18-1286> [<https://perma.cc/UK7X-HLLV>]. Additionally, Florida law originally allowed school nurses to administer the doses. FLA. STAT. ANN. § 1006.062 (West Supp. 2019).

program. This lack of registration was one of the reasons Genny Barbour was originally denied the right to take her dose at school.²⁶⁸ Most if not all state marijuana programs require physicians to register with the state health department;²⁶⁹ asking school nurses to do so would not be much of an imposition. These procedures could have the effect of lowering liability for school nurses and their districts in turn, at least under state law.

Because students should not have to leave school property to take their medical marijuana doses, and because administration of these doses in school by school officials is the option that is most protective of educational opportunities, school nurses are essential to any solution. School nurses are the health leaders in school settings, and their goal is the promotion of “current evidence-based practices so students requiring medication during the school day can safely have their needs met and remain in school ready to learn.”²⁷⁰ They are responsible for developing policies and procedures relating to medication administration.²⁷¹

A second solution at the state level involves the court system. State court judges have ruled to allow individual students to take medical marijuana at school.²⁷² In addition, states pay attention to each other, especially in the context of judicial precedents.²⁷³ Thus, if litigation using precedents that further the goal of allowing children with treatment-resistant conditions to take their medical marijuana on school property is encouraged, the issue will spread with positive effect. An example of such precedents is *Willis v. Winters* out of Oregon.²⁷⁴ In that case, the Supreme Court of Oregon held that “the Federal Gun Control Act

²⁶⁸ *G.B. v. Maple Shade Twp. Bd. of Educ. & LARC Sch.*, OAL DKT. No. EDS 00879-15, at *5 (2015), 2015 WL 9254137 (N.J. Admin.).

²⁶⁹ Many states allow physicians to register per the medical marijuana program regulations online. See, e.g., *Medicinal Marijuana Program*, N.J. DEP’T OF HEALTH, <http://www.nj.gov/health/medicalmarijuana/patients/find-doctor/> [<https://perma.cc/4LL2-6UQA>]; *Practitioner Information*, N.Y. STATE DEP’T OF HEALTH, https://www.health.ny.gov/regulations/medical_marijuana/practitioner/ [<https://perma.cc/LF8D-7BLX>]; *Getting Medical Marijuana*, COMMONWEALTH OF PA., <https://www.pa.gov/guides/pennsylvania-medical-marijuana-program/#GetRegistered> [<https://perma.cc/QV2L-B2MQ>].

²⁷⁰ See *Medication Administration in the School Setting: Medication Administration in Schools*, NAT’L ASSN. OF SCH. NURSES (Feb. 2017), <https://www.nasn.org/nasn/advocacy/professional-practice-documents/position-statements/ps-medication> [<https://perma.cc/QFZ7-9DD6>].

²⁷¹ *Id.*

²⁷² An example is Brooke Adams, a kindergartener who in September was given permission by a California administrative court to bring her cannabis-based medicine to school. Jen Christensen & Dan Simon, *Girl Can Attend School with Her Cannabis-Based Medicine, California Court Rules*, CNN (Sept. 25, 2018), <https://www.cnn.com/2018/09/25/health/medical-marijuana-california-child-school-ruling/index.html> [<https://perma.cc/697Y-PXC9>].

²⁷³ See Abigail Anne Matthews, *Connected Courts: The Diffusion of Precedent Across State Supreme Courts*, IOWA RES. ONLINE 2 (2017), available at <https://ir.uiowa.edu/cgi/viewcontent.cgi?article=7287&context=etd> [<https://perma.cc/X6MB-ZM2D>].

²⁷⁴ *Willis v. Winters*, 253 P. 3d 1058, 1058–68 (Or. 2011).

does *not* preempt the state's concealed handgun licensing statute and, therefore, Oregon sheriffs must issue (or renew) the requested licenses."²⁷⁵ The court noted that it was the job of the Oregon state sheriffs to enforce state law rather than overly concern themselves with federal law.²⁷⁶ Precedents like this demonstrate that some state courts are distinctly committed to giving effect to state law without regard to actors who ask about federal law.²⁷⁷ If litigation utilizing such precedents is encouraged, enough court rulings may add up that it is not a state-by-state solution but rather an indicator of national change.²⁷⁸

Actions like these would fill the gaps that exist in state marijuana schemes and subsequent school district policies and uphold the medical access and education rights of students who suffer from debilitating conditions like epilepsy, cancer, and autism while still protecting school districts and states as much as possible from liability. Since so many states still are developing their legislation on medical marijuana, this area is consequently abstract, but this is not an excuse to deny students their education.

Under these models, there have not been any prosecutions; in fact, all that is known for sure under this model is that children are able to take their medicine and can go to school. While this solution will not completely cure the fear, it will provide a practical outcome for students that do require medical cannabis.

VI. CONCLUSION

Even in the shadow of federal prohibition, the momentum of marijuana reform and industrial development in the past decade has been powerful. Because of the legalization of medical marijuana in the form of low THC, high CBD oils and edibles, children with severe, intractable, treatment-resistant conditions like autism, epilepsy, and cancer have found relief and, for some, a second chance at life. However, due to fear of federal prosecution under the CSA and safe and drug-free schools acts or the rescinding of federal funding,

²⁷⁵ *Id.* at 1060.

²⁷⁶ *See id.* at 1068 (“The sheriffs in this case are not excused from their duty under ORS 166.291(1) to issue CHLs to qualified applicants, without regard to the applicant’s use of medical marijuana, on the ground that issuance of CHLs to medical marijuana users would violate a federal prohibition on making false statements about the lawfulness of transferring firearms to such persons.”).

²⁷⁷ *See id.* at 1066 (reasoning that “[i]t is well established that the federal government lacks constitutional authority to commandeer the policy-making or enforcement apparatus of the states by requiring them to enact or enforce a federal regulatory program” and citing cases such as *Printz v. United States*, 521 U.S. 898, 925–31 (1997)).

²⁷⁸ Courts have become increasingly active in instructing state governments to reconsider their marijuana schemes. For example, in late 2017, a New Jersey appeals court “told the Christie administration it must reconsider its classification of marijuana because its medical health benefits are ‘abundantly and glaringly apparent now.’” Kevin C. Shelly, *New Jersey Ordered to Reconsider Legal Classification of Marijuana*, PHILLY VOICE (Nov. 1, 2017), <https://www.phillyvoice.com/new-jersey-ordered-reconsider-legal-classification-marijuana/> [https://perma.cc/KBE3-VMV6].

most school districts do not allow these children to take their doses on school property. This has resulted in such children being forced to leave school to take their much-needed medication and missing valuable educational opportunities, even though they are entitled to a free and fair public education. This problem represents a gap in state medical marijuana schemes that target the population for which such schemes were created in the first place.

At its most basic level, this issue is about enabling children to take the medication they need. While the federal and state governments have already taken some action demonstrating their willingness to support these children, more needs to be done to address this problem. Short of legislative reform, officials at the state and federal levels can take measures to insulate schools and children from prosecution, thus creating a safe space that allows school districts to feel more comfortable. This is a treatment that is working, there are plenty of students who could benefit, and they are the most sympathetic users who are also entitled to a public education. Therefore, a national effort utilizing all levels of government is necessary to ensure that this vital gap within the evolving medical marijuana scheme is filled.

