



**Texas Association of School Boards**

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## Legal Questions About CBD and Marijuana in Schools

Published online in [TASB School Law eSource](#)

The law involving marijuana is in flux. A majority of states have legalized medical marijuana to some extent, including the District of Columbia and eleven states that allow for recreational use. Federal laws also address marijuana. As new approaches continue to be tested in the ‘laboratories of democracy,’ the marketplace has responded with cannabis-related products such as cannabidiol (CBD), which can be purchased in any jurisdiction thanks to the Internet. School officials may be wondering how these new products and legal developments impact Texas public schools.

### What is CBD?

CBD, or cannabidiol, is one of many naturally occurring chemical compounds of *Cannabis sativa* L., the plant from which both marijuana and hemp are derived. Tetrahydrocannabinol, or THC, is another compound of the cannabis plant. The primary difference between hemp and marijuana is the amount of THC, which is the main component of marijuana that creates a “high” sensation. Both hemp and marijuana contain CBD, which is non-intoxicating. CBD has been shown to be effective in treating some forms of epilepsy. Preliminary research has also suggested that CBD may be used to treat other health conditions, including anxiety, insomnia, and chronic pain.<sup>1</sup> Unlike whole-plant marijuana, which is usually smoked or vaporized, CBD is commonly consumed as an oil extract or a pre-mixed additive in food or beverages.

### How do Texas and federal laws treat CBD and medical marijuana?

Both Texas and federal laws have decriminalized CBD that is extracted from hemp. *Hemp* is defined by law as the plant *Cannabis sativa* L. and any part of that plant with a THC concentration of no more than 0.3 percent. In 2019, the 86th Texas Legislature enacted House Bill 1325, legalizing hemp and mandating a regulatory framework for the manufacture and sale of *consumable hemp products*, defined as food, drugs, devices, or cosmetics containing hemp or a hemp-derived cannabinoid such as CBD.<sup>2</sup>

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<sup>1</sup> Peter Grinspoon, MD, [Cannabidiol \(CBD\)--what we know and what we don't](#). Harvard Health Blog (Aug. 24, 2018).

<sup>2</sup> Act of June 10, 2019, 86th Leg., R.S. H.B. 1325 (to be codified at Tex. Agric. Code ch. 122 and Tex. Health & Safety Code ch. 443).

Distinguishing between legal and illegal CBD is complicated. The extensive regulations and testing procedures required by House Bill 1325 have not yet been put into place. A product may purport to be legal, but without standardized regulations or labeling requirements for CBD, vendors' claims are unreliable. To make things even more complicated, interpretations and enforcement of the new laws may vary in local jurisdictions.

### Federal law

Under federal law, CBD that is extracted from hemp and contains less than 0.3 percent THC is exempt from the Controlled Substances Act.<sup>3</sup> Currently, the Federal Drug Administration (FDA) has not approved CBD to be added to foods or other preparations to be consumed.<sup>4</sup> The FDA has only approved one CBD-based medication, Epidiolex, which may be prescribed to treat seizures associated with Lennox-Gastaut syndrome and Dravet syndrome, two rare and severe forms of epilepsy.<sup>5</sup>

Many unlicensed manufacturers label CBD products as dietary supplements, rather than medication or food products, in an unsuccessful attempt to avoid FDA testing requirements. The FDA has stated that products containing THC or CBD do not qualify as dietary supplements and that selling them in interstate commerce is a violation of the Federal Food, Drug, and Cosmetic Act.<sup>6</sup> The FDA has sent warning letters to companies selling "CBD products that claimed to prevent, diagnose, treat, or cure serious diseases, such as cancer"; however, the agency has discretion whether to initiate an enforcement action based on several factors, including whether a substance poses a threat to public health.<sup>7</sup>

In addition, federal law requires a school district to provide an educational environment and workplace that is free from controlled substances as a condition of receiving federal funds.<sup>8</sup> In jurisdictions where medical marijuana is permitted, state law typically prohibits possessing or administering marijuana in public places, including school districts, in order to avoid a conflict between state and federal law that could jeopardize federal funding for school programs.

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<sup>3</sup> See 7 U.S.C. § 1639o(1); 21 U.S.C. § 802(16) (exempting "hemp," defined as any *Cannabis sativa* L. containing less than 0.3 percent of THC by dry weight).

<sup>4</sup> 21 U.S.C. § 812(b); 21 C.F.R. § 1308.11(d)(58).

<sup>5</sup> U.S. Food & Drug Administration, [FDA Approves First Drug Comprised of an Active Ingredient Derived from Marijuana to Treat Rare, Severe Forms of Epilepsy](#) (June 26, 2018).

<sup>6</sup> U.S. Food & Drug Administration, [FDA Regulation of Cannabis and Cannabis-Derived Products: Questions and Answers](#) (Apr. 3, 2019).

<sup>7</sup> U.S. Food & Drug Administration, [FDA Regulation of Cannabis and Cannabis-Derived Products: Questions and Answers](#) (Apr. 3, 2019).

<sup>8</sup> Drug Free Workplace Act 41 U.S.C. § 81; ESEA, Title IV, Part A, §§ 4001 *et seq.*

## State law

With House Bill 1325, the 86th Texas Legislature followed the example of federal law by removing hemp from the state list of controlled substances.<sup>9</sup> *Hemp* is defined as the plant *Cannabis sativa* L. and any part of that plant with a THC concentration of no more than 0.3 percent.<sup>10</sup> If a product labeled CBD is derived from this type of hemp, it is legal to use and possess. Some products may contain greater amounts of THC, however. Until these products are fully regulated, it is impossible to verify the contents without chemical testing.<sup>11</sup> Despite these complexities, CBD is widely available online and in retail stores across the state. Local law enforcement agencies have differing views on whether pursuing criminal charges related to CBD is an appropriate use of resources. As such, district officials should not assume that possession of CBD will be prosecuted as a crime.

## Texas Compassionate Use Act

In 2015, the Texas legislature passed the Texas Compassionate Use Act, legalizing possession of cannabis with high CBD concentration under certain circumstances. A school district may not adopt or enforce any rule that prohibits a patient's access to low-THC cannabis pursuant to the Act, which the 86th Legislature expanded in 2019. Patients suffering from epilepsy, a seizure disorder, multiple sclerosis, spasticity, amyotrophic lateral sclerosis (ALS), autism, terminal cancer, or an incurable neurodegenerative disease may be prescribed low-THC, high-CBD cannabis by a licensed physician.<sup>12</sup> Valid patients, as well as their legal guardians, are exempt from criminal penalties for possession and the patient's use of low-THC cannabis.<sup>13</sup> Districts that have adopted TASB's Model Student Code of Conduct can find this exception in their local codes.

### **Can we ban CBD on district property?**

Given the current problems with testing to determine whether a substance is legal, school officials may want to adopt a general ban on CBD. Districts that wish to adopt a ban on use or possession of CBD on district property may likely do so under the school board's general authority to adopt rules for the safety and welfare of students and employees.<sup>14</sup> Provisions in House Bill 1325 prohibit local authorities from adopting or enforcing a rule that prohibits the handling or sale of hemp, or the manufacture or sale of a consumable hemp product. These provisions do not restrict local prohibitions on possession or use of hemp or hemp products.

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<sup>9</sup> Act of June 10, 2019, 86th Leg., R.S. H.B. 1325, § 8 (to be codified at Tex. Health & Safety Code § 481.002(5) and (26)).

<sup>10</sup> Tex. Agric. Code § 121.001.

<sup>11</sup> See [Brief Explanation of the Federal Farm Bill and Related Texas Legislation in the Context of Marijuana Prosecution](#), Tex. Forensic Science Commission (Aug. 2019) (discussing impact of federal and state legislation on forensic analysis of seized drugs).

<sup>12</sup> Act of June 14, 2019, 86th Leg. R.S. H.B. 3703, § 2 (to be codified at Tex. Occ. Code § 169.003).

<sup>13</sup> Tex. Health & Safety Code § 481.111(e).

<sup>14</sup> Tex. Educ. Code § 37.102(a).

Before adopting a local prohibition, district leaders would be wise to consult their school attorneys and coordinate with local law enforcement authorities to clarify how they are interpreting the recent changes in law.

### **Can district employees possess CBD products at work?**

Unless employees are covered by the Texas Compassionate Use Act or prescribed Epidiolex, they should not use or possess at work any cannabis-related product with a THC concentration of more than 0.3 percent, including CBD. The Texas Educator’s Code of Ethics prohibits “illegal use, abuse, or distribution of controlled substances, prescription drugs, and toxic inhalants.”<sup>15</sup> TASB Model Policies DH(LOCAL) and DH(EXHIBIT) make this ethical rule applicable to all certified and uncertified employees.

Cracking down on employees’ use and possession of CBD may be difficult, however. In order to confirm that a product labeled CBD is a controlled substance, testing for trace amounts of THC would be required to determine if the product is legal hemp-based CBD or illegal marijuana.<sup>16</sup> Districts should take care to communicate expectations to employees in advance. Many people use CBD for health-related issues. Even in states that have legalized medical marijuana, courts have determined that employers do not have to allow the use of medical marijuana because of federal law.<sup>17</sup> Nonetheless, district officials should consider speaking to an attorney before taking specific disciplinary actions against an employee because of possessing or using CBD.

### **Does CBD use result in a positive drug test?**

Possibly. Regular use of a commercially available CBD product containing even small amounts of THC can create a detectable buildup in a user’s body over time. Therefore, regular use may lead to a positive result for marijuana on urinalysis and other forms of drug testing.<sup>18</sup> Districts should follow U.S. Department of Transportation guidelines and their local policies and procedures for testing students and employees (found in the district’s policy manual at FNF and DHE, respectively). Remember, CBD alone is not intoxicating. In order to justify a reasonable suspicion-based test, a district official should be able to identify specific observations of a student’s or employee’s speech, behavior, appearance, or body odor that suggest the individual has or is

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<sup>15</sup> 19 Tex. Admin. Code § 247.2.

<sup>16</sup> See Flaccus, Gillian, *Associated Press* “[Is it hemp or is it pot? DEA seeks testing technology while look-alike leads to false arrests](#)” (citing lack of field testing equipment sensitive enough to determine THC levels).

<sup>17</sup> See *Emerald Steel Fabricators, Inc. v. Bureau of Labor and Indus.*, 230 P.3d 518 (Or. 2010) (state law did not require accommodation of employee’s medical marijuana because possession of marijuana is unlawful under federal law); *Ross v. Ragingwire Telecomm., Inc.*, 174 P.3d 382 (Cal. 2008) (employee fired for medical marijuana use did not have claim for wrongful termination); *but see Barbuto v. Advantage Sales and Mktg., LLC*, 78 N.E.3d 37 (Mass. 2017) (permitting disability discrimination lawsuit by employee fired after testing positive for marijuana).

<sup>18</sup> Karina Brown, [A School Employee Was Assured He Could Use a CBD Tincture and Still Pass a Drug Test. He Didn’t](#). Willamette Week (Feb. 28, 2018).

under the influence of drugs or alcohol. District policy should also allow employees and students to provide relevant information about any factors that may influence a screening, whether based on reasonable suspicion or a law or policy requiring randomized testing.

### **What should we do if a student has CBD at school or a school-related activity?**

The answer may depend on the product. CBD and THC products come in all varieties. If the product is designed to be smoked in an e-cigarette (vaping or Juuling), the answer is clear. Under state law, a minor under the age of 21 may not possess, purchase, consume, or accept an e-cigarette.<sup>19</sup> The Texas Education Code also requires a school district board of trustees to prohibit smoking or using e-cigarettes at school-related or school-sanctioned activities on or off school property.<sup>20</sup> The TASB Model Student Code of Conduct prohibits e-cigarettes and any component, part, or accessory for an e-cigarette device. As such, a student's possession or use of CBD oil in any form intended to be used through an e-cigarette is a punishable violation on its own—in addition to possibly being punishable as use or possession of an illegal drug.

If the substance in question appears to be marijuana, but the student claims that it is legal hemp, consider the circumstances. State law does not authorize the manufacture of a product containing hemp for smoking. If, for example, a campus administrator can document that the substance is in a smokable form or smoke is obvious in the student's vicinity; the student has made statements indicating possession or intent to sell marijuana; or the student appears to be "high," the district has a strong legal basis for disciplinary action, including DAEP or expulsion for possession or use of a controlled substance at school.

Use, possession, sale, or delivery of oils, edibles, and other products may be punishable under a school district's student code of conduct as misconduct related to an illegal drug or a controlled substance if the product has THC in excess of the legal limit of 0.3 percent. As mentioned above, this determination requires chemical testing. District leaders should consult with local law enforcement authorities to determine how a student might be charged for using or possessing marijuana in their jurisdiction. Though school disciplinary decisions are not always reliant on criminal charges, parents and others may be confused if the school interprets conduct as criminal when law enforcement does not.

Before deciding on any disciplinary measure involving suspension, removal to a DAEP, expulsion, or placement in a JJAEP, the campus behavior coordinator must take into account the legally required mitigating factors: self-defense; intent or lack of intent; a student's disciplinary history; a disability that substantially impairs the student's capacity to appreciate the wrongfulness of the misconduct; and whether the student is homeless or in foster care. Consideration of the mitigating factors is required even if the decision concerns a disciplinary measure described as "mandatory" in the Texas Education Code.<sup>21</sup>

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<sup>19</sup> Tex. Health & Safety Code § 161.252.

<sup>20</sup> Tex. Educ. Code § 38.006.

<sup>21</sup> Tex. Educ. Code § 37.001(a)(4).

For example, while possession of a non-felony amount of marijuana or a controlled substance could lead to mandatory placement in DAEP, a campus administrator could reasonably conclude that a student with a small amount of CBD oil that a parent provided for anxiety did not intend to commit the crime of possessing marijuana or a controlled substance. Therefore, after considering the mitigating factor of the student's intent, the administrator could decide not to place the student in DAEP, even if it turns out that what the student believed to be CBD oil exceeded the legal limit for THC concentration of 0.3 percent. Just like with any other disciplinary decision, campus officials should treat all students consistently and document the basis for the outcome.

Finally, if a student claims that he or she needs to use CBD to treat a medical or mental health condition, take the student's motivations seriously. There may be an underlying issue that the district can, or even must, accommodate.

### **Can a student use CBD or medical marijuana pursuant to a Section 504 plan or IEP?**

Public schools across the country are getting requests from parents who wish to use CBD for their children's physical and mental health needs, including autism. Districts may find themselves caught between compliance with state and federal drug laws and their obligation to provide a free appropriate public education under the Individuals with Disabilities Education Act (IDEA) and Section 504 of the Rehabilitation Act.

As discussed above, students with a condition such as autism, MS, or a seizure disorder are entitled to legally use CBD products under the Texas Compassionate Use Act. When this is the case, districts should come to an arrangement with the parents and the family's authorized medical provider that is memorialized in a Section 504 plan or individualized education program (IEP). Note that the FDA-approved drug Epidiolex is intended as a preventative medication, but an authorized doctor may prescribe additional uses, including use of CBD substances during school hours. If this is the case, the student's IEP or Section 504 plan should address when the CBD is needed and who will administer it to the student. The school nurse may object to administering a controlled substance to a student. According to a position brief by the National School Nurses Association, only FDA-approved cannabis or marijuana products should be allowed in the school setting.<sup>22</sup> Under the Texas Compassionate Use Act, however, an authorized physician may prescribe CBD products other than the FDA-approved Epidiolex. In these rare circumstances, districts should follow their FFAC(LOCAL) policies for administering prescription medication and come to an agreement that meets the student's needs.

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<sup>22</sup> [Position Brief – Cannabis/Marijuana](#), National Association of School Nurses (Jan. 2019).

If a parent requests that a student be allowed to use CBD at school for an issue that could rise to the level of a disability, district officials should consult Policy FFAC(LOCAL) and work closely with legal counsel due to the complexity of the law. It may be wise to offer alternative accommodations. For instance, in the hypothetical situation of a student taking CBD to treat anxiety, the district could offer to provide preferential seating, testing accommodations, or opportunities to check in with a counselor or mentor.

### Conclusion

In the rapidly changing field of cannabis law, even experts have a hard time explaining what is and is not legal. School officials are understandably confused. Paradoxically, when the law is changing quickly, the best advice may be to slow down. Don't rush to adopt a policy that may be impacted or even negated by pending issues on the state or federal levels. Don't rush to discipline; remember your policies and the legally required mitigating factors. Finally, don't rush to judgment. Approach employees, students, and parents without bias as to their choice of treatment.<sup>23</sup> TASB Legal Services will continue to keep districts informed as the law evolves.

This document is continually updated, and references to online resources are hyperlinked, at [tasb.org/services/legal-services/tasb-school-law-esource/students/documents/legal-questions-about-cbd-in-schools.pdf](https://tasb.org/services/legal-services/tasb-school-law-esource/students/documents/legal-questions-about-cbd-in-schools.pdf). For more information on this and other school law topics, visit TASB School Law eSource at [schoollawesource.tasb.org](https://schoollawesource.tasb.org).

*This document is provided for educational purposes only and contains information to facilitate a general understanding of the law. It is not an exhaustive treatment of the law on this subject nor is it intended to substitute for the advice of an attorney. Consult with your own attorneys to apply these legal principles to specific fact situations.*

*Updated August 2019*

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<sup>23</sup> See, e.g., [Position Brief – Cannabis/Marijuana](#), National Association of School Nurses (Jan. 2019) (requiring the school nurse to “approach the student and family without judgment regarding their choice of treatment or preferences”).